

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

<b>In the Matter of the Application</b>	)	<b>FINAL FINDINGS OF FACT</b>
<b>For a Service Permit Filed by:</b>	)	<b>CONCLUSIONS OF LAW</b>
	)	<b>AND ORDER</b>
<b>JOEL HERNANDEZ</b>	)	<b>OLCC-09-SPR-011</b>

**HISTORY OF THE CASE**

On February 2, 2009, the Oregon Liquor Control Commission (OLCC or Commission) received an application for a service permit from Joel Hernandez (Applicant). On March 3, 2009, the OLCC issued a Service Permit Denial Notice to Applicant. The Notice alleged that the application should be denied pursuant to OAR 845-009-0020(7)(a)(A), because within three years Applicant had two Driving Under the Influence of Intoxicants (DUII) convictions or diversions, one of which was within the past 12 months. Applicant filed a timely request for hearing. The case was referred to the Office of Administrative Hearings on April 17, 2009.

A hearing was held by telephone on June 8, 2009, before Administrative Law Judge Robert L. Goss. Applicant appeared without counsel and testified. Gwenn McNeal presented the case for OLCC and testified. The record closed at the conclusion of the hearing.

The Administrative Law Judge considered the record of the hearing and the applicable law and issued a Proposed Order mailed June 29, 2009.

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:

**EVIDENTIARY RULINGS**

OLCC's Exhibits A1 through A3 were admitted into the record without objection.

**ISSUES**

1. Whether Applicant's application for a service permit should be denied because, within three years of the application for a service permit, he had a DUII conviction and a DUII diversion, at least one of which was within 12 months of the date of his application. ORS 471.380; OAR 845-009-0020(7)(a)(A); ORS 670.280.

2. If the application should be denied because of Applicant's convictions, whether he has shown good cause to overcome the denial. OAR 845-009-0020(3) and (7)(b).

### FINDINGS OF FACT

1. Applicant applied for a service permit. The Commission received the application on February 2, 2009. (Ex. A1; Test. of Ms. McNeal.)

2. On January 14, 2008, Applicant was arrested for DUII. As a result of the arrest and resulting charge of DUII, Applicant entered into a DUII diversion agreement through the Circuit Court of Multnomah County on March 12, 2008. The diversion ended on March 11, 2009. (Ex. A2; test. of Applicant.)

3. On February 23, 2009, Applicant was convicted of DUII in the Circuit Court of Washington County. The DUII crime occurred on January 12, 2009. Applicant is currently on probation for the DUII, which he believes should last for approximately two years from the date of conviction. (Ex. A2; test. of Applicant.)

4. Applicant is currently enrolled in a substance abuse program through Lifeworks. Applicant plans to be through with treatment in August or September 2009. Applicant has abstained from alcohol since the end of January 2009. (Test. of Applicant.)

5. Applicant currently works as a waiter/bartender at the Juan Colorado restaurant in Portland. Because the restaurant has a liquor license and sells alcoholic beverages to customers, Applicant must have a service permit to continue his employment. (Test. of Applicant.)

### CONCLUSIONS OF LAW

1. Applicant's application for a service permit should be denied because, within three years, he had a conviction and diversion for DUII, both of which were within 12 months of the Commission's receipt of his application.

2. Applicant has not shown good cause to overcome the denial.

### OPINION

The Commission proposes to deny Applicant's service permit application on the basis of the service permit rule, OAR 845-009-0020. ORS 471.380(1)(a) and (d) allows the Commission to deny a service permit based on the applicant's habit of using alcohol or controlled substances to excess and on the applicant's law violation history.<sup>1</sup> OAR 845-009-0020 describes how the Commission applies these statutory provisions.<sup>2</sup>

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<sup>1</sup> ORS 471.380 provides, in relevant part:

**Grounds for refusing to issue permit; request for hearing.** (1) The Oregon Liquor Control Commission may refuse to grant a service permit if it has reasonable grounds to believe any of the following to be true:

Where conviction of a crime is the basis for agency action, ORS 670.280 applies and the Commission must show the relationship between the conviction and the person's fitness to sell or serve alcoholic liquor.<sup>3</sup> The Commission has concluded that DUII convictions are convictions for violations of alcoholic liquor laws and are relevant to a person's fitness to serve and sell alcoholic liquor. *Dorothy J. Hamblin* (OLCC, Final Order, 03-APR-036, December 2003); *Carolyn A. White* (OLCC, Final Order, 98-SPR-050, January 1996).

OAR 845-009-0020(7)(a)(A) provides that the Commission will deny a service permit if within three years, an applicant has had two DUII convictions or one diversion and one conviction, any one of which was within 12 months of the date the application is received by the Commission.

Applicant entered into a DUII diversion agreement that ended on March 11, 2009, and he was convicted of DUII on February 23, 2009. Both events are within one year of the receipt of his service permit application by the OLCC on February 2, 2009. Therefore, under OAR 845-

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(a) That the applicant is in the habit of using alcoholic beverages or controlled substances to excess.

\* \* \* \* \*

(d) That the applicant has been convicted of violating any of the alcoholic liquor laws of this state, general or local, or has been convicted at any time of a felony.

<sup>2</sup> OAR 845-009-0020 provides, in relevant part:

(1) ORS 471.380(1)(a) and (d) allow the Commission to deny a service permit based on the applicant's habit of using alcohol or controlled substances to excess and on the applicant's law violation history. This rule describes how the Commission applies these statutory provisions.

(2) For this rule, references to a period of time means a period of time ending on the date the Commission receives the application. For example, "within two years" means within two years of the date the Commission receives the application.

\* \* \* \* \*

(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[.]

<sup>3</sup> 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.

009-0020(7)(a)(A), the Commission is authorized to deny Applicant's application for a service permit, unless he can show good cause to overcome the denial.

Good Cause

OAR 845-009-0020(3) and (7)(b) provide that an applicant may show good cause to overcome the denial by showing that the applicant has an alcohol or drug addiction disability; that the applicant has not used alcohol or controlled substances within 24 months of the service permit application; that the applicant has met drug treatment requirements as set out in the rule; and that the applicant has completed all parole or probation requirements.<sup>4</sup>

Applicant last consumed a controlled substance (alcohol) in January 2009, which is within the 24 months immediately preceding the Commission's receipt of his service permit application in February 2009. Moreover, Applicant is currently on probation following his February 2009 DUII conviction, and that probation is not scheduled to end for approximately two more years. The Commission has previously decided that, to qualify for good cause, applicants must complete all probation or parole requirements. This good cause requirement is strict, and includes completion of an inactive supervision or bench probation program. *Rita Vanatta* (OLCC, Final Order, 01-SPR-018, July 2001). Because Applicant consumed a controlled substance within the 24 months immediately preceding the Commission's receipt of his application and he has not completed his probation on the DUII conviction, he cannot establish good cause. His service permit application must be denied.

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<sup>4</sup> OAR 845-009-0020(3) and (7)(b) provide, in relevant parts:

- (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 controlled substance within 24 months; and
  - (B) He/she has successfully completed a state certified 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 the application for a service permit filed by Joel Hernandez and received by the Commission on February 2, 2009, be DENIED.

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

Dated this 21<sup>st</sup> day of July, 2009.

/s/ Stephen A. Pharo  
Stephen A. Pharo  
Executive Director  
OREGON LIQUOR CONTROL COMMISSION

Mailed this 21<sup>st</sup> day of July, 2009.

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.