

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

IN THE MATTER OF:)	FINAL FINDINGS OF FACT
)	CONCLUSIONS OF LAW
U-N-ME, INC.)	AND ORDER
THERESA BROWN,)	OLCC-10-L-012
DBA FOSTER WATERHOLE)	
)	

HISTORY OF THE CASE

On November 2, 2010, the Oregon Liquor Control Commission issued a license to U-N-Me, Inc. and Theresa Brown, President, Director, Shareholder, doing business as Foster Waterhole (Licensee). The license included restrictions relating to Theresa Brown’s husband, Laune Brown. Licensee filed a timely hearing request to challenge the restrictions. The Commission referred the case to the Office of Administrative Hearings on November 24, 2010.

A contested case hearing was held in Albany, Oregon, on April 4, 2011, before Administrative Law Judge James W. Han. Attorney Rachel L. Kittson-MaQatish represented Licensee. Theresa Brown, Laune Brown, and Michael Hall testified for Licensee. Kelly Rouff presented the case for the Commission. OLCC Regional Manager James Lynch testified for the Commission.

The record was held open to April 25, 2011, for the parties to submit written arguments. Both parties submitted written closing arguments and the record closed on April 25, 2011.

The Administrative Law Judge considered the record of the hearing and the applicable law and issued a Proposed Order mailed June 21, 2011.

Licensee filed Exceptions to the Proposed Order on July 5, 2011. The Administrative Law Judge responded to Licensee’s exceptions on July 13, 2011.

On August 11, 2011, 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 and the Administrative Law Judge’s Response to Licensee’s Exceptions. Based on this review and the preponderance of the evidence, the Commission enters the following:

ISSUES

1. Whether Laune Brown has a financial interest in the licensed business. ORS 471.757(2); OAR 845-005-0311(4).
2. Whether the Commission has grounds to deny a license to Laune Brown if he were the applicant. ORS 471.757(2) and 471.313(4); OAR 845-005-0311(4).
3. Whether good cause exists to overcome the denial criteria. OAR 845-005-0325(5).
4. Whether the Commission may restrict Licensee’s license. OAR 845-005-0355(1).

EVIDENTIARY RULING

Exhibits A1 through A5 and P1 through P3 were admitted in evidence at the hearing without objection. Regulatory staff's relevance objections to Exhibits P4 through P6 and P8 through P16 were overruled and the exhibits were admitted in evidence. Exhibit P7 was not admitted because it was duplicative of Exhibit A1 at 6.

FINDINGS OF FACT

1. Theresa Brown is U-N-Me, Inc.'s sole officer, director, and shareholder. (Ex. A1 at 3.) Until 2010, she had been an IT manager for Hewlett-Packard for 30 years. She has never before owned or managed a business licensed to sell alcoholic liquor. (Test. of T. Brown.)

2. Laune Brown is Theresa's husband. (Test. of T. Brown.) Laune Brown was registered with the Oregon Medical Marijuana Program (OMMP) for over six years, until May 23, 2010. (Test. of L. Brown; Exs. P10 and P14.) On September 9, 2009, he submitted an application to OMMP to grow marijuana for another medical marijuana applicant. Laune Brown never received authorization to grow marijuana for another person. (Test. of L. Brown; Ex. P11.) On September 22, 2009, police arrested Laune Brown for growing four plants more than the maximum number he was authorized to grow. (Test. of L. Brown.) On May 10, 2010, Laune pleaded guilty to Unlawful Possession of Marijuana, a Class B Felony, and sentenced to 18 months probation, which expires on November 9, 2011. (Exs. A3 and P13.) Laune Brown asked to be removed from the OMMP on May 23, 2010. (Ex. P14.)

3. In June 2010, U-N-Me filed its articles of incorporation and applied for a limited on-premises and off-premises sales license. (Exs. A1 at 2, and P2.) In September 2010, U-N-Me purchased the Foster Waterhole Tavern for \$62,800. (Ex. A1 at 6.)

