

**BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF OREGON
for the
OREGON LIQUOR CONTROL COMMISSION**

In the Matter of the Proposed) **FINAL ORDER BY DEFAULT**
Revocation of the Service Permit held)
by:)
) Agency Case No.: OLCC-12-SPR-021
BRITTANY M. TACKETT)

HISTORY OF THE CASE

On September 6, 2012, the Oregon Liquor Control Commission (the OLCC) issued a Service Permit Revocation Notice to Brittany M. Tackett (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 on January 22, 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 March 21, 2013. Gwenn McNeal appeared on behalf of the OLCC. Permittee did not appear.

In its contested case notice, the OLCC designated the agency file in the matter as the record. The OLCC offered no further evidence or testimony, and the record closed on the date of the scheduled hearing.

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

The OLCC's file, including Exhibits A1 through A5, constitutes the record in this case.

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FINDINGS OF FACT

1. On December 27, 2007, the OLCC issued Service Permit No. 296158 to Permittee Brittany M. Tackett. (Ex. A2.)

2. On January 28, 2010, Permittee was arrested and cited for DUII. She enrolled in a DUII diversion program on March 26, 2010, which ended on March 25, 2011. (Ex. A3.)

3. On August 27, 2012, Permittee was convicted of DUII, a Class A Misdemeanor, in Clackamas County, Oregon, following a June 27, 2012 DUII arrest. (Ex. A3.)

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 revocation basis. OAR 845-009-0020(3) and (7)(b).

OPINION

OAR 137-003-0670 applies when, as in this case, the agency issues a notice of proposed action that does not become final in the absence of a request for hearing. Pursuant to subsection (1)(c) of this rule, the agency or, if authorized, the ALJ may issue a final order by default when the agency or ALJ has notified the party of the time and place of the hearing, and the party fails to appear at the hearing. Pursuant to OAR 137-003-0670(3)(a), the agency or ALJ may issue an order adverse to the party on default only upon a prima face case made on the record. The agency file constituting the record must contain sufficient evidence of facts necessary to support the order. As explained below, the OLCC file supports the proposed action.

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 DUII, a crime that necessarily requires a determination that the individual drove a vehicle while under the influence of intoxicating liquor, a controlled substance, or an inhalant. 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 August 27, 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.¹ 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 within three years, any one of which was within 12 months.²

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:
(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[.]

In the present case, Permittee has one DUII diversion that began on March 26, 2010 and ended on March 25, 2011, and one DUII conviction on August 27, 2012. The OLCC has established by case precedent that for a service permit denial or revocation, the relevant date for a diversion is the date it was completed, not the date diversion began. *Tamara L. Cardenas*, (OLCC Final Order, OLCC-94-SPR-122, March 1995). The end of diversion and the conviction occurred within the last three years, and the final conviction was within the last 12 months. Therefore, 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. *Whether Permittee has 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) and (7)(b) provide that an applicant may show good cause to overcome a denial (or as in this case, a revocation), by establishing that the applicant has a drug addiction disability or an alcohol addiction disability; that the applicant has not used or consumed controlled substances within 24 months; that the applicant has successfully completed a state certified drug treatment program; and that the applicant has completed all parole or probation requirements.³

Permittee did not appear for the hearing and did not offer evidence of good cause. Revocation of Permittee's service permit is therefore warranted.

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³ OAR 845-009-0020 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.

* * * * *

(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.

PROPOSED ORDER

I propose that service permit No. 296158, issued to Brittany M. Tackett on December 27, 2007, be REVOKED.

/s/ Lynnette M. Turner
Lynnette M. Turner
Administrative Law Judge
Office of Administrative Hearings

THIS ORDER IS EFFECTIVE ON THE DATE MAILED. Any monetary fine or civil penalty set out in the order shall be due and payable 10 days after the date of mailing.

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.

CERTIFICATE OF SERVICE

I certify that on April 23, 2013, I served the attached Final Order by Default by mailing certified and/or first class mail, in a sealed envelope, with first class postage prepaid, a copy thereof addressed as follows:

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/s/ Carol Buntjer

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Administrative Specialist

Office of Administrative Hearings