

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

**In the Matter of the Application for a
Service Permit Filed by:**

**ANDREW J. HERINCKX
525 NE 37th Avenue
Hillsboro, OR 97124**

) **FINAL FINDINGS OF FACT**
) **CONCLUSIONS OF LAW**
) **AND ORDER**
)

Agency Case No.: OLCC-14-SPR-043

HISTORY OF THE CASE

On November 7, 2014, the Oregon Liquor Control Commission (OLCC) issued a Service Permit Denial Notice to Andrew J. Herinckx (Mr. Herinckx/Applicant). The OLCC proposed to deny Applicant's service permit application pursuant to OAR 845-009-0020(3)(b) based upon a sex abuse incident leading to a conviction and the incident leading to the conviction occurred within two years of the date the OLCC received his service permit application.

Applicant filed a timely request for hearing. On January 8, 2015, the OLCC issued an Amended Service Permit Denial Notice to Applicant further explaining its reason for denial.

The OLCC referred the hearing request to the Office of Administrative Hearings (OAH) on January 29, 2015. OAH assigned the case to Matthew Wymer, Administrative Law Judge (ALJ). ALJ Wymer held a contested case hearing by telephone at 1:00 p.m. on February 25, 2015. Becky Voelkel represented the OLCC. Gwenn McNeal testified on behalf of the OLCC. Applicant appeared at hearing, and testified. The record closed at the end of the hearing.

The Administrative Law Judge considered the record of the hearing and the applicable law and issued a Proposed Order by mail March 2, 2015.

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 Applicant's application for a service permit should be denied because he has one felony conviction for a violent crime and the incident leading to the conviction occurred within two years of the date the OLCC received his service permit application. OAR 845-009-0020(3)(b).

2. If the application for a service permit should be denied, whether Applicant has shown good cause to overcome the denial. OAR 845-009-0020(7).

EVIDENTIARY RULINGS

OLCC Exhibits A1 through A4 were admitted into the record without objection.

FINDINGS OF FACT

1. Between September 1, 2013 and March 5, 2014, Applicant, age 29, committed the crime of Sexual Abuse in the Second Degree by a Coach, a Class C Felony, when he engaged in sexual contact with a female under the age of sixteen. (Exs. A2 and A3.)

2. On September 24, 2014, the OLCC received Applicant's service permit application. (Ex. A1 at 1.)

3. On October 14, 2014, Applicant pled guilty to the crime of Sexual Abuse in the Second Degree by a Coach in Washington County Circuit Court, Washington County, Oregon. Applicant's conviction for this felony crime was entered on December 1, 2014. The Court sentenced Applicant to five years supervised probation, and 18 additional conditions, including 60 days in the Washington County Jail, starting October 28, 2014. (Ex. A3.)

CONCLUSIONS OF LAW

1. Applicant's application for a service permit should be denied because he has one felony conviction for a violent crime and the incident leading to the conviction occurred within two years of the date the OLCC received his service permit application. OAR 845-009-0020(3)(b).

2. Applicant has not shown good cause to overcome the denial basis. OAR 845-009-0020(7).

OPINION

1. Whether Applicant's application for a service permit should be denied:

The OLCC proposes to deny Mr. Herinckx's application for a service permit on the basis of ORS 471.380(1)(d), which states:

(1) The [OLCC] may refuse to grant a service permit if it has reasonable grounds to believe any of the following to be true:

* * * * *

(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.

ORS 471.380(1)(d) provides that the OLCC may refuse to issue a service permit if an applicant has been convicted at any time of a felony. In this case, the OLCC seeks to deny Applicant's service permit application under the provisions of OAR 845-009-0020(3), which authorizes the OLCC to deny a service permit application if an applicant has had one felony conviction for a violent crime and the incident leading to the conviction occurred within two years of the date the OLCC received his service permit application.¹

At hearing, applicant asserted that the sexual contact was consensual and therefore his crime was not "violent" as defined by OAR 845-009-0020(3)(a)(B). However, the OLCC has concluded that Sexual Abuse in the Second Degree constitutes a violent crime as defined by the rule. *See David E. Neel* (OLCC Final Order 08-SPR-022, November 2008).

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 violent crime conviction and the applicant's fitness to sell or serve alcoholic liquor.² The Commission has concluded that the commission of a violent crime is related to an applicant's ability to sell and serve alcohol and has denied a service permit to an applicant who was convicted of committing a violent crime. *Jessica R. Cunningham* (OLCC Final Order, 00-SPR-007, October 2000); *see also, Christi R. Boatner* (OLCC Final Order, 93-SPR-136, May 1994).

In this matter, Applicant committed the crime of Sexual Abuse in the Second Degree by a Coach between September 1, 2013 and March 5, 2014, and was convicted of that crime, a Class C Felony, on December 1, 2014. Applicant's commission of that crime was within one year of OLCC's receipt of his service permit application on September 24, 2014. Thus, the OLCC has shown that it may deny Applicant's service permit under the provisions of OAR 845-009-0020(3)(b).

¹ OAR 845-009-0020(3) provides in relevant part:

Felony Convictions.

(a) Definitions. As used in this rule:

* * * * *

(B) A "felony violent crimes conviction" means a felony conviction for a crime which causes, attempts to cause, or threatens to cause physical injury or harm to another person irrespective of the jurisdiction.

(b) The Commission will deny a service permit if the applicant has one felony conviction of the types listed above and the incident leading to this conviction occurred within two years of the date the Commission received the application * * * [.]

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 Applicant has good cause to overcome the denial:

The OLCC's administrative rules provide that, under certain specific circumstances, an applicant may show good cause to overcome a service permit denial. Pursuant to OAR 845-009-0020(7), if an applicant demonstrates that the following circumstances exist, a denial based on felony convictions or liquor law violations will be set aside:

(a) The applicant or permittee provides written proof that a licensed medical professional diagnosed the applicant with a drug or alcohol addiction prior to, or as a result of, the incident(s) leading to at least one of the relevant convictions or diversions;

(b) The applicant or permittee provides a sworn statement that he or she has not used or consumed any alcohol or controlled substances, as appropriate to the denial basis, for a minimum of 12 consecutive months prior to the date the Commission received his or her application;

(c) The applicant or permittee provides written proof that after the relevant incident(s) he or she has successfully completed an alcohol or drug treatment or recovery program, as appropriate to the refusal basis, and is following treatment recommendations; is participating in an ongoing alcohol or drug treatment or recovery program, as appropriate to the refusal basis, and is following treatment recommendations; or, has otherwise been successfully rehabilitated, AND

(d) The applicant or permittee has substantially complied and continues to comply with all post-prison supervision or probation requirements, if any, imposed as a result of the underlying incident(s).

In this case, there is no evidence in the record establishing that Applicant is diagnosed with a drug or alcohol addiction or that he meets the additional criteria under OAR 845-009-0020(7). Therefore, Applicant has not established good cause to overcome the denial under OAR 845-009-0020(7). For these reasons, Mr. Henrickx's service permit application must be denied.

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FINAL ORDER

The Commission orders that the application for a service permit filed by Applicant Andrew J. Herinckx and received by the OLCC on September 24, 2014 be DENIED.

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

Dated this 31st day of March

/s/Steven Marks
Steven Marks
Executive Director
OREGON LIQUOR CONTROL COMMISSION

Mailed this 2nd day of April

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.