

**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**
)

Joshua D. Gillam

Agency Case No.: OLCC-12-SPR-010

HISTORY OF THE CASE

On February 16, 2012, the Oregon Liquor Control Commission (OLCC) received an application for a service permit from Joshua D. Gillam (Applicant). The OLCC proposed to deny Applicant's service permit pursuant to OAR 845-009-0020(4)(a)(C) because Applicant was convicted of two felony drug charges, one of which was within the past three years.

Applicant filed a timely request for hearing. The OLCC referred the request to the Office of Administrative Hearings on May 11, 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 9:00 a.m. on June 22, 2012. 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 June 22, 2012.

The Administrative Law Judge considered the record of the hearing and the applicable law and issued a Proposed Order mailed August 1, 2012.

Applicant filed Exceptions to the Proposed Order on August 15, 2012. The Administrative Law Judge responded to Applicant's Exceptions on September 10, 2012.

On October 25, 2012 and March 1, 2013, the Commission considered the record of the hearing, the applicable law, the Proposed Order of the Administrative Law Judge, Applicant's Exceptions to the Proposed Order and the Administrative Law Judge's Response to Applicant's Exceptions. 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 two controlled substance felony convictions, one of which was within three years of the application. ORS 471.380(1)(d); OAR 845-009-0020(4)(a)(C).

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(3); OAR 845-009-0020(4)(b).

EVIDENTIARY RULINGS

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

FINDINGS OF FACT

1. On or about May 9, 2008, Applicant Joshua D. Gillam committed the crime of Unlawful Possession of Cocaine. Applicant was convicted of this charge, a Class C Felony, on July 21, 2008, in Washington County Circuit Court, Washington County, Oregon. The Court sentenced Applicant to 18 months Formal Probation. (Ex. A2, A3.)

2. On or about December 19, 2009, Applicant committed the crime of Unlawful Possession of Heroin. Applicant was convicted of this charge, a Class B Felony, on January 26, 2010, in Polk County Circuit Court, Polk County, Oregon. The Court sentenced Applicant to 18 months Supervised Probation. (Ex. A4.)

3. On February 16, 2012, the OLCC received Applicant's service permit application. (Ex. A1; test. of McNeal.)

4. As a result of his July 21, 2008 conviction, Applicant was diagnosed as alcohol and drug addicted and entered substance abuse treatment through Washington County Community Corrections. In December 2010, while on probation for this January 26, 2010 conviction, Applicant relapsed into drug use. He voluntarily told his probation officer about his relapse, and entered a state certified inpatient treatment program through Washington County Community Corrections. He successfully completed this program in April 2011. Applicant voluntarily began attending an outpatient treatment program with Allied Health Services in September 2011. He attends group therapy every week and individual counseling, and is subject to random urinalysis testing. He also attends NA regularly and completed a program to mentor others. Applicant has not used or consumed controlled substances since December 2010. (Test. of Applicant.)

5. Applicant's probation on the January 26, 2010 conviction was extended as a result of his December 2010 relapse. He is now on "case bank" probation, which does not require him to report to a probation officer. He expects to complete his probation on August 22, 2012. (Test. of Applicant.)

6. Applicant had difficulty finding employment with his criminal record. He has worked as a server at a Red Robin restaurant since January 2012. His probation officer supports his current employment. (Test. of Applicant.)

CONCLUSIONS OF LAW

1. Applicant's application for a service permit should be denied because Applicant has two controlled substance felony convictions, one of which was within three years of the date the OLCC received the application. ORS 471.380(1)(d); OAR 845-009-0020(4)(a)(C).

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)(C), which provides that the OLCC will deny a service permit application if an applicant has two controlled substance felony convictions, one of which was within three years.¹

The phrase "within three years" as used in the administrative rule means within three 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 July 21, 2008, Applicant was convicted of Unlawful Possession of Cocaine, a Class C Felony. On January 26, 2010, Applicant was convicted of Unlawful Possession of Heroin, a Class B Felony. Applicant's second controlled substance conviction occurred within three years of the OLCC's receipt of his service permit application on February 16, 2012. Thus, the OLCC has shown that it may deny Applicant's service permit under the provisions of OAR 845-009-0020(4)(a)(C).

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¹ OAR 845-009-0020(4)(a)(C) provides:

(4) Felony Drug Conviction:

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

(D) Two controlled substance felony convictions, one of which was within three 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.

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 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 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.³

Applicant has made many positive changes in his life, and is very close to meeting 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 drug treatment program, and is currently active in an outpatient program. Applicant is still on probation, but will complete his probation requirements on August 22, 2012. He has not used or consumed controlled substances since December 2010, and will be drug-free 24 months in December 2012.

Unfortunately, the administrative rule does not allow for discretion in its application, and Applicant did not meet all of the criteria set forth in OAR 845-009-0020(4)(b) at the time of the hearing. Because Applicant is still on probation and used controlled substances within the last 24 months, he cannot show good cause to overcome the denial at this time. Applicant's service permit application must therefore be denied.

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³ 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.

FINAL ORDER

The Commission orders that the application for a service permit filed by Applicant Joshua Gillam and received by the OLCC on February 16, 2012 be DENIED.

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

Dated this 8th day of March, 2013

/s/ Merle Lindsey

Merle Lindsey

Interim Executive Director

OREGON LIQUOR CONTROL COMMISSION

Mailed this 11th day of March, 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.