

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

In the Matter of the Application for a Service Permit Filed by:) **FINAL FINDING OF FACT**
) **CONCLUSIONS OF LAW**
) **AND ORDER**
Kimberly L. Forness)

Agency Case No.: OLCC-13-SPR-016

HISTORY OF THE CASE

On May 3, 2013, the Oregon Liquor Control Commission (OLCC) received an application for a service permit from Kimberly L. Forness (Applicant). On May 28, 2013, the OLCC issued a Service Permit Denial Notice proposing to deny Applicant's service permit pursuant to OAR 845-009-0020(7)(a)(A), because Applicant had two diversions or convictions for driving under the influence of intoxicants (DUII) within three years, at least one of which was in the past 12 months.

Applicant filed a timely request for hearing. The OLCC referred the request to the Office of Administrative Hearings (OAH) on July 12, 2013. The OAH assigned the case to Lynnette M. Turner, Administrative Law Judge (ALJ). ALJ Turner held a contested case hearing by telephone at 10:00 a.m. on October 4, 2013. Gwenn McNeal appeared on behalf of the OLCC and testified. Applicant appeared on her own behalf and testified. The hearing record closed at the conclusion of the hearing on October 4, 2013.

The Administrative Law Judge considered the record of the hearing and the applicable law and issued a Proposed Order mailed November 12, 2013.

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 Applicant's application for a service permit should be denied because Applicant has had two DUII diversions or convictions within three years, one of which was in the past 12 months. ORS 471.385(1)(b); OAR 845-009-0020(7)(a)(A).

2. If the service permit application should be denied, whether Applicant has shown good cause to overcome the denial. OAR 845-009-0020(7)(b); OAR 845-009-0020(3).

EVIDENTIARY RULINGS

Exhibits A1 through A4, offered by the OLCC, and Exhibit P1, offered by Applicant, were admitted into the record without objection.

FINDINGS OF FACT

1. On May 3, 2013, the OLCC received Applicant Kimberly L. Forness's Service Permit Application. (Ex. A1; test. of McNeal.)

2. On or about February 19, 2010, Applicant was arrested and cited for driving under the influence of intoxicants (DUII). She entered a diversion program on March 12, 2010, and completed diversion on March 11, 2011. (Ex. A2; test. of McNeal.)

3. On or about September 1, 2012, Applicant was arrested and cited for DUII, and was convicted of the charge on November 8, 2012. (Ex. A2; test. of McNeal.)

4. As part of the November 8, 2012 DUII conviction, the Circuit Court judge sentenced Applicant to bench probation for a period of one year, to conclude on November 7, 2013. (Test. of Applicant.)

5. Applicant was diagnosed as alcohol addicted while in treatment at Yamhill County Chemical Dependency Program (YCDP), a state certified substance abuse treatment program. Applicant entered treatment at YCDP in February 2013 and will complete treatment on October 24, 2013. (Test. of McNeal, Applicant.)

6. Applicant's employer is aware of Applicant's DUII diversion and conviction, and is supporting her in her recovery process. (Test. of Applicant.)

7. Applicant last consumed alcohol on September 2, 2012. (Test. of Applicant.)

CONCLUSIONS OF LAW

1. Applicant's application for a service permit should be denied because Applicant has one DUII diversion and one DUII conviction within three years, one of which was within the past 12 months. ORS 471.385(1)(b); OAR 845-009-0020(7)(a)(A).

2. Applicant has not shown good cause to overcome the denial basis. OAR 845-009-0020(7)(b); OAR 845-009-0020(3).

OPINION

1. Whether Applicant's application for a service permit should be denied:

ORS 471.380(1)(d) provides that the OLCC may refuse to issue a service permit if an applicant has been convicted of violating any of the alcoholic liquor laws of this state. In this

case Applicant has one diversion and one conviction for DUII, a crime that necessarily requires a determination that the individual drove a vehicle while under the influence of intoxicating liquor or a controlled substance. ORS 813.010(1). The OLCC has consistently held in similar cases that DUII convictions are violations of alcoholic liquor laws. *Dorothy J. Hamblin* (OLCC Final Order, OLCC-03-SPR-036, December 2003), *citing Carolyn A. White* (OLCC Final Order, OLCC 98-SPR-005, August 1999). Therefore, under ORS 471.380(1)(d), the OLCC has the statutory authority to revoke Applicant's service permit for her 2011 DUII diversion and 2012 DUII conviction.

