

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

In the Matter of the)	FINAL FINDINGS OF FACT
License Application for)	CONCLUSIONS OF LAW
)	AND ORDER
)	
Lehrer LLC)	OLCC-12-L-005
Alexander Lehrer, Managing Member)	
dba LEHRER'S GASTRO PUB)	
8775 SW Canyon Lane)	
Portland, OR 97225)	

HISTORY OF THE CASE

On June 25, 2012, the Oregon Liquor Control Commission (OLCC or Commission) issued a Notice of Proposed License Refusal to Lehrer LLