

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

In the Matter of the Application for a Service Permit Filed by:) **FINAL FINDINGS OF FACT**
) **CONCLUSIONS OF LAW**
) **AND ORDER**
MARCUS A. QUEENER)
)

Agency Case No.: OLCC-13-SPR-021

HISTORY OF THE CASE

On June 14, 2013, the Oregon Liquor Control Commission (the OLCC) issued a Service Permit Denial Notice to Marcus A. Queener. The OLCC proposed to deny Mr. Queener's service permit application because he had one driving under the influence of intoxicants (DUII) diversion and one DUII conviction within three years, at least one of which was in the past 12 months.

Mr. Queener filed a timely request for hearing. The OLCC referred the request to the Office of Administrative Hearings (OAH) on July 11, 2013. The OAH assigned the case to John Lohuis, Administrative Law Judge (ALJ). OAH subsequently reassigned the case to Senior ALJ Alison Greene Webster.

ALJ Webster held a contested case hearing by telephone at 9:00 a.m. on September 10, 2013. Gwenn McNeal appeared on behalf of the OLCC and testified. Mr. Queener appeared without counsel and testified on his own behalf. The hearing record closed at the conclusion of the hearing on September 10, 2013.

The Administrative Law Judge considered the record of the hearing and the applicable law and issued a Proposed Order mailed October 10, 2013. Staff filed Comments on the Proposed Order on October 25, 2013. The Administrative Law Judge responded to Staff's Comments on November 6, 2013.

On December 12, 2103, the Commission considered the record of the hearing, the applicable law, the Proposed Order of the Administrative Law Judge, Staff's Comments on the Proposed Order and the Administrative Law Judge's Response to Staff's Comments. Based on this review and the preponderance of the evidence, the Commission enters the following:

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ISSUES

1. Whether Mr. Queener's application for a service permit should be denied because he has had two DUII diversions or convictions within three years, one of which was in the past 12 months. ORS 471.380(1)(d), OAR 845-009-0020(7)(a)(A).¹

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

EVIDENTIARY RULING

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

FINDINGS OF FACT

1. On July 25, 2010, Mr. Queener was arrested for the crime of DUII in Josephine County, Oregon. On August 31, 2010, as a result of the arrest, Mr. Queener entered a DUII diversion program. He completed the diversion program on August 31, 2011. (Ex. A2.)

2. On September 5, 2012, Mr. Queener was again arrested for DUII in Josephine County, Oregon. As a result of the September 5, 2012 arrest, Mr. Queener was convicted of the crime of DUII on November 26, 2012. (Ex. A2.)

3. As a result of the November 26, 2012 conviction, Mr. Queener was sentenced to 12 months' probation. He was required to complete 15 hours of community service (work crew) and drug and alcohol classes. (Test. of Queener.)

4. Mr. Queener completed his community service requirement, but has yet to complete the drug and alcohol classes. He plans to complete the classes this fall. (Test. of Queener.)

5. Mr. Queener has not been diagnosed as alcohol or drug addicted. He participated in a counseling program related to alcohol abuse in connection with his DUII diversion program, but he was not required to complete a drug or alcohol evaluation in connection with his DUII conviction. (Test. of Queener.)

6. Mr. Queener has not consumed alcohol since his September 5, 2012 DUII arrest. (Test. of Queener.)

7. Mr. Queener completed a Service Permit Application on April 7, 2013. The Commission received the completed application on May 17, 2013. (Ex. A1.)

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¹ In commenting on the Proposed Order, OLCC Staff requested a change to the statutory references in order to correct scrivener's errors. The ALJ agreed to the change in her Response to Staff's Comments.

CONCLUSIONS OF LAW

1. Mr. Queener's application for a service permit should be denied because he has one DUII diversion and one DUII conviction within three years, one of which was within the past 12 months of his application. ORS 471.380(1)(d), OAR 845-009-0020(7)(a)(A).²

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

OPINION

1. Whether the OLCC should deny Mr. Queener's service permit application:

ORS 471.380(1)(d) authorizes 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 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 Mr. Queener's service permit application based on OAR 845-009-0020(7)(a)(A), which provides as follows:

(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;

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).

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.³ The Commission has previously held that a DUII conviction involves consuming alcoholic beverages, which is relevant to a person's 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).

² Id.

³ ORS 670.280 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.

Mailed this 17 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.