

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

<b>In the Matter of the Application for a Service Permit Filed by:</b>	)	<b>FINAL FINDINGS OF FACT</b>
	)	<b>CONCLUSIONS OF LAW</b>
	)	<b>AND ORDER</b>
	)	
<b>Emily M. Pinkerton 703 Mitchell Street NE Salem, OR 97301</b>	)	Agency Case No.: OLCC-13-SPR-030
	)	
	)	

**HISTORY OF THE CASE**

On July 24, 2012, the Oregon Liquor Control Commission (OLCC) received an application for a service permit from Emily M. Pinkerton (Applicant). On August 19, 2013, the OLCC issued a Service Permit Denial Notice proposing to deny Applicant’s service permit pursuant to OAR 845-009-0020(4)(a)(B), because Applicant was convicted of a felony drug delivery charge within the past two years.

Applicant timely filed a request for hearing. The OLCC referred the request to the Office of Administrative Hearings (OAH) on November 8, 2013. The OAH assigned the case to Linda A. Lohr, Administrative Law Judge (ALJ). ALJ Lohr held a contested case hearing by telephone at 9:00 a.m. on January 14, 2014. Gwenn McNeal appeared on behalf of the OLCC and testified. Applicant appeared on her own behalf and testified. The hearing record closed at the conclusion of the hearing on January 14, 2014.

The Administrative Law Judge considered the record of the hearing and the applicable law and issued a Proposed Order mailed February 18, 2014.

Applicant filed Exceptions to the Proposed Order on February 26, 2014. Staff filed Comments on the Proposed Order on February 26, 2014. The Administrative Law Judge responded to Applicant’s Exceptions and Staff’s Comments on May 15, 2014.

On June 25, 2014 and August 21, 2014, the Commission considered the record of the hearing, the applicable law, the Proposed Order of the Administrative Law Judge, Licensee’s Exceptions to the Proposed Order, Staff’s Comments on the Proposed Order and the Administrative Law Judge’s Response to Licensee’s Exceptions and Staff’s Comments. 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 she has a felony drug conviction within two years of the application. OAR 845-009-0020(4)(a)(B); ORS 471.380(1)(d).<sup>1</sup>

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<sup>1</sup> Due to scrivener’s error, the Proposed Order incorrectly cited OAR 845-009-0020(4)(a)(D).

2. If the application should be denied because of Applicant's conviction, whether Applicant has shown good cause to overcome the denial. OAR 845-009-0020(4)(b); OAR 845-009-0020(3).

### **EVIDENTIARY RULINGS**

OLCC Exhibits A1 and A2 were admitted into the record without objection.

### **FINDINGS OF FACT**

1. On March 28, 2012, Applicant Emily M. Pinkerton committed the crime of unlawful delivery of marijuana. Applicant pled guilty and was convicted of this charge, a Class B Felony, on July 23, 2012, in Polk County Circuit Court, Polk County, Oregon. The Court sentenced Applicant to 36 months supervised probation. (Ex. A2)

2. On July 24, 2013, the OLCC received Applicant's service permit application. (Ex. A1; Test. of McNeal.)

3. As a result of her March 28, 2012, arrest, Applicant was diagnosed with a drug addiction disability and completed a substance abuse treatment program on October 19, 2012. (Test. of Applicant.)

4. Applicant works full-time as a food server at Donatella's Pizza restaurant. (Test. of Applicant.)

5. Applicant has not used or consumed controlled substances since her March 28, 2012, arrest.

### **CONCLUSIONS OF LAW**

1. Applicant's application for a service permit should be denied because Applicant has a felony drug conviction which occurred within two years of the application. ORS 471.380(1)(d); OAR 845-009-0020(4)(a)(B).<sup>2</sup>

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)(B), which provides that the OLCC will deny a

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<sup>2</sup> Due to scrivener's error, the Proposed Order incorrectly cited OAR 845-009-0020(4)(a)(D).

service permit application if an applicant has had a felony conviction for delivering a controlled substance within two years of the date the OLCC received the application.

The phrase “within two years” as used in the administrative rule means within two years of the date the OLCC received the application. OAR 845-009-0020(2). When a criminal conviction 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.<sup>3</sup> 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 23, 2012, Applicant was convicted of unlawful delivery of marijuana, a controlled substance felony. Applicant’s conviction occurred within two years of the OLCC’s receipt of her July 24, 2013, service permit application. Thus, the OLCC has shown it may deny Applicant’s service permit under the provisions of OAR 845-009-0020(4)(a)(B).<sup>4</sup>

*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 to be qualified 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. In this case, Applicant established that she was diagnosed with a drug addiction disability as a result of her conviction and, therefore, qualifies to show good cause to overcome the proposed service permit denial.

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.<sup>5</sup>

Applicant has made some positive changes in her life. However, Applicant has not met all the criteria required to establish good cause. Although Applicant has not used or consumed

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<sup>3</sup> ORS 670.280(2) (“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”).

<sup>4</sup> Due to scrivener’s error, the Proposed Order incorrectly cited OAR 845-009-0020(4)(a)(D).

<sup>5</sup> 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”).

controlled substances for more than 12 months, the rule requires 24 months of abstinence to establish good cause. Similarly, while Applicant testified she completed a drug counseling program in October 2012, there is no evidence she provided a sworn statement on a Commission-supplied form that she completed a state-certified drug treatment program and is currently following treatment recommendations. Additionally, Applicant will not complete her probation until July 23, 2015.

Because Applicant's last use of controlled substances was within 24 months of the date the Commission received the service permit application, and because she has not completed her probation requirements, she has not met all the criteria set forth in OAR 845-009-0020(4)(b) and cannot show good cause to overcome the denial.<sup>6</sup> Applicant's service permit application must therefore be denied.

### **FINAL ORDER**

The Commission orders that the application for a service permit filed by Applicant Emily M. Pinkerton and received by the OLCC on July 24, 2013, be DENIED.

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

Dated this 26 day of August 2014

/s/ Steven Marks

Steven Marks

Executive Director

OREGON LIQUOR CONTROL COMMISSION

Mailed this 26 day of August 2014

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.

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<sup>6</sup> Staff's Comments requested revisions to reflect that the rule considers Applicant's use of controlled substances within 24 months of the date the Commission receives the application. The ALJ agreed to this revision in her Response to Exceptions and Comments.