

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

In the Matter of the Application for a) **FINAL FINDING OF FACT
Service Permit Filed by:) **CONCLUSIONS OF LAW**
) **AND ORDER**
STEVEN L. DURFEE)**

Agency Case No.: OLCC-13-SPR-014

HISTORY OF THE CASE

On April 29, 2013, the Oregon Liquor Control Commission (OLCC) received an application for a service permit from Steven L. Durfee (Applicant). On May 28, 2013, the OLCC issued a Service Permit Denial Notice proposing to deny Mr. Durfee’s service permit application. On July 10, 2013, the OLCC issued an Amended Service Permit Denial Notice proposing to deny Mr. Durfee’s service permit application pursuant to OAR 845-009-0020(4)(a)(C), because Mr. Durfee has two controlled substance felony convictions, one of which was within the past three years.

Mr. Durfee filed a timely request for hearing. The OLCC referred the request to the Office of Administrative Hearings (OAH) on July 12, 2013. The OAH assigned the case to Lynnette M. Turner, Administrative Law Judge (ALJ). A contested case hearing was scheduled for October 10, 2013, but was postponed at the request of the OLCC. ALJ Turner convened a contested case hearing by telephone at 9:00 p.m. on October 30, 2013. Gwenn McNeal appeared on behalf of the OLCC and testified. Mr. Durfee appeared on his own behalf and testified. The hearing record closed at the conclusion of the hearing on October 30, 2013.

The Administrative Law Judge considered the record of the hearing and the applicable law and issued a Proposed Order mailed January 9, 2014

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:

ISSUES

1. Whether Mr. Durfee’s application for a service permit should be denied because he has two controlled substance felony convictions, one of which was within three years of the application. ORS 471.380(1)(d); OAR 845-009-0020(4)(a)(C).

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

EVIDENTIARY RULINGS

Exhibits A1 through A5, offered by the OLCC, and P1 through P3, offered by the Applicant, were admitted into the record without objection.

FINDINGS OF FACT

1. On or about May 29, 2009, Applicant Steven L. Durfee committed the crime of Unlawful Possession of Heroin. Mr. Durfee pled guilty and was convicted of this charge, a Class B Felony, on June 1, 2009 in Washington County Circuit Court, Washington County, Oregon. The Court sentenced Mr. Durfee to 18 months Supervised Probation. (Ex. A2, A3.)

2. Mr. Durfee completed his probation on or about December 1, 2010. (Test. of Durfee.)

3. On or about July 31, 2012, Mr. Durfee committed the crime of Unlawful Delivery of Heroin. On November 12, 2012, Mr. Durfee was convicted of this charge, a Class A Felony, in Washington County Circuit Court. The Court sentenced Mr. Durfee 36 months Supervised Probation. (Ex. A4, A5.)

4. Mr. Durfee entered a state certified residential treatment program run by the Washington County jail immediately following his 2012 conviction, and completed the program in February 2013. While in the program, Mr. Durfee was diagnosed with a drug addiction disability. He participated in the program's after-care component, but did not complete this part of the program. (Test. of Durfee; exs. P1 – P3.)

5. On April 29, 2013, the OLCC received Mr. Durfee's service permit application. (Ex. A1; test. of McNeal.)

6. Mr. Durfee relapsed into drug use in July 2013, and on August 17, 2013 he was incarcerated for violating his probation. His term of incarceration is 21 to 22 months. In January 2014, Mr. Durfee is scheduled to begin a substance abuse treatment program, and if successful in that program he will be granted transitional leave to a clean and sober living program on July 25, 2014. (Test. of Durfee.)

7. Mr. Durfee has not used or consumed controlled substances since late July 2013. (Test. of Durfee.)

CONCLUSIONS OF LAW

1. Mr. Durfee's application for a service permit should be denied because he has two controlled substance felony convictions, one of which was within three years of the date the OLCC received the application. ORS 471.380(1)(d); OAR 845-009-0020(4)(a)(C).

2. Mr. Durfee has not shown good cause to overcome the denial basis.

OPINION

1. Whether Mr. Durfee'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 Mr. Durfee's service permit application under the provisions of OAR 845-009-0020(4)(a)(C), which provides that the OLCC will deny a service permit application if an applicant has had two controlled substance felony convictions, one of which was within three years.¹

The phrase "within three years" as used in the administrative rule means within three years of the date the OLCC received the application. OAR 845-009-0020(2). Where the 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 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 June 1, 2009, Mr. Durfee was convicted of Unlawful Possession of Heroin, and on November 12, 2012, Mr. Durfee was convicted of Unlawful Delivery of Heroin, both controlled substance felonies. Mr. Durfee's latest conviction occurred within three years of the OLCC's receipt of his service permit application on April 29, 2013. Thus, the OLCC has shown that it may deny Mr. Durfee's service permit under the provisions of OAR 845-009-0020(4)(a)(C).

¹ OAR 845-009-0020(4)(a)(C) provides:

(4) Felony Drug Conviction:

(a) The Commission will deny a service permit if the applicant has had:

(C) Two controlled substance felony convictions, one of which was within three years[.]

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.

2. Whether Mr. Durfee 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. 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.

Mr. Durfee established that he was diagnosed with a drug addiction disability as a result of his 2012 conviction. Mr. Durfee entered a state certified drug treatment program and completed the residential care component of the program. However, Mr. Durfee did not complete the after-care component of the program and relapsed into drug use. Mr. Durfee last used controlled substances in July 2013. His probation has been revoked and he is currently incarcerated.

Mr. Durfee has not met the criteria set forth in OAR 845-009-0020(4)(b) and cannot show good cause to overcome the denial. Mr. Durfee's service permit application must therefore be denied.

FINAL ORDER

The Commission orders that the application for a service permit filed by Applicant Steven L. Durfee and received by the OLCC on April 29, 2013 be DENIED.

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

Dated this 31st day of January 2014

/s/ Steve Marks

Steve Marks
Executive Director
OREGON LIQUOR CONTROL COMMISSION

Mailed this 31st day of January 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.