

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

In the Matter of the Application for a Service Permit Filed by:) **FINAL FINDING OF FACT**
) **CONCLUSION OF LAW**
) **AND ORDER**
Tyler J. Norman)
Agency Case No.: OLCC-13-SPR-001

HISTORY OF THE CASE

On December 11, 2012, the Oregon Liquor Control Commission (OLCC) received an application for a service permit from Tyler J. Norman (Applicant). On December 18, 2012, the OLCC issued a Service Permit Denial Notice proposing to deny Applicant’s service permit pursuant to OAR 845-009-0020(4)(a)(B), because Applicant was convicted of a felony drug delivery charge in the past two years. On February 21, 2013, the OLCC issued an Amended Service Permit Denial Notice, proposing to deny Applicant’s service permit pursuant to OAR 845-009-0020(4)(a)(D), because Applicant was convicted of three or more felony drug charges, at least one of which was within the past six years.

Applicant filed a timely request for hearing. The OLCC referred the request to the Office of Administrative Hearings (OAH) on March 15, 2013. The OAH assigned the case to Lynnette M. Turner, Administrative Law Judge (ALJ). ALJ Turner held a contested case hearing by telephone at 1:00 p.m. on May 30, 2013. Gwenn McNeal appeared on behalf of the OLCC and testified. Applicant appeared on his own behalf and testified. The hearing record closed at the conclusion of the hearing on May 30, 2013.

The Administrative Law Judge considered the record of the hearing and the applicable law and issued a Proposed Order mailed July 26, 2013.

Applicant filed Exceptions to the Proposed Order on August 15, 2013. Staff filed Comments on the Proposed Order on August 13, 2013. The Administrative Law Judge responded to Applicant’s Exceptions and Staff’s Comments on September 23, 2013.

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

ISSUES

1. Whether Applicant’s application for a service permit should be denied because he has three or more controlled substance felony convictions, any one of which was within six years of the application. OAR 845-009-0020(4)(a)(D); ORS 471.380(1)(d).

2. If the application should be denied because of Applicant's convictions, whether Applicant has shown good cause to overcome the denial. OAR 845-009-0020(4)(b); OAR 845-009-0020(3).

EVIDENTIARY RULINGS

Exhibits A1 through A5, offered by the OLCC, were admitted into the record without objection.

FINDINGS OF FACT

1. On or about February 2, 2012, Applicant Tyler J. Norman committed the crime of Unlawful Delivery of Heroin. Applicant pled guilty and was convicted of this charge, a Class A Felony, on February 29, 2012 in Lane County Circuit Court, Lane County, Oregon. The Court sentenced Applicant to 36 months Supervised Probation. (Ex. A2, A3.)

2. On or about April 3, 2012 and again on or about June 6, 2012, Applicant committed the crime of Unlawful Delivery of Heroin. On February 6, 2013, Applicant was convicted of two Class A Felonies for these charges in Lane County Circuit Court. Applicant was also convicted of Unlawful Possession of Heroin for this conduct. The Court sentenced Applicant to an additional 36 months Supervised Probation, which he expects to complete on February 6, 2016. (Ex. A4, A5.)

3. On December 11, 2012, the OLCC received Applicant's service permit application. (Ex. A1; test. of McNeal.)

4. As a result of his June 6, 2012 arrest, Applicant was diagnosed with a drug addiction disability and completed a substance abuse treatment program through Pacific Palms Recovery. This program is certified by the State of California and consists of 30 days of inpatient treatment and 30 days of outpatient treatment. Applicant then voluntarily spent 90 days in a sober living residence provided by the program. He currently attends AA one or two times per week. He has a sponsor through the program and is a sponsor for others. (Test. of Applicant.)

5. Applicant works full-time as a food server at an Olive Garden restaurant. He was hired December 10, 2012. Applicant is paying off his supervision fees, rehabilitation fees and attorney fees relating to his incarceration and treatment, and is in compliance with his probation. (Test. of Applicant.)

6. Applicant has not used or consumed controlled substances since June 8, 2012. (Test. of Applicant.)

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CONCLUSIONS OF LAW

1. Applicant's application for a service permit should be denied because Applicant has three or more controlled substance felony convictions, at least one of which was within six years. ORS 471.380(1)(d); OAR 845-009-0020(4)(a)(D).

