

**BEFORE OREGON LIQUOR CONTROL COMMISSION
of the
STATE OF OREGON**

In the Matter of the Service Permit)	FINAL FINDINGS OF FACT
Held by:)	CONCLUSIONS OF LAW
)	AND ORDER
)	
JONATHAN HILL)	OLCC-14-V-033
Permit No. 416814)	
)	
)	

HISTORY OF THE CASE

On February 11, 2014, the Oregon Liquor Control Commission (OLCC or Commission) issued a Notice of Proposed Service Permit Revocation to Jonathan Hill (Permittee). The Notice charged Permittee with a violation of ORS 471.385(1)(b), based on his December 9, 2013 felony conviction for Unlawful Possession of Cocaine. Permittee timely requested a hearing.

The Commission referred Licensee’s hearing request to the Office of Administrative Hearings (OAH) on March 26, 2014. The OAH assigned the matter to Senior Administrative Law Judge (ALJ) Alison Greene Webster.

ALJ Webster presided over the hearing in this matter in Tualatin, Oregon, on June 17, 2014. Permittee appeared without counsel. Anna Davis presented the case for the OLCC.

The following witnesses testified at the hearing on behalf of OLCC: OLCC Inspectors John Mereen and Mark Smith. Permittee chose not to testify.

The record closed on June 17, 2014, at the close of the hearing.

The Administrative Law Judge considered the record of the hearing and the applicable law and issued a Proposed Order mailed June 24, 2014. Staff filed Comments on the Proposed Order on July 9, 2014. The Administrative Law Judge responded to Staff’s Comments on July 14, 2014.

On August 21, 2014, the Commission considered the record of the hearing, the applicable law, the Proposed Order of the Administrative Law Judge, Staff’s Comments on the Proposed Order and the Administrative Law Judge’s Response to Staff’s Comments. Based on this review and the preponderance of the evidence, the Commission enters the following:

EVIDENTIARY RULINGS

OLCC Exhibits A1 through A4 were admitted without objection.

ISSUE

Whether the Commission may revoke Permittee's service permit under ORS 471.385(1)(b) based on his December 9, 2013 felony conviction for Unlawful Possession of Cocaine.

FINDINGS OF FACT

1. On August 24, 2012, the Commission issued a service permit (permit no. 416814) to Jonathan Hill. (Ex. A1.)

2. On the evening of December 4, 2013, OLCC Inspectors John Mereen and Mark Smith went to Permittee's place of employment, Café Nell, located at 1987 NW Kearney, Portland, Oregon to investigate a complaint. The inspectors had received information that Permittee Hill had been drinking while on duty as a bartender at Café Nell. (Ex. A4.)

3. After conducting outside observations for about a half an hour, the inspectors entered the premises at approximately 9:10 p.m. They contacted Permittee and asked to see his service permit. Permittee presented his permit. Inspector Mereen wrote down Permittee's information. He then stepped outside and had OLCC dispatch run a routine status check on Permittee through Oregon's Law Enforcement Data System (LEDS). Moments later, OLCC dispatch advised the inspector that Permittee was the subject of an arrest warrant from Washington County, Oregon. Inspector Mereen called the Washington County Sheriff's Office and confirmed that the warrant was still active. (Exs. A3 and A4; test. of Mereen.)

4. At approximately 9:30 p.m., the inspectors reentered the premises and recontacted Permittee. They asked him to speak to him outside the premises. Once they were outside, Inspector Mereen advised Permittee of the outstanding warrant, and placed him under arrest. As the inspector handcuffed Permittee, Permittee made furtive attempts to put his hand in the left front pocket of his pants. Inspector Mereen pulled Permittee's hand away and directed him not to reach for anything. The inspector then advised Permittee of his rights, which Permittee acknowledged understanding. (Exs. A3 and A4; test. of Mereen.)

5. Inspector Mereen asked Permittee what he had been reaching for in his left front pants pocket. Permittee said that he had a "bag of coke" in his pocket. The inspector then removed a small green baggie containing a white powdery substance from Permittee's left front pocket. Permittee told Inspector Mereen that he was holding the coke for a friend. Permittee explained that he had paid \$50 for the cocaine, and that he was planning to deliver it to his friend at the licensed premises later that night. He added that his friend was going to pay him back for the purchase. (Exs. A3 and A4; test. of Mereen.)

6. Inspector Mereen, who is certified in field testing controlled substances, tested the white powder he had removed from the baggie in Permittee's pocket. The test came back positive for cocaine. (Exs. A3 and A4; test. of Mereen.)

7. Inspector Mereen charged Permittee with possession of a controlled substance – cocaine and delivery of a controlled substance – cocaine. The inspectors then turned Permittee over to the custody of the Portland Police Bureau for transport to the Multnomah County Detention Center. (Exs. A3 and A4; test. of Mereen.)

8. On December 9, 2013, Permittee pled guilty to one count of Unlawful Possession of Cocaine. On December 23, 2013, based on the guilty plea, Permittee was convicted in Multnomah County Circuit Court of Unlawful Possession of Cocaine under ORS 475.884, a Class C Felony. Permittee was sentenced to supervised probation for a period of 12 months. (Ex. A2.)

CONCLUSIONS

The Commission may revoke Permittee’s service permit under ORS 471.385(1)(b) based on his December 9, 2013 felony conviction for Unlawful Possession of Cocaine.