In cases in which an agency proposes to revoke an individual's license based on a conviction of a crime, ORS 670.280 requires the agency to show a relationship between the conviction and the individual's fitness to hold the license.¹ The OLCC has previously held that a conviction involving abuse of a controlled substance was related to an individual's fitness to sell and serve alcoholic beverages because it indicated poor judgment with respect to the controlled substance. *John O. Myshak* (OLCC Final Order, OLCC-88-V-002, May 1988). In this matter, Applicant has received a diversion and been convicted of a crime that involves the abuse of an intoxicant. As with the *Myshak* case, Applicant's diversion and conviction involving the abuse of an intoxicant are related to her fitness and judgment to sell and serve alcoholic beverages, and provide a basis for the proposed denial of her application.

The OLCC has adopted administrative rules to apply the above statutory provisions. In this case, the OLCC proposes to deny Applicant's service permit application under the provisions of OAR 845-009-0020(7)(a)(A), which provides that the OLCC will deny a service permit application if an applicant has had two DUII convictions or one diversion and one conviction in three years, either one of which was within 12 months.² The phrase "within 12 months" as used in the administrative rule means within 12 months of the date the OLCC received the application. OAR 845-009-0020(2).

In the present case, Applicant received a DUII diversion and conviction within a three year period, and her most recent conviction, on November 8, 2012, was within 12 months of the

¹ ORS 670.280(2) provides:

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.

² OAR 845-009-0020 provides, in relevant part:

(7) Driving Under the Influence of Intoxicants (DUII)/Furnishing Alcohol to Minors/Liquor Law Violations:
(a) The Commission will deny a service permit if:
(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[.]

date the OLCC received her application for a service permit. Therefore, under OAR 845-009-0020(7)(a)(A), the OLCC has the authority to deny her application for a service permit, unless she can show good cause to overcome the denial.

2. Whether Applicant has good cause to overcome the denial:

OAR 845-009-0020(3) and (7)(b) provide that an applicant may show good cause to overcome the service permit denial. OAR 845-009-0020(3) provides that in order to show good cause, an applicant must have had a drug addiction disability or an alcohol addiction disability at the time of the DUII convictions or diversions. OAR 845-009-0020(7)(b) provides that in order to show good cause to overcome a denial, an applicant must provide a sworn statement that the applicant has not used or consumed controlled substances within 24 months, has successfully completed or is actively participating in a state certified drug treatment program, and has completed all parole or probation requirements.³

In the course of her treatment at YCDP, which Applicant entered as a result of the DUII diversion and conviction at issue, Applicant was diagnosed with an alcohol addiction, satisfying the requirement of OAR 845-009-0020(3)(b). Applicant is actively involved in a state certified treatment program, as required by OAR 845-009-0020(7)(b)(B). However, Applicant last consumed alcohol on or about September 2, 2012, which is within 24 months of the proposed denial. Additionally, Applicant was placed on probation following her November 8, 2012 conviction, and will remain on probation until November 7, 2013. Because Applicant has not abstained from using a controlled substance for 24 months and has not yet completed her probation, she cannot establish good cause to overcome the service permit application denial under 845-009-0020(7)(b). For these reasons, the OLCC may deny Applicant's service permit.

³ OAR 845-009-0020(3) and (7)(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:

* * * * *

(D) DUII convictions or diversions which form the denial basis under OAR 845-009-0020(7) and (8); or

(b) The applicant was diagnosed as drug or alcohol addicted at the time of or as a result of the incidents described above.

* * * * *

(7)(b) 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:

(A) He/she has not used or consumed alcohol or controlled substances within 24 months; and

(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

(C) He/she has completed all parole or probation requirements.

FINAL ORDER

The Commission orders that the application for a service permit filed by Applicant Kimberly L. Forness and received by the OLCC on May 3, 2013 be DENIED.

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

Dated this 9th day of December, 2013

_____/s/ Steve Marks_____
Steve Marks
Executive Director
OREGON LIQUOR CONTROL COMMISSION

Mailed this 10th day of December, 2013

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.