

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

In the Matter of the Proposed) **FINAL FINDINGS OF FACT**
Revocation of the Service Permit held) **CONCLUSIONS OF LAW**
by:) **AND ORDER**
)
CINDY R. PARKER) Agency Case No.: OLCC-12-SPR-016-R

HISTORY OF THE CASE

On June 7, 2012, the Oregon Liquor Control Commission (the OLCC) issued a Service Permit Revocation Notice to Cindy R. Parker (Permittee). The OLCC proposed to revoke Permittee's service permit because she had two diversions or convictions for driving under the influence of intoxicants (DUII) within three years, at least one of which was in the past 12 months.

Permittee filed a timely request for hearing. The OLCC referred the request to the Office of Administrative Hearings (OAH) on July 19, 2012. The OAH 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 28, 2012. Gwenn McNeal appeared on behalf of the OLCC and testified. Permittee appeared without counsel and testified on her own behalf. The hearing record remained open for the receipt of additional evidence until September 5, 2012. The ALJ received and admitted additional evidence into the hearing record on August 28, 2012. The hearing record closed on September 5, 2012.

ALJ Turner issued a Proposed Order on October 24, 2012, proposing that the OLCC revoke Permittee's service permit. On November 5, 2012, OLCC staff submitted comments on the Proposed Order and on November 7, 2012, Permittee filed exceptions to the Proposed Order. ALJ issued a Response to Exceptions and Staff Comments on November 21, 2012.¹

On December 17, 2012, the OLCC remanded the matter to the OAH for further hearing on the Proposed Order's Finding of Fact 2. A hearing on the remanded issue convened on February 5, 2013. No other substantive issues were addressed in the hearing. Gwenn McNeal appeared on behalf of the OLCC and testified. Permittee appeared without counsel and testified. The hearing record on remand closed February 5, 2013.

An Amended Proposed Order was issued February 27, 2013. Applicant filed Exceptions to the Amended Proposed Order on March 13, 2013. The Administrative Law Judge responded to Applicant's Exceptions on April 15, 2013.

¹ Pursuant to the Response to Exceptions and Staff Comments to the original Proposed Order, the second paragraph of the good cause analysis was removed from the Amended Proposed Order on Remand by the Administrative Law Judge.

On April 25, 2013 and June 27, 2013, the Commission considered the record of the hearing, the applicable law, the Amended Proposed Order of the Administrative Law Judge, Applicant's Exceptions to the Amended 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 Permittee's service permit should be revoked because Permittee 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 should be revoked, whether Permittee has shown good cause to overcome the revocation. OAR 845-009-0020(3) and (7)(b).

EVIDENTIARY RULINGS

Exhibits A1 through A5, offered by the OLCC, were admitted into the record without objection. Exhibits P1 and P2, offered by Permittee, were admitted into the record without objection. The record remained open until September 5, 2012 to allow Permittee to submit a letter from her employer. Ms. McNeal did not object to admission of this pending document. On August 31, 2012, Permittee submitted a letter from her employer to the OLCC and the OAH. The ALJ marked this document as Exhibit P3 and admitted it into the record.

After the close of the hearing on August 28, 2012, Permittee submitted an Interpretive Assessment Summary to the OLCC and the OAH. The ALJ marked this document as Exhibit P4 and admitted it into the record. The parties were allowed 10 days from the date on which the Proposed Order was mailed to file written objections to the admission of Exhibit P4. The OAH received no objections to the exhibit.

FINDINGS OF FACT

1. On June 17, 2011, the OLCC received Permittee Cindy R. Parker's Service Permit Application. (Ex. A1.) The OLCC issued Service Permit No. 385981 to Permittee on July 1, 2011. (Ex. A2.)