OPINION

As set out above, the Commission proposes to revoke Permittee’s service permit pursuant to ORS 471.385(1)(b) based on Permittee’s felony conviction. As the proponent of this position, Commission Staff bears the burden of proof. ORS 183.450(2); *Harris v. SAIF*, 292 Or 683, 690 (1982) (general rule regarding allocation of burden of proof is that the burden is on the proponent of the fact or position).

ORS 471.385(1)(b) provides as follows:

(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.

The evidence establishes that Permittee was convicted of a felony, Unlawful Possession of Cocaine. The Commission has designated a violation of ORS 471.385(1)(b) as a Category I violation. Category I violations are the most serious type – those that make a licensee ineligible for a license. OAR 845-006-0500(7)(a)(A) and Exhibit 1 to OAR 845-006-0500(7). Thus, under ORS 471.385(1)(b) and the Commission’s established penalty schedule, the Commission may revoke Permittee’s permit based on his felony conviction.

Also pertinent to this matter is ORS 670.280,¹ which prohibits a licensing agency from denying an occupational or professional license solely for the reason that the applicant has been convicted of a crime, but authorizes the agency to consider the relationship of the facts which support the conviction to the specific occupational or professional standard in determining the applicant's fitness for the license. It is well-established Commission case precedent that a conviction involving an illegal controlled substance is related to the fitness to serve alcoholic liquor because alcohol is also a controlled substance. *John O. Myshak* (OLCC Final Order, 88-V-002, May 1988); *Michelle L. Haynes* (OLCC Final Order, 06-SPR-022, December 2006).

Here, as found above, Permittee was convicted of Unlawful Possession of Cocaine. Permittee had that cocaine in his possession while he was on duty at Café Nell. He admitted to the inspectors at the time of his arrest that he intended to deliver the cocaine to his friend later that night at the licensed premises. Consequently, not only is Permittee's conviction related to his occupation as a server in a general sense because it involved a controlled substance, but also because he committed the crime while on duty. Under these circumstances, as required by ORS 670.280, Permittee's felony drug conviction relates to his fitness to hold a service permit.

In *John O. Myshak*, the Commission held that, in deciding whether revocation of the service permit is an appropriate sanction, it should consider whether the permittee has reformed. Noting that the passage of time since the felony conviction is an important factor in the analysis, the Commission found that the passage of nine months was not enough time to determine whether a permittee had reformed to the extent that he or she would be a good risk for compliance. Final Order at 10. There, the Commission also found it significant that the permittee had committed felonies while at work. It explained: "Commission of the felonies on the licensed premises showed a lack of good judgment and a disregard for Commission rules and laws and, therefore, provides a basis to aggravate the penalty." *Id.* at 11.

In this case, like *John O. Myshak*, there is no persuasive reason for reducing the standard sanction. Based on his December 23, 2013 felony conviction for Unlawful Possession of Cocaine, Permittee violated ORS 471.385(1)(b). The felony conviction is directly related to Permittee's fitness to sell and serve alcoholic liquor. Only six months have passed since the conviction, and Permittee committed the underlying felony while at work at a licensed premises. In this case good cause analysis is necessary, but Permittee did not provide any evidence to support good cause. Given these circumstances, revocation of Permittee's service permit is warranted.²

¹ ORS 670.280 provides:

Denial, suspension or revocation of license prohibited solely because of criminal conviction; exception. Except as provided in ORS 342.143 or 342.175, no licensing board or agency shall deny, suspend or revoke an occupational or professional license or certification 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 such license or certificate.

² In *Michelle L. Haynes*, following issuance of her service permit, the permittee was convicted of manufacture of marijuana, a Class A felony, and delivery of marijuana for consideration, a Class B

FINAL ORDER

The Commission orders that service permit no. 416814 issued to Johnathan Hill on August 24, 2012, be REVOKED.

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

Dated this 26 day of August 2014

/s/ Steve Marks

Steven Marks

Executive Director

OREGON LIQUOR CONTROL COMMISSION

Mailed this 26 day of August 2014

THIS ORDER IS EFFECTIVE AT 7:00 AM ON THE 29th DAY OF August, 2014.

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.

felony. The Commission that found it had grounds under ORS 471.385(1)(b) to revoke or suspend her permit and that, under ORS 670.280, there was a relationship between the convictions and the permittee's fitness to sell or serve alcoholic liquor. The Commission also applied its Service Permit Denial Criteria rule, set out in OAR 845-009-0020(4), to determine whether revocation of the service permit was an appropriate sanction. The Commission held that revocation was appropriate, and that the permittee could not establish good cause to overcome the grounds for revocation because she had not been diagnosed as drug addicted, a threshold for eligibility of good cause. Final Order at 3-5.

The ALJ submits that the analysis adopted by the Commission in *Michelle L. Haynes* is necessary even when, as in this case, the violation of ORS 471.385(1)(b) arises out of a *felony committed while the permittee was on duty at a licensed premises*. Because Permittee's felony drug conviction is recent and he committed the underlying crime while on duty, revocation of the service permit is an appropriate sanction. *See, e.g., John O. Myshak*, Final Order at 11. Any further analysis regarding good cause under the provisions of OAR 845-009-0020(3) and (4)(b)(A) through (C) would be superfluous, since Permittee provided no proof of having a drug or alcohol addiction disability at the time of his felony drug conviction.