

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

In the Matter of the Proposed) **FINAL FINDING OF FACT**
Revocation of the Service Permit held) **CONCLUSIONS OF LAW**
by:) **AND ORDER**
)
ROSETTA E. TIMMENS)

Agency Case No.: OLCC-13-SPR-011

HISTORY OF THE CASE

On March 15, 2013, the Oregon Liquor Control Commission (the OLCC) issued a Service Permit Revocation Notice to Rosetta E. Timmens (Permittee). The OLCC proposed to revoke Permittee's service permit because she had three diversions or convictions for driving under the influence of intoxicants (DUII) within seven years, at least one of which was in the past 18 months.

Permittee did not respond to the Service Permit Revocation Notice, and on April 26, 2013, the OLCC revoked Permittee's service permit. Permittee filed a request for hearing on May 3, 2013. The OLCC issued an Order Granting Relief from Default on May 13, 2013, and referred the hearing request to the Office of Administrative Hearings on May 23, 2013. The Office of Administrative Hearings assigned the case to Lynnette M. Turner, Administrative Law Judge (ALJ).

ALJ Turner held a contested case hearing by telephone at 9:00 a.m. on August 13, 2013. Gwenn McNeal appeared on behalf of the OLCC and testified. Permittee appeared without counsel and testified on her own behalf. John Ottman testified as a witness for Permittee. The hearing record closed at the conclusion of the hearing on August 13, 2013.

The Administrative Law Judge considered the record of the hearing and the applicable law and issued a Proposed Order mailed October 14, 2013.

Permittee filed Exceptions to the Proposed Order on DATE. The Administrative Law Judge responded to Permittee's Exceptions on October 28, 2013.

On December 12, 2013, the Commission considered the record of the hearing, the applicable law, the Proposed Order of the Administrative Law Judge, Permittee's Exceptions to the Proposed Order and the Administrative Law Judge's Response to Permittee's Exceptions. Based on this review and the preponderance of the evidence, the Commission enters the following:

(////)

ISSUES

1. Whether Permittee's service permit should be revoked because Permittee has had three DUII diversions or convictions within seven years, one of which was in the past 18 months. ORS 471.385(1)(b), OAR 845-009-0020(7)(a)(B).

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

EVIDENTIARY RULING

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

FINDINGS OF FACT

1. On November 30, 2010, the OLCC received Permittee Rosetta E. Timmens' Service Permit Application. The OLCC issued Service Permit No. 372028 to Permittee on December 9, 2010. (Ex. A2.)

2. On August 22, 2005, Permittee was arrested and cited for driving under the influence of intoxicants (DUII) in Jackson County, Oregon. She entered a diversion program on September 13, 2005 and completed diversion on September 12, 2006. (Ex. A3; test. of McNeal.)

3. On February 15, 2007, Permittee was arrested and cited for DUII in Jackson County, Oregon. Permittee was convicted of the February 15, 2007 DUII charge, a Class A Misdemeanor, on April 30, 2007. (*Id.*)

4. Permittee was arrested and cited for DUII in Multnomah County, Oregon on October 10, 2012. She was convicted of this charge, a Class A Misdemeanor, on February 27, 2013. (*Id.*)

5. The Multnomah County Circuit Court judge sentenced Permittee to one year of formal probation and three years of extended bench probation, to conclude on February 26, 2017. (Test. of Permittee.)

6. The OLCC issued a Service Permit Revocation Notice to Permittee, dated March 15, 2013.

7. As a result of her 2013 DUII conviction, Permittee began outpatient treatment with Lifeworks Northwest, a state certified mental health and addiction treatment program. She started Level One treatment in June 2013 and expects to complete the program in November 2013. She attends group therapy once per week, individual therapy once per month, and participates in AA meetings twice per month. She is subject to random urinalysis testing, the results of which have all been clean. Permittee does not consider herself to be an alcoholic and does not recall being diagnosed with an alcohol or drug addiction. (Test. of Permittee.)

8. Permittee has worked for the same employer for two years. She is the employer's only full-time employee. Her job involves serving food and drinks to customers. The employer is aware of Permittee's convictions and supports her in her treatment program. The employer has a zero tolerance policy for employee's use of drugs or alcohol on the premises and has discharged employees in the past for violating this prohibition. (Test. of Ottman.)

9. Permittee has been in the service industry for nine years and has no other job skills. She is a student at Portland State University and uses her income as a server to fund her education. (Test. of Permittee.)

10. Permittee has not consumed drugs or alcohol since February 26, 2013. (Test. of Permittee.)

CONCLUSIONS OF LAW

1. Permittee's service permit should be revoked because Permittee has three DUII convictions within seven years, one of which was within the past 18 months. ORS 471.385(1)(b), OAR 845-009-0020(7)(a)(B).

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

OPINION

1. Whether Permittee's service permit should be revoked:

The OLCC proposes to revoke Permittee's service permit on the basis ORS 471.385(1)(b), which states:

(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:

* * * * *

(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.

ORS 471.385(1)(b) provides that the OLCC may revoke a service permit if a permittee has been convicted of violating any of the liquor laws of the state. In this case Permittee has been convicted of three counts of 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 471.385(1)(b), the OLCC has the statutory authority to revoke Permittee's service permit for her 2007 and 2013 DUII convictions.

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, Permittee has received a diversion and has twice been convicted of charges that involve the abuse of an intoxicant. As with the *Myshak* case, Permittee's diversion and convictions 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 revocation of her license.

The OLCC has adopted administrative rules to apply the above statutory provisions. In this case, the OLCC relies on its service permit denial rules to support the proposed revocation of Permittee's permit. See *Michelle L. Haynes* (OLCC Final Order, OLCC-06-SPR-022, December 2006) (holding that it is reasonable to apply service permit rules to determine whether revocation of a service permit is warranted). The OLCC seeks to revoke Permittee's service permit under the provisions of OAR 845-009-0020(7)(a)(B), which provides that the OLCC will deny a service permit application if an applicant has had three DUII convictions or diversions within seven years, any one of which was within 18 months.² The phrase "within 18 months" as used in the administrative rule means within 18 months of the date the OLCC received the application. OAR 845-009-0020(2). For a proposed revocation, the relevant time period is 18 months from the date the OLCC issued the Service Permit Revocation Notice, as there would be a basis to deny an application made on or after that date. *James D. Popick* (OLCC Final Order, OLCC-09-SPR-008, August 2009).

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:

* * * * *

(B) Within seven years the applicant has had a combination of three diversions and convictions for DUII or Furnishing Alcohol to Minors, any one of which was within 18 months[.]

In the present case, Permittee has one DUII diversion that ended September 12, 2006, and two DUII convictions dated April 30, 2007 and February 27, 2013. The OLCC has established by case precedent that for a service permit denial or revocation, the relevant date for a diversion is the date diversion was completed. *Tamara L. Cardenas*, (OLCC Final Order, OLCC-94-SPR-122, March 1995). The diversion and convictions occurred within seven years of the Service Permit Revocation Notice issued on March 15, 2013, and the final conviction was within 18 months of that date.³ Therefore, under OAR 845-009-0020(7)(a)(B), the OLCC has the authority to revoke Permittee's service permit, unless Permittee can show good cause to overcome the revocation.

The OLCC's administrative rules provide that an applicant may show good cause to overcome a service permit denial. The OLCC has also relied on these rules to determine whether there is good cause to overcome a proposed revocation. *Michelle L. Haynes*, Final Order. 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.⁴ OAR 845-009-0020(7)(b) provides that in order to show good cause to overcome a denial (or as in this case, a revocation), 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.⁵

³ As of September 13, 2013, more than seven years have passed since Permittee completed diversion on the August 22, 2005 DUII arrest. Barring additional law violations, the provisions of OAR 845-009-0020(7)(a)(B) would no longer preclude Permittee from qualifying for a service permit.

⁴ OAR 845-009-0020(3) provides, 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.

⁵ OAR 845-009-0020(7)(b) provides:

(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

Applicant has not been diagnosed with a drug or alcohol addiction and therefore cannot establish good cause to overcome the denial pursuant to OAR 845-009-0020(3).

In this case, although Permittee is currently participating in a state certified substance abuse treatment program, she has not been diagnosed with an alcohol or drug addiction either before or as a result of her DUII convictions. Because Permittee does not have a diagnosed disability, she cannot establish good cause to overcome the denial pursuant to OAR 845-009-0020(3). Even if Permittee had the requisite diagnosis, Permittee last consumed alcoholic beverages on February 26, 2013, which is within 24 months of the proposed revocation. Additionally, she was placed on probation following her February 27, 2013 conviction, and will remain on probation until February 26, 2017. Because Permittee has not abstained from using a controlled substance for 24 months and has not yet completed her probation, she could not establish good cause to overcome the revocation if she had been diagnosed as alcohol or drug addicted. For these reasons, the OLCC may revoke Permittee's service permit.

FINAL ORDER

The Commission orders that service permit No. 372028, issued to Rosetta E. Timmens on December 9, 2010, be REVOKED.

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

Dated this 17 day of December, 2013

/s/ Steve Marks

Steve Marks
Executive Director
OREGON LIQUOR CONTROL COMMISSION

Mailed this 17 day of December, 2013

THIS ORDER IS EFFECTIVE AT 7:00 AM ON THE 20TH DAY OF DECEMBER, 2013.

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.

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