

**BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF OREGON
for the
OREGON LIQUOR CONTROL COMMISSION**

In the Matter of the application for a Service Permit filed by:) **FINAL ORDER BY DEFAULT**
)
)
LANCE P. NEWTON)
) **Agency Case No.: OLCC-11-SPR-003**

HISTORY OF THE CASE

On March 15, 2011, the Oregon Liquor Control Commission (the OLCC) issued a Service Permit Denial Notice to Lance P. Newton (Applicant). The OLCC proposed to deny Applicant's service permit application because of the allegation that he had two driving under the influence of intoxicants (DUII) convictions or diversions within three years, at least one of which was within the past 12 months.

Applicant made a timely request for hearing. The OLCC referred the request for hearing to the Office of Administrative Hearings on April 8, 2011. The OAH assigned the case to Administrative Law Judge (ALJ) John R. Lohuis. ALJ Lohuis held a contested case hearing by telephone on June 29, 2011. Gwenn McNeal appeared on behalf of the OLCC and testified. Applicant did not appear.

The record closed at the conclusion of the hearing on June 29, 2011.

ISSUES

1. Whether Applicant's application for a service permit should be denied because he has two DUII convictions or diversions within three years, at least one of which was within the past 12 months. ORS 471.380(1)(d); OAR 845-009-0020(7)(a)(A).

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

EVIDENTIARY RULING

Exhibits A1 through A3, offered by the OLCC, were admitted into the record without objection.

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FINDINGS OF FACT

1. On May 7, 2010, Applicant was arrested and cited for DUII in Josephine County. (Ex. A2.) Applicant entered a diversion program on July 12, 2010. The diversion program was scheduled to end on July 11, 2011.

2. On August 5, 2010, Applicant was again arrested and cited for DUII in Josephine County. His diversion agreement was revoked and, on November 8, 2010, Applicant was convicted of DUII for the May 7, 2010 incident.

3. On November 29, 2010, Applicant was convicted for DUII based on his August 5, 2010 arrest.

4. On February 4, 2011, the OLCC received Applicant's Service Permit Application. (Test. of McNeal.)

CONCLUSIONS OF LAW

1. Applicant's service permit application should be denied because he has two driving under the influence of intoxicants (DUII) convictions or diversions within three years, at least one of which was within the past 12 months. ORS 471.380(1)(d); 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

OAR 137-003-0670 applies when, as in this case, the agency issues a notice of proposed action that does not become final in the absence of a request for hearing. Pursuant to subsection (1)(c) of this rule, the ALJ or the agency may issue a final order by default when the agency or ALJ has notified the party of the time and place of the hearing, and the party fails to appear at the hearing.

Pursuant to OAR 137-003-0670(3)(a), the agency or ALJ may issue an order adverse to the party on default only upon a prima facie case made on the record. This rule requires that the record contain evidence necessary to support the order. As explained below, the record supports the order.

1. Whether Applicant's service permit application 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 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 the 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 two DUII convictions, one on November 8, 2010 and the second on November 29, 2010. The OLCC received Applicant’s application on February 4, 2011, which is within 12 months of both convictions. Therefore, under OAR 845-009-0020(7)(a)(A), the OLCC will deny the 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:

(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:

Applicant did not appear at the hearing, and did not offer any evidence of good cause to overcome the denial. As such, the OLCC must deny Applicant's application for a service permit.

FINAL ORDER

It is ordered that service permit application filed by Applicant Lance P. Newton and received by the OLCC on February 4, 2011 be DENIED.

/s/ John R. Lohuis

John R. Lohuis
Administrative Law Judge
Office of Administrative Hearings

THIS ORDER IS EFFECTIVE ON THE DATE MAILED. Any monetary fine or civil penalty set out in the order shall be due and payable 10 days after the date of mailing.

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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(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.

CERTIFICATE OF SERVICE

I certify that on July 29, 2011, I served the attached Final Order by Default by mailing certified and/or first class mail, in a sealed envelope, with first class postage prepaid, a copy thereof addressed as follows:

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 /s/ Pam Arcari
Pam Arcari
Administrative Specialist
Office of Administrative Hearings