

**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**
)

KELLY M. LEITHEISER

Agency Case No.: OLCC-12-SPR-023

HISTORY OF THE CASE

On November 15, 2012, the Oregon Liquor Control Commission (the OLCC) issued a Service Permit Denial Notice to Kelly M. Leitheiser. The OLCC proposed to deny Ms. Leitheiser's application for a service permit because of the allegation that Ms. Leitheiser had two controlled substance felony convictions, one of which was within three years of the date of her application, and that she made a false statement in her permit application.

Ms. Leitheiser made a timely request for hearing. The OLCC referred the request for hearing to the Office of Administrative Hearings (the OAH) on January 17, 2013. The OAH assigned the case to John R. Lohuis, Administrative Law Judge (ALJ). ALJ Lohuis held a contested case hearing by telephone at 9:00 a.m. on March 11, 2013. Anna Davis appeared for the OLCC and testified on its behalf. Ms. Leitheiser appeared, represented herself, and testified on her own behalf.

The record closed at the conclusion of the hearing on March 11, 2013.

The Administrative Law Judge considered the record of the hearing and the applicable law and issued a Proposed Order mailed April 3, 2013.

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 Ms. Leitheiser's application for a service permit should be denied because she has two controlled substance felony convictions, one of which was within three years of the date of her application, and/or because she made a false statement on her application. ORS 471.380(1)(b), 471.380(1)(d), OAR 845-009-0020(4)(a)(C).

2. If the application should be denied, whether Ms. Leitheiser has good cause to overcome the denial. OAR 845-009-0020(3) and (4)(b).

EVIDENTIARY RULING

Exhibits A1 through A5, offered by the OLCC, were admitted into the record without objection. Exhibit 101, pages 1 through 7, offered by Ms. Leitheiser, were admitted into the record without objection.

FINDINGS OF FACT

1. On or about February 3, 2012, Ms. Leitheiser committed the crime of Unlawful Possession of Methamphetamine. On May 16, 2012, Ms. Leitheiser was convicted of the charge of Unlawful Possession of Methamphetamine, a Class C Felony. Ms. Leitheiser was sentenced to 18 months of probation for the conviction. (Exs. A2, A3, test. of Ms. Leitheiser.)

2. On or about April 22, 2012, Ms. Leitheiser committed the crime of Unlawful Possession of Methamphetamine. On June 21, 2012, Ms. Leitheiser was convicted of the charge of Unlawful Possession of Methamphetamine, a Class C Felony. Ms. Leitheiser was subject to 18 months of probation as a result of this conviction. (Ex. A4, A5, test. of Leitheiser.)

3. On October 22, 2012, the OLCC received Ms. Leitheiser's service permit application. Ms. Leitheiser's employer's human resource manager filled in the application. The human resource manager listed Ms. Leitheiser's 2004 convictions for "felony theft, fraud, identity theft, and escape," but did not list Ms. Leitheiser's 2012 convictions for Unlawful Possession of Methamphetamine. Ms. Leitheiser signed the application. Above the line for the applicant's signature, the application read: "I understand that my application may be refused or my service permit revoked if my answers on this application are not true and compete (ORS 471.380; ORS 471.385). Providing a false statement to the OLCC is a misdemeanor crime subject to penalties imposed by the court. I also understand that I must pass an ASE course within 45 days or this application will be denied (ORS 471.542). (Ex. A1, test. of Leitheiser, test. of Davis.)

4. Ms. Leitheiser completed both in-patient and out-patient treatment programs for chemical dependency. (Test. of Leitheiser, ex. A101, pp. 2, 7.) Ms. Leitheiser last consumed drugs on May 3, 2012. (Test. of Leitheiser.)

CONCLUSIONS OF LAW

1. Ms. Leitheiser's application for a service permit should be denied because she has two controlled substance felony convictions, one of which was within three years of her application, and because Ms. Leitheiser made a false statement on her permit application.

2. Ms. Leitheiser has not demonstrated good cause to overcome the denial.

OPINION

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 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 Ms. Leitheiser's service permit application under 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. 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).

The OLCC also proposes to deny Ms. Leitheiser's application because she made a false statement on her permit application. ORS 471.380(1)(b) provides that the OLCC may refuse to grant a service permit if it has reasonable grounds to believe that the applicant has made false statements to the commission.

Denial for Controlled Substance Convictions

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.¹ The OLCC has previously determined that convictions involving controlled substances are relevant to an individual's fitness to dispense alcoholic liquor. *John O. Myshak* (OLCC Final Order, OLCC-88-V-002, May 1988).

In the present case, Ms. Leitheiser has two controlled substance felony convictions, both of which are within three years of the date the OLCC received her application for a service permit. Therefore, under OAR 845-009-0020(4)(a)(C), the OLCC will deny Ms. Leitheiser's application for a service permit, unless she can show good cause to overcome the denial.

Whether Ms. Leitheiser has Good Cause to Overcome the Denial

OAR 845-009-0020(4)(b) provides that an applicant may show good cause to overcome a service permit denial. OAR 845-009-0020(3) states 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. 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.²

In this matter, Ms. Leitheiser has completed both in-patient and out-patient chemical dependency treatment programs. However, Ms. Leitheiser last consumed drugs on May 3, 2012, and therefore does not yet have 24 months abstinence as required by rule. Additionally, Ms. Leitheiser will remain on probation until December 2013.

¹ 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.

² 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))[]

* * * * *

(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.

Because Ms. Leitheiser has not abstained from using a controlled substance for 24 months, and because she has not yet completed her probation requirements, she has not demonstrated good cause to overcome the denial. For these reasons, her service permit application must be denied.

Denial for False Statement on Permit Application

ORS 471.380(1)(b) provides that the OLCC may refuse to grant a service permit if it has reasonable grounds to believe that the applicant has made false statements to the commission.

Ms. Leitheiser's application disclosed some of her convictions. However, Ms. Leitheiser's application did not list her two most recent felony convictions. Ms. Leitheiser's employer's human resource manager apparently filled out the application for her, but Ms. Leitheiser signed the application, and Ms. Leitheiser was responsible for ensuring that the information on her own application was accurate and complete. The false statement on Ms. Leitheiser's application was material because the two felony convictions provided a separate and distinct basis to deny her application under ORS 471.380(1)(b). *See Kimberly Carole LaBare* (Final Order, OLCC-86-SPR-017, October 1986), *see also Christina M. Downer* (Final Order, OLCC-07-SPR-020, September 2007). The denial of Ms. Leitheiser's application was proper, based on the material false statement in her service permit application.

FINAL ORDER

The Commission orders that the application for a service permit filed by Applicant Kelly M. Leitheiser and received by the OLCC on October 22, 2012 be DENIED.

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

Dated this 23rd day of April 2013

/s/ Merle Lindsey

Merle Lindsey

Interim Executive Director

OREGON LIQUOR CONTROL COMMISSION

Mailed this 24th day of April 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.