2. Applicant has not shown good cause to overcome the denial basis.

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 a felony. The OLCC has adopted administrative rules to apply this statute. In this case, the OLCC seeks to deny Applicant's service permit application under the provisions of OAR 845-009-0020(4)(a)(D), which provides that the OLCC will deny a service permit application if an applicant has had three or more controlled substance felony convictions any one of which was within six years of the date the OLCC received the application.¹

The phrase "within six years" as used in the administrative rule means within six years of the date the OLCC received the application. OAR 845-009-0020(2). Where the 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 applicant's fitness to sell or serve alcoholic liquor.² The OLCC has previously concluded that convictions involving controlled substances are relevant to an individual's fitness to serve and sell alcoholic liquor. *Michelle Haynes* (OLCC Final Order, OLCC-06-SPR-022, December 2006).

On February 29, 2012, Applicant was convicted of Unlawful Delivery of Heroin, a controlled substance felony. On February 6, 2013, Applicant was convicted of two counts of

¹ OAR 845-009-0020(4)(a)(D) provides:

(4) Felony Drug Conviction:

(a) The Commission will deny a service permit if the applicant has had:

(D) Three or more controlled substance felony convictions, any one of which was within six years.

² 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.

Unlawful Delivery of Heroin.³ All of Applicant's convictions occurred within six years of the OLCC's receipt of his service permit application on December 11, 2012. Thus, the OLCC has shown that it may deny Applicant's service permit under the provisions of OAR 845-009-0020(4)(a)(D).

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

OAR 845-009-0020(3) and (4)(b) provide that an applicant may show good cause to overcome a proposed service permit denial. OAR 845-009-0020(3) provides that to be qualified to show good cause, an applicant must have had a drug addiction disability or an alcohol addiction disability at the time of the felony drug conviction, or as a result of the conviction. OAR 845-009-0020(4)(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 a state certified drug treatment program, and has completed all parole or probation requirements.⁴

Applicant has made many positive changes in his life, and meets most of the criteria set forth in OAR 845-009-0020(3) and OAR 845-009-0020(4)(b). He established that he was diagnosed with a drug addiction disability as a result of his convictions. Applicant has completed a state certified drug treatment program, and is an active participant in AA meetings.

Despite Applicant's excellent progress, he has not met all the criteria required to establish good cause. When considering good cause to overcome the denial, the period of abstinence is measured from the date of the applicant's last use to the date of the application. *Cynthia K. Kennedy* (OLCC Final Order, OLCC-95-SPR-115, June 1996). The record shows that at the time

³ Applicant's conviction for Unlawful Possession of Heroin was not considered in this decision, as it was part of the single criminal episode that resulted in his Unlawful Delivery of Heroin conviction. *Christine M. Scott* (OLCC Final Order, OLCC-95-SPR-063, December 1995).

⁴ OAR 845-009-0020(3) and (4)(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:

(A) Felony drug conviction(s) (OAR 845-009-0020(4)); [or]

* * * * *

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

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(4)(b) The only good cause to overcome the criteria in this section is the applicant's sworn statement on a Commission-supplied form that:

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

(B) He/she has successfully completed a state certified drug treatment program or is actively involved in a state certified drug 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.

of the application, Applicant had not used or consumed controlled substances for 6 months.⁵ The rule requires 24 months of abstinence to establish good cause. Similarly, while Applicant is complying with the terms of his probation and is doing well, his probation will not be complete until February 6, 2016. Because Applicant's last use of controlled substances was within 24 months of the hearing, and because he has not completed his probation requirements, he has not met all the criteria set forth in OAR 845-009-0020(4)(b) and cannot show good cause to overcome the denial. Applicant's service permit application must therefore be denied.

FINAL ORDER

The Commission orders that the application for a service permit filed by Applicant Tyler J. Norman and received by the OLCC on December 11, 2012 be DENIED.

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

Dated this 25 day of October, 2013

/s/ Merle Lindsey

Merle Lindsey
Interim Executive Director
OREGON LIQUOR CONTROL COMMISSION

Mailed this 25 day of October, 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.

⁵ The Commission elects to modify the proposed order because it is inconsistent with OLCC final order precedent. In both the proposed order and her response to exceptions, the Administrative Law Judge analyzed the good cause factor described in OAR 845-009-0020(5)(b)(A) by measuring applicant's period of abstinence from the date of last use to the present, rather than from the date of last use to the date of the application.