2. On August 26, 2010, Permittee was arrested and cited for DUII and Reckless Driving. Permittee was convicted of Reckless Driving, A Class A Misdemeanor, on October 15, 2010. She entered a diversion program on the DUII charge on September 22, 2010. Permittee successfully completed diversion on September 21, 2011. (Ex. A3, A4; test. of Permittee and McNeal.)

3. On February 29, 2012, Permittee was arrested and cited for DUII, a Class A Misdemeanor. (Ex. A3, A4; test. of McNeal.)

4. Permittee was convicted of DUII on May 18, 2012 (Ex. A3.) The Circuit Court judge sentenced Permittee to probation for a period of two years, to conclude in May 2014. (Test. of Permittee.)

5. As a result of her DUII diversion, Permittee entered a DUII treatment program with Integrated Health Clinics, a state certified substance abuse treatment program. She successfully completed this program. As a result of her relapse and DUII conviction, Permittee reentered this treatment program on July 31, 2012. She attends weekly classes and is tested for alcohol or drug use monthly. (Ex. P1, P4.) Permittee attends AA meetings regularly. (Test. of Permittee.)

6. Permittee has not consumed alcohol since March 29, 2012. (Test. of Permittee.)

7. Permittee's employer is aware of Permittee's DUII diversion and conviction, and has found Permittee to be a dependable and trustworthy employee. (Ex. P3.)

CONCLUSIONS OF LAW

1. Permittee's service permit should be revoked because Permittee has one DUII diversion and one DUII conviction within three years, one of which was within the past 12 months. ORS 471.385(1)(b), OAR 845-009-0020(7)(a)(A).

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 471.380(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 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 convictions of alcoholic liquor laws and are relevant to that individual's fitness to sell and serve

alcoholic liquor. *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 May 18, 2012 DUII conviction.

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.² In addition to the *Hamblin* case noted above, 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 was convicted of a misdemeanor that involves the abuse of an intoxicant. Similar to the *Hamblin* and *Myshak* cases, Permittee's conviction involving the abuse of an intoxicant is related to her fitness and judgment to sell and serve alcoholic beverages, and provides a basis for the proposed revocation of her license.

The OLCC also relies on its service permit denial rules to support the proposed revocation of Permittee's permit. See *Michelle L. Haynes* (OLCC Final Order, OLCC-006-SPR-022, December 2006) (holding that it is reasonable to apply service permit rules to determine whether revocation of a service permit is warranted). In this case, the OLCC seeks to revoke Permittee's service permit 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, any one of which was within 12 months.³

In the present case, Permittee has one DUII diversion that was completed on September 21, 2011, and one DUII conviction on May 18, 2012. The OLCC proposed to revoke Permittee's service permit on June 7, 2012, which was within 12 months of the DUII conviction. Under OAR 845-009-0020(7)(a)(A), the OLCC has the authority to revoke Permittee's service permit, unless Permittee can show good cause to overcome the revocation.

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.

³ 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. *Whether Permittee has good cause to overcome the denial:*

The OLCC's administrative rules provide that an applicant may show good cause to overcome the service permit revocation. 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

In this case, Permittee last consumed alcohol on March 29, 2012, which is within 24 months of the proposed revocation. Additionally, Permittee was placed on probation following her May 18, 2012 conviction, and will remain on probation until May 2014. Because Permittee 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 revoke Permittee's service permit.

Permittee appears to sincerely regret her past choices and has benefited from her substance abuse treatment. She is active in her recovery and continues to take positive steps to improve her life. Her employer supports her in her recovery and Permittee hopes to continue to work in her current position. Unfortunately, the law does not consider these factors sufficient to establish good cause to overcome the revocation of her 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

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

FINAL ORDER

The Commission orders that service permit No. 385981, issued to Cindy R. Parker on July 1, 2011, be REVOKED.

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

Dated this 2nd day of July 2013.

/s/ Merle Lindsey

Merle Lindsey

Interim Executive Director

OREGON LIQUOR CONTROL COMMISSION

Mailed this 2nd day of July 2013.

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