4. Theresa Brown supplied all the funds for the purchase, using money she borrowed, her personal stock in Hewlett-Packard, and her credit card. (Test. of T. Brown; Exs. 4 through 7.)

5. U-N-Me applied for a full on-premises and off-premises sales license. (Ex. A1 at 1.) On November 2, 2010, the Commission issued a full on-premises and off-premises sales license to U-N-Me and its sole officer, director, shareholder Theresa Brown, with the following restrictions:

1. Licensee shall prohibit Laune Brown from being on the licensed premises at all times.
2. Licensee shall prohibit Laune Brown from taking part in the operation or management of the business.

(Ex. A5 and November 2, 2010, OLCC's notice of license grant.)

6. Theresa Brown has a good reputation for her ability to manage and control the premises. (Test. of Hall.) Between October 2010 and February 21, 2011, there has been only one disturbance at Foster Waterhole that required a call to the police department. (Ex. P16.)

CONCLUSIONS OF LAW

- 1. Laune Brown has a financial interest in the licensed business.
- 2. The Commission has grounds to deny a license to Laune Brown if he were the applicant.
- 3. Good cause to overcome the denial criteria has not been established.
- 4. The Commission may restrict Licensee’s license.

OPINION

The Commission issued a license to Licensee that contained restrictions prohibiting applicant’s husband, Laune Brown, from being on the licensed premises and from participating in the operations and management of the business. The Commission may impose license restrictions if it has a basis to deny the license in the absence of the restriction. OAR 845-005-0355(1)(a). The Commission may deny a license to an applicant if the Commission may deny a license to a person with a financial interest in the licensed business. ORS 474.313(4) and 471.757(2).¹ The Commission established all requirements for imposing the license restrictions.

¹ ORS 471.313(4) provides:

The Oregon Liquor Control Commission may refuse to license any applicant under the provisions of this chapter if the commission has reasonable ground to believe any of the following to be true:

(4) That the applicant:

* * * * *

(d) 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.

* * * * *

ORS 471.757 provides:

(1) At such times as the Oregon Liquor Control Commission may prescribe and upon forms furnished by the commission, any license applicant or licensee of the commission may be required to submit a sworn statement to the commission showing the name, address and the nature and extent of the financial interest of each person, individual and corporate, having a financial interest in the business operated under the license.

(2) The commission shall review the statement and may refuse to issue a license to any license applicant, or may suspend, cancel or refuse to renew the license of any licensee, when conditions exist in relation to any person having a financial interest in the business or in the place of business which would constitute grounds for refusing to issue a license or for cancellation or suspension of a license if such person were the license applicant or licensee. However, in cases where the financial interest is held by a corporation, only the officers and directors of the corporation, any individual or combination of individuals who own a controlling financial interest in the business and any manager of the business shall be considered persons having a financial interest within the meaning of this subsection.

Licensee failed to show that Laune Brown does not have a financial interest in the business or that good cause exists to overcome the denial criteria as to Laune Brown.

Laune Brown's Financial Interest in the Business

The Commission may deny a license if “an unlicensable person has any financial interest in the licensed business.” OAR 845-005-0311(4). A financial interest exists “if a person may financially benefit or suffer based on the performance of the licensed business. Examples of the persons having a financial interest in the business include: * * * * (d) The spouse or domestic partner of the licensee or license applicant.” OAR 845-005-0311(4)(d).

Even if Theresa Brown contributed all the money to acquire the business, Laune Brown, as the spouse, is likely to financially benefit or suffer based on the performance of the licensed business. Therefore, under this rule, Laune Brown must be considered a person with a financial interest in the licensed business.

Applicant's attorney argued that under ORS 471.757(2), only Theresa Brown has a financial interest in the business because only she is the corporation's officer, director, and manager and only she holds a controlling financial interest in the business. Applicant's interpretation might be correct if the statute had stated that it applied whenever a corporation was the *applicant*. But the statute did not so state; the statute applies only if a corporation holds a financial interest in the business.

Here, the applicant, Theresa Brown, and the person with a financial interest, Laune Brown, are individuals, not a corporation. As U-N-Me's sole officer, director, and shareholder, Theresa Brown is the license applicant. OAR 845-006-0301.² As Theresa's spouse, Laune Brown is a person with a financial interest in the business. OAR 845-005-0311(4)(d). *See Swan Mart* (OLCC Final Order, 05-L-008, October 2006) (finding that the spouse of an individual who is the sole officer, director, and shareholder of the corporate licensee is deemed to have a financial interest in the business under OAR 845-005-0311(4)(d).)

Basis to Deny License to Laune Brown

The Commission had a basis to deny Laune Brown a license because of his felony conviction for unlawful possession of marijuana. Under ORS 471.757(2), the Commission may deny a license “if circumstances exist with regard to any person who has any financial interest in

² OAR 845-006-0301(1) provides:

- (1) A license issued by the Commission shall include as licensees under a single license the individuals or legal entities who own or have an interest in the business as defined in OAR 845-005-0311(3). If any such licensee is a corporation or other legal entity, the following persons shall also be included as licensees under the license:
 - (a) Each principal officer as defined in OAR 845-006-0475(1)(d);
 - (b) Each director;
 - (c) Each person or entity who owns or controls 10% or more of the entity's stock or who holds 10% or more of the total membership interest in the entity or whose investment interest is 10% or more of the total investment interests in the entity;
 - (d) Each manager of a limited liability company and each general partner of a limited partnership.

the licensed business * * * such that the Commission would have a basis to cancel or refuse to issue a license to the person with a financial interest if that person were the licensee or applicant.”

A felony conviction is grounds to deny a license if there is a relationship between the facts that support the conviction and the applicant’s fitness to exercise the license privileges. OAR 845-005-0325(5). The Commission has shown a relationship between the felony conviction and Laune Brown’s fitness to sell or serve alcoholic liquor. As the Commission has previously held, “it is reasonable to infer that the fact an applicant engages in illegal acts involving one controlled substance [marijuana in Laune Brown’s case] is evidence that the applicant will be a poor risk for complying with laws concerning another controlled substance (alcoholic liquor).” *In the Matter of Loretta J. Clayton*, OLCC-88-SP-002, September 1988, at page 10; *see also Swan Mart*, Final Order at 8 (holding that a felony conviction for possession with intent to distribute pseudo ephedrine is related to a person’s fitness to hold a liquor license).

ORS 670.280 provides that a license cannot be denied solely because the applicant or licensee has been convicted of a crime; but the agency may consider “the relationship of the facts which support the conviction and all intervening circumstances to the specific occupational standards in determining the fitness of the person to receive or hold such license or certificate.”³ Because Laune Brown was convicted of a crime relating to possession of a controlled substance, the facts underlying the conviction bear a direct relationship to his fitness for a liquor license. The license denial here would not be based solely on the ground that Laune Brown had a felony conviction.

Good Cause to Overcome the Basis for Denial

The Browns argued that good cause exists to overcome the basis for denial, under OAR 845-005-0325(5), which provides in part: “When there is a relationship between the applicants fitness and the felony, the Commission considers any intervening circumstances since the commission of the crime in determining whether the applicant is an acceptable future compliance risk.”⁴ Laune Brown testified that he was lawfully registered with the Oregon Medical

³ 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.

⁴ OAR 845-005-0325(5) provides:

If any of the following criteria apply, the Commission will deny a license unless the applicant shows good cause that overcomes the criterion involved:

* * * * *

(5) The applicant has been convicted of a felony when there is a relationship between the facts that support the conviction and applicant’s fitness to exercise the license privileges. When there is a relationship between the applicant’s fitness and the felony, the

Marijuana program and legally authorized to grow marijuana for his personal medical use. He asserted that the felony conviction resulted from his growing marijuana for another medical marijuana registrant before Laune Brown received authorization to do so. The Browns argued that Laune Brown “did not intend to disregard the law.”

Although Laune Brown may have submitted an application to grow for another person, he had never received legal authorization to do so. Regardless of his intention, he violated the law when he grew more marijuana than he was permitted to grow. Therefore, his explanation of the circumstances resulting in the conviction did not establish that the conviction should be ignored in determining whether the license should be granted.

Since the conviction, Laune Brown has voluntarily removed himself from the medical marijuana program and has stopped consuming marijuana. Further, since Theresa Brown began operating the business, there have been few incidents at the licensed premises that required a call to the police. These facts are likely to improve the Licensee’s ability to overcome the denial criteria when more time has passed. Passage of time is the most important factor in determining good cause. The Commission generally has considered two years passage of time necessary to weigh in favor of good cause. *See Gail D. Betha* (OLCC Final Order, 99-SPR-056, September 1992). In *Juanita Lee Ray* (OLCC, Final Order, 90-SP-189, May 1991), the Commission explained that “the passage of time must be long enough to allow the Commission to conclude that the applicant has reformed and will not be a poor risk for compliance.” Laune Brown was arrested for his crime in September 2009, less than two years ago, and was convicted a little more than a year ago.⁵ His 18 month probation period has not yet expired. Further time must pass, during which the Browns can establish a pattern of compliance with the license restrictions and the liquor laws.

License Restriction

The Commission may restrict a license when, in the absence of a restriction, the Commission has a basis to deny the license. OAR 845-005-0355(1)(a). There is a basis to deny the license because Laune Brown, a person with a financial interest in the business, is unlicensable. Therefore, restrictions may be imposed on the license.

The proposed restrictions are:

1. Licensee shall prohibit Laune Brown from being on the licensed premises at all times.
2. Licensee shall prohibit Laune Brown from taking part in the operation or management of the business.

Commission considers any intervening circumstances since the commission of the crime in determining whether the applicant is an acceptable future compliance risk.

⁵ Licensee argued in its Exceptions that the passage of time should be measured from the date of the crime rather than the date of the conviction. The Commission has modified the analysis accordingly. Pursuant to OAR 845-005-0325(5) the Commission considers any intervening circumstances since the date of the crime. However, even when measured from the date of Mr. Brown’s arrest, September 22, 2009, the passage of time with no adverse intervening circumstances has been less than two years.

The restrictions are reasonably related to the risk of noncompliance presented by Laune Brown's relationship to the applicant.⁶ Therefore, the restrictions are appropriate.

FINAL ORDER

The Commission orders that the Full On-Premises and Off-Premises Sales licenses be GRANTED to U-N-Me, Inc. and Theresa Brown, doing business as Foster Waterhole, with the following restrictions:

1. Licensee shall prohibit Laune Brown from being on the licensed premises at all times.
2. Licensee shall prohibit Laune Brown from taking part in the operation or management of the business.

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

Dated this 19th day of August, 2011.

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

Mailed this 19th day of August, 2011.

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.

⁶ The restrictions proposed in this case are the standard restrictions the Commission uses when an unlicensable person has a financial interest in a licensed business. *See, e.g., Swan Mart, supra.* Licensee argued that Laune Brown should be allowed on the premises as a customer and to perform maintenance and repairs because he possesses mechanical skills. However, Licensee also asserts that Theresa Brown, and not Laune Brown, is the owner of the real property where the business is located and that Theresa Brown is solely responsible for the management of the business. Licensee's interest in having Laune Brown on the premises does not outweigh the basis for the restrictions. The Commission finds that the proposed restrictions are necessary to reduce the risk of non-compliance posed by an unlicensable person who has a financial interest in the licensed business. Therefore, the Commission declines to modify the restrictions. Moreover, the Commission's restriction rule, OAR 845-005-0355 provides a means by which a licensee can request modification of a restriction when the reasons for the restriction no longer exist or are less compelling.