

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

In the Matter of the Application for a Service Permit Filed by:) **FINAL FINDINGS OF FACT**
) **CONCLUSIONS OF LAW**
) **AND ORDER**
TERESA L. JACOBSON) Agency Case No.: OLCC-10-SPR-025
)

HISTORY OF THE CASE

On June 10, 2010, the Oregon Liquor Control Commission (the OLCC) received an application for a service permit from Teresa L. Jacobson (Applicant). The OLCC proposed to deny Applicant'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.

Applicant filed a timely request for hearing. The OLCC referred the request to the Office of Administrative Hearings on July 28, 2010. 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 November 3, 2010. Gwenn McNeal appeared on behalf of the OLCC and testified. Applicant appeared without counsel and testified on her own behalf. The record remained open until 5:00 p.m. on November 3, 2010, to allow Applicant to submit additional documentary evidence. Applicant submitted the requested information and the record closed at 5:00 p.m. on November 3, 2010.

The Administrative Law Judge considered the record of the hearing and the applicable law and issued a Proposed Order mailed December 9, 2010.

Applicant filed Exceptions to the Proposed Order on December 17, 2010.

On April 21, 2011 and June 23, 2011, the Commission considered the record of the hearing, the applicable law, the Proposed Order of the Administrative Law Judge, Applicant's Exceptions to the Proposed Order and the Administrative Law Judge's Response to Applicant's Exceptions. 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 Applicant 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 application should be denied, whether Applicant has shown good cause to overcome the denial. OAR 845-009-0020(3) and (7)(b).

EVIDENTIARY RULING

Exhibits A1 through A4, offered by the OLCC, were admitted into the record without objection. Exhibit B1, submitted by Applicant after the close of the hearing, was marked and admitted into the record.

FINDINGS OF FACT

1. On June 10, 2010, the OLCC received Applicant Teresa Jacobson's Service Permit Application. (Ex. A1; test. of McNeal.)

2. On September 6, 2007, Applicant was arrested and cited for driving under the influence of intoxicants (DUII). She entered a diversion program on November 7, 2007, and completed diversion on November 6, 2008. (Ex. A2; test. of McNeal.)

3. On January 1, 2010, Applicant was arrested and cited for DUII, and was convicted of the charge on March 5, 2010. (Ex. A2; test. of McNeal.)

4. As part of the March 5, 2010 DUII conviction, the Circuit Court judge sentenced Applicant to bench probation for a period of one year, to conclude in March 2011. (Test. of Applicant.)

5. Applicant was diagnosed as alcohol addicted while in treatment at CODA, an addiction treatment program in the Portland area. Applicant entered treatment at CODA on April 8, 2010 and completed treatment July 19, 2010. (Test. of McNeal, Applicant.)

6. Applicant's employer is aware of Applicant's DUII diversion and conviction, and is supporting her in her recovery process. The employer hopes she can continue to work in her current position. (Test. of Applicant.)

CONCLUSIONS OF LAW

1. Applicant's application for a service permit should be denied because Applicant 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. Applicant has not shown good cause to overcome the denial. OAR 845-009-0020(3) and (7)(b).

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 violating any of the alcoholic liquor laws of this state or has been convicted of a felony. The OLCC has adopted administrative rules to apply this statutory

provision. In this case, the OLCC proposes to deny Applicant's service permit application 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, either one of which was within 12 months.¹

The phrase "within 12 months" as used in the administrative rule means within 12 months of the date the OLCC received the application. OAR 845-009-0020(2). Where a conviction of a crime 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.² The OLCC has previously concluded that DUII convictions are relevant to an individual's fitness to serve and sell alcoholic liquor. *Dorothy J. Hamblin* (OLCC Final Order, OLCC-03-SPR-036, December 2003).

In the present case, Applicant has one DUII diversion that began on November 7, 2007 and ended on November 6, 2008, and one DUII conviction, on March 5, 2010, arising out of her January 1, 2010 arrest. The OLCC received Applicant's application on June 10, 2010, which is within 12 months of the DUII conviction. Therefore, under OAR 845-009-0020(7)(a)(A), the OLCC has the authority to deny Applicant's application for a service permit, unless Applicant can show good cause to overcome the denial.

2. *Whether Applicant has good cause to overcome the denial:*

OAR 845-009-0020(7)(b) provides that an applicant may show good cause to overcome the service permit denial. OAR 845-009-0020(3) provides that in order to show good cause, an applicant must have had a drug addiction disability or an alcohol addiction disability at the time of the DUII convictions or diversions. OAR 845-009-0020(7)(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.³

¹ 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[.]

² 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.

³ OAR 845-009-0020(3) and (7)(b) provide, in relevant part:

In the course of her treatment at CODA, which Applicant entered as a result of the DUII diversion and conviction at issue, Applicant was diagnosed with an alcohol addiction. Therefore, Applicant satisfied one of the good cause requirements listed in OAR 845-009-0020(3)(b). However, Applicant last consumed alcohol on or about January 1, 2010, which is within 24 months of the proposed denial. Additionally, Applicant was placed on probation following her March 5, 2010 conviction, and will remain on probation until March 2011. Because Applicant has not abstained from using a controlled substance for 24 months and has not yet completed her probation, she cannot establish good cause to overcome the service permit application denial under 845-009-0020(7)(b). For these reasons, the OLCC may deny Applicant's service permit.

Applicant appears to sincerely regret her past choices and has benefited from her substance abuse treatment. She is active in her recovery and continues to take positive steps to improve her life. Her employer supports her in her recovery and hopes she can continue to work in her current position. Unfortunately, the law does not consider these factors sufficient to establish good cause to overcome the denial of her service permit application.

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- (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.

FINAL ORDER

The Commission orders that the application for a service permit filed by Applicant Teresa L. Jacobson and received by the OLCC on June 10, 2010, be DENIED.

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

Dated this 24th day of June, 2011.

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

Mailed this 24th day of June, 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.