

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

In the Matter of the Proposed) **FINAL ORDER BY DEFAULT**
Revocation of the Service Permit held)
by:)
)
CLAYTON C. HOFFMAN, JR.) Agency Case No.: OLCC-10-SPR-029

HISTORY OF THE CASE

On August 30, 2010, the Oregon Liquor Control Commission (the OLCC) issued a Service Permit Revocation Notice to Clayton C. Hoffman, Jr. (Permittee). The OLCC proposed to revoke Permittee's service permit 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.

Permittee made a timely request for hearing. The OLCC referred the request for hearing to the Office of Administrative Hearings on September 30, 2010. The OAH assigned the case to Administrative Law Judge (ALJ) John R. Lohuis. ALJ Lohuis held a contested case hearing by telephone on November 16, 2010. Gwenn McNeal appeared on behalf of the OLCC and testified. Permittee did not appear.

The record closed at the conclusion of the hearing on November 16, 2010.

ISSUES

1. Whether Permittee's service permit should be revoked because he has two DUII convictions or diversions within three years, at least one of which was within the past 12 months. ORS 471.385(1)(b), ORS 670.280, OAR 845-009-0020(7)(a)(A).

2. If the service permit should be revoked, whether Permittee has good cause to overcome the revocation. OAR 845-009-0020(3) and (7)(b).

EVIDENTIARY RULING

Exhibits A1 through A6, offered by the OLCC, were admitted into the record without objection.

FINDINGS OF FACT

1. On February 12, 2008, the OLCC received Permittee Clayton C. Hoffman's Service Permit Application. (Ex. A1; test. of McNeal.) The OLCC granted Permittee's application for a service permit and issued service permit No. 299934 to Permittee on February 27, 2008. (Ex. A2; test. of McNeal.)

2. On April 6, 2010, Permittee was arrested and cited for DUII. (Ex. A4.) Permittee entered a diversion program on May 10, 2010. (Ex. A4; test. of McNeal.) The diversion program is scheduled to end on May 9, 2011. (*Id.*)

3. On June 13, 2010, Permittee was again arrested and cited for DUII. (Ex. A3; test. of McNeal.) On August 9, 2010, Permittee was convicted for DUII based on his June 13, 2010 arrest. (Ex. A4; test. of McNeal.)

CONCLUSIONS OF LAW

1. Permittee's service permit should be revoked 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 471.385(1)(b), OAR 845-009-0020(7)(a)(A).

2. Permittee has not shown good cause to overcome the revocation.

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 Permittee's service permit should be revoked:

The OLCC proposes to revoke Permittee's service permit pursuant to ORS 471.385(1), which states, in relevant part:

(1) The Oregon Liquor Control Commission may revoke or suspend a service permit, or impose a civil penalty in lieu of or in addition to suspension as provided by ORS 471.322, if it finds or has reasonable grounds to believe any of the following to be true:

* * * * *

(b) That the permittee has been convicted of a felony, of violating any of the liquor laws of the state, general or local, or any misdemeanor or violation of any municipal ordinance committed on the licensed premises.

In the present case, Permittee has a DUII conviction, a crime that necessarily requires a determination that the individual drove a vehicle while under the influence of intoxicating liquor or a controlled substance. ORS 813.010(1). The OLCC has consistently held in similar cases that DUII convictions are convictions of alcoholic liquor laws and are relevant to that individual's fitness to sell and serve alcoholic liquor. *Dorothy J. Hamblin* (OLCC Final Order, OLCC-03-SPR-036, December 2003), *citing Carolyn A. White* (OLCC Final Order, OLCC 98-SPR-005, August 1999). Therefore, under ORS 471.385(1)(b), the OLCC has the statutory authority to revoke Permittee's service permit for his August 9, 2010 DUII conviction.

In cases in which an agency proposes to revoke an individual's license based on a conviction of a crime, ORS 670.280 requires the agency to show a relationship between the conviction and the individual's fitness to hold the license.¹ In a similar case, the OLCC held that a conviction involving abuse of a controlled substance was related to an individual's fitness to sell and serve alcoholic beverages because it indicated poor judgment with respect to the controlled substance. *John O. Myshak* (OLCC Final Order, OLCC-88-V-002, May 1988). In this matter, Permittee was convicted of a misdemeanor that involves the abuse of an intoxicant. Similar to the *Myshak* case, Permittee's conviction involving the abuse of an intoxicant is related to his fitness and judgment to sell and serve alcoholic beverages, and provides a basis for the proposed revocation of his license.

ORS 670.280 also requires the OLCC to consider the intervening circumstances that have occurred since the conviction of a crime. Here, relatively little time has passed since the commission of the crime. Additionally, the good cause criteria set forth in OAR 845-009-0020(3) and (7)(b) demonstrate that the OLCC does consider other intervening circumstances and will not revoke a service permit when an applicant can demonstrate, among other factors, successful completion of all parole and probation requirements. Here, the OLCC considered such factors and determined that revocation of Permittee's service permit was appropriate. In the present case, the OLCC's proposed revocation is consistent with ORS 670.280.

The OLCC also relies on service permit denial rules in support of its proposed action.² These rules allow the OLCC to deny an application for a service permit if an applicant has had

¹ 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 The OLCC has previously held that it is reasonable to apply the service permit rules to determine whether revocation of the permit is an appropriate sanction. *Michelle L. Haynes* (OLCC Final Order, OLCC-06-SPR-022, December 2006).

two DUII convictions or one DUII conviction and one diversion, either one of which was within 12 months.³ In the present case, Permittee was convicted of DUII on August 9, 2010. Prior to that, on May 10, 2010, Permittee entered a diversion program. Because Permittee would have been ineligible for a permit based on his DUII conviction and diversion, revocation is the appropriate sanction now.

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

OAR 845-009-0020 provides that an applicant may show good cause to overcome a 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 felony drug conviction. OAR 845-009-0020(7)(b) provides that the only good cause to overcome a denial is 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.⁴

Permittee did not appear at the hearing, and did not offer any evidence of good cause to overcome the revocation. As such, the OLCC should revoke Permittee's service permit.

FINAL ORDER

³ 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[.]

⁴ The good cause portion of the rule states, 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:

* * * * *

(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.

It is ordered that service permit No. 299934, issued to Clayton C. Hoffman Jr. on February 27, 2008 be REVOKED.

/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.

CERTIFICATE OF SERVICE

I certify that on December 15, 2010, 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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