

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

In the Matter of the Application for a Service Permit Filed by:) **FINAL FINDINGS OF FACT**
) **CONCLUSIONS OF LAW**
) **AND ORDER**
)
ELISHA R. DAWSON) Agency Case No.: OLCC-12-SPR-017

HISTORY OF THE CASE

On June 20, 2012, the Oregon Liquor Control Commission (the OLCC) received an application for a service permit from Elisha R. Dawson (Applicant). The OLCC proposed to deny Applicant’s service permit because she had two 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 on August 27, 2012. 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 1:00 p.m. on October 30, 2012. Gwenn McNeal appeared on behalf of the OLCC and testified. Applicant appeared without counsel and testified on her own behalf. The hearing record remained open for the receipt of additional evidence until November 2, 2012. The ALJ received and admitted additional evidence into the hearing record on November 2, 2012, at which time the hearing record closed.

The Administrative Law Judge considered the record of the hearing and the applicable law and issued a Proposed Order mailed November 29, 2012.

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(3) and (7)(b).

EVIDENTIARY RULING

Exhibits A1 through A3, offered by the OLCC, were admitted into the record without objection. The record remained open until November 2, 2012 to allow Applicant to submit a letter from her employer. Ms. McNeal did not object to admission of this pending document. On October 31, 2012, Applicant submitted a letter from her employer to the OLCC and the OAH. The ALJ marked this document as Exhibit P1 and admitted it into the record.

FINDINGS OF FACT

1. On June 20, 2012, the OLCC received Applicant Elisha R. Dawson's Service Permit Application. (Ex. A1; test. of McNeal.)

2. On March 9, 2010, Applicant was arrested and cited for driving under the influence of intoxicants (DUII) in Idaho. She was convicted of this misdemeanor charge on May 18, 2010. (Ex. A2; test. of McNeal.)

3. On March 18, 2012, Applicant was arrested and cited for DUII, a Class A misdemeanor, in Oregon. She was convicted of this charge on May 29, 2012 and was sentenced to probation for a period of at least one year, to conclude no sooner than May 28, 2013. Applicant is doing well on probation and has recently been allowed to check in with her probation officer by mail rather than in person. (*Id.*)

4. As a result of her second DUII conviction, Applicant was required to participate in a substance abuse treatment program. Applicant started substance abuse treatment at Emergence, a state certified treatment program, in August 2012. It is a 14-week outpatient program and requires Applicant to attend two-hour weekly meetings and comply with random urinalysis testing. Applicant voluntarily attends AA twice per week. (Test. of Applicant.)

5. Applicant pays \$50 per week for her substance abuse treatment classes, and \$40 per month for probation fees. She has paid off her court fines. (*Id.*)

6. Applicant's employer is aware of her substance abuse history and supports her application for a server permit. (Ex. P1.)

7. Applicant last consumed alcohol on the date of her arrest, March 18, 2012. (Ex. A3, test. of Applicant.)

CONCLUSIONS OF LAW

1. Applicant's application for a service permit should be denied because Applicant has two DUII convictions within three years, both of which were 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. OAR 845-009-0020(3) and (7)(b).

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 or has been convicted of a felony. The OLCC has adopted administrative rules to apply this statutory provision. 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, either one of which was within 12 months.¹

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 a 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 DUII convictions are relevant to an individual's fitness to serve and sell alcoholic liquor. *Dorothy J. Hamblin* (OLCC Final Order, OLCC-03-SPR-036, December 2003).

In the present case, Applicant has two DUII convictions, one on May 18, 2010, arising out of her March 9, 2010 arrest in Idaho, and one on May 29, 2012, arising out of her March 18, 2012 arrest in Oregon. The OLCC received Applicant's application June 20, 2012, which is within 12 months of the second DUII conviction. Therefore, under OAR 845-009-0020(7)(a)(A), the OLCC has the authority to deny Applicant's application for a service permit, unless Applicant can show good cause to overcome the denial.

¹ 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[.]

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.

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

OAR 845-009-0020(7)(b) provides 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 this case, although Applicant is currently participating in a state certified substance abuse treatment program, there is no direct evidence in the record that she has been diagnosed with an alcohol addiction either before or as a result of her DUII convictions. Also, Applicant last consumed alcoholic beverages on March 18, 2012, which is within 24 months of her application. Additionally, she was placed on probation following her May 29, 2012 conviction, and will remain on probation until May 28, 2013, at the earliest. 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 revocation. For these reasons, the OLCC may deny Applicant's service permit application.

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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 Elisha R. Dawson and received by the OLCC on June 20, 2012, be DENIED.

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

Dated this 7th day of January, 2013

/s/ Merle Lindsey _____
Merle Lindsey
Interim Executive Director
OREGON LIQUOR CONTROL COMMISSION

Mailed this 9th day of January, 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.