

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

In the Matter of the application for a) **FINAL FINDING OF FACT**
Service Permit filed by:) **CONCLUSIONS OF LAW**
) **AND ORDER**
)
CHYNELE L. FERRARA)

Agency Case No.: OLCC-13-SPR-007

HISTORY OF THE CASE

On March 19, 2013, the Oregon Liquor Control Commission (Commission or OLCC) informed Chynele L. Ferrara that it planned to deny her service permit application, on the ground that she had two felony convictions for violent crimes, at least one of which was within the past three years.

On or about April 3, 2013, Ms. Ferrara requested a hearing. On June 19, 2013, the OLCC referred the request for hearing to the Office of Administrative Hearings (OAH). The OAH initially assigned the case to Administrative Law Judge (ALJ) John R. Lohuis. On July 24, 2013, the OAH reassigned the matter to Senior ALJ Jennifer H. Rackstraw.

On August 7, 2013, the OLCC issued an Amended Notice to Deny Service Permit to Ms. Ferrara, which informed Ms. Ferrara that she is permitted to sell and serve alcohol until there is a final decision to deny her permit.

On August 13, 2013, ALJ Rackstraw held an administrative hearing by telephone. Ms. Ferrara represented herself and testified. Gwenn McNeal represented the OLCC and testified. The record closed at the conclusion of the hearing.

The Administrative Law Judge considered the record of the hearing and the applicable law and issued a Proposed Order mailed September 4, 2013.

Ms. Ferrara filed Exceptions to the Proposed Order on September 19, 2013. The Administrative Law Judge responded to Ms. Ferrara's Exceptions on October 11, 2013.

On October 24, 2013, the Commission considered the record of the hearing, the applicable law, the Proposed Order of the Administrative Law Judge, Ms. Ferrara's Exceptions to the Proposed Order and the Administrative Law Judge's Response to Ms. Ferrara's Exceptions. Based on this review and the preponderance of the evidence, the Commission enters the following:

///
///

ISSUES

1. Whether the OLCC should deny Ms. Ferrara's application for a service permit because she has two felony convictions for the commission of a violent crime, at least one of which was within the past three years. ORS 471.380(1)(d); OAR 845-009-0020(5)(a)(B).
2. If the application for a service permit should be denied because of Ms. Ferrara's convictions, whether she has good cause to overcome the denial. OAR 845-009-0020(3) and (5)(b).

EVIDENTIARY RULINGS

The OLCC's Exhibits A1 through A4 were admitted into the record without objection.

FINDINGS OF FACT

1. On June 24, 2011, Ms. Ferrara was indicted in Multnomah County on two counts of Assault III (for recklessly causing serious physical injury by means of a dangerous weapon), three counts of Assault IV (for recklessly causing physical injury), three counts of Driving under the Influence of Intoxicants, six counts of Recklessly Endangering Another Person, and one count of Reckless Driving. (Ex. A4 at 1-3.)
2. On October 31, 2011, Ms. Ferrara was convicted of two counts of felony Assault III, two counts of Recklessly Endangering Another, and one count of Driving under the Influence of Intoxicants. The convictions arose from conduct that occurred on October 16, 2010, involving the use of alcohol. (Exs. A2 at 1-4, 7; A3 at 1-5; A4 at 1-2; test. of Ferrara.)
3. Judgment was entered on November 2, 2012. (Ex. A3.) Among other things, Ms. Ferrara was sentenced to three years of probation and her driver license was suspended for five years. She was also ordered to undergo alcohol evaluation and treatment, and to refrain from consuming alcohol. (Exs. A2 at 1-2; A3 at 2-4.)
4. On February 4, 2013, the OLCC received Ms. Ferrara's Service Permit Application. (Test. of McNeal, Ex. A1.)
5. Ms. Ferrara has been diagnosed with an alcohol addiction. (Test. of Ferrara, McNeal.) She has abstained from the use of alcohol since approximately November 2011. She completed alcohol treatment in September 2012. (Test. of Ferrara.)
6. Ms. Ferrara's probation will end in October 2014. (See Exs. A2; A3.)

CONCLUSIONS OF LAW

1. The OLCC should deny Ms. Ferrara's application for a service permit because she has two felony convictions for the commission of a violent crime, at least one of which was within the past three years.

2. Ms. Ferrara has not demonstrated good cause to overcome the denial.

OPINION

1. Whether Ms. Ferrara's service permit application should be denied

ORS 471.380(1)(d) allows the OLCC to refuse to issue a service permit if an applicant “has been convicted of violating any of the alcoholic liquor laws of this state, general or local, or has been convicted at any time of a felony.” The OLCC has adopted administrative rules to apply this statutory provision. Here, the OLCC proposes to deny Ms. Ferrara’s service permit application under OAR 845-009-0020(5)(a)(B), which states that the OLCC will deny a service permit to an applicant who has had “[t]wo felony convictions for the commission of violent crimes, any one of which was within three years[.]”

OAR 845-009-0020(5)(c) defines “violent crimes” as crimes that “cause, attempt to cause, or threaten physical injury or harm to another person. Examples are: Murder, rape, assault, sodomy, armed robbery.” On October 31, 2011, Ms. Ferrara was convicted of two counts of Assault III. ORS 163.165 defines Assault III, in relevant part, as follows:

(1) A person commits the crime of assault in the third degree if the person:

(a) Recklessly causes serious physical injury to another by means of a deadly or dangerous weapon[.]

Ms. Ferrara’s Assault III convictions are “violent crimes” within the meaning of OAR 845-009-0020(5)(c) because they involve Ms. Ferrara’s reckless infliction of physical injury to other individuals.

OAR 845-009-0020(2) explains how to calculate the time periods referenced in the administrative rule, as follows:

[R]eferences to a period of time mean a period of time ending on the date the Commission receives the application. For example, “within two years” means within two years of the date the Commission receives the application.

The OLCC received Ms. Ferrara’s service permit application on February 4, 2013. Her Assault III convictions were within three years of that date.

Where conviction of a crime is the basis for agency action, ORS 670.280 applies and the OLCC must show the relationship between the conviction and the person’s fitness to sell or serve alcoholic liquor.¹ Here, that relationship is established because Ms. Ferrara’s convictions were

¹ ORS 670.280(2) provides:

all related to her consumption of alcoholic beverages, which is relevant to her fitness to sell and serve the same. *See Dorothy J. Hamblin* (OLCC Final Order, OLCC-03-SPR-036, December 2003) (holding that DUII convictions are relevant to an individual's fitness to sell and serve alcoholic liquor).

ORS 670.280 also requires the OLCC to consider any intervening circumstances that have occurred since the conviction of the crime(s) at issue. The good cause criteria set forth in OAR 845-009-0020(3) and (5)(b) demonstrate that the OLCC does consider intervening circumstances and will not deny a service permit when an applicant can demonstrate, among other factors, successful completion of all parole and probation requirements and successful completion of a substance abuse treatment program. Here, the OLCC considered such factors and determined that denial of Ms. Ferrara's service permit application is nonetheless appropriate. While Ms. Ferrara has successfully completed alcohol treatment and she has abstained from the use of alcohol for almost two years, her convictions were relatively recent and she has not yet completed her probation. The OLCC's proposed denial is consistent with ORS 670.280.

The OLCC has proven all the elements required for a denial of Ms. Ferrara's service permit application under OAR 845-009-0020(5)(a)(B). The OLCC should therefore deny her application, unless good cause exists to overcome the denial.

2. *Whether Ms. Ferrara has good cause to overcome the denial*

An applicant may show good cause to overcome a service permit denial if the applicant's felony convictions involving commission of a violent crime also involved alcohol or controlled substances. OAR 845-009-0020(3) and (5)(b) provide, in relevant part:

(3) To be qualified for good cause under this rule:

(a) An applicant must have had a drug addiction disability or alcohol addiction disability at the time of:

* * * * *

(B) A felony conviction involving the commission of a violent crime where alcohol or controlled substances were involved[.]

(5)(b) If the felony conviction(s) involving the commission of a violent crime in (5)(a)(A), (B), or (C) involved alcohol or controlled substances, good cause may apply. The only good cause to overcome the criteria in

Except as provided in ORS 342.143 (3) or 342.175 (3), a licensing board, commission or agency may not deny, suspend or revoke an occupational or professional license 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 the license.

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 this service of this Order. Judicial review is pursuant to the provisions of ORS Chapter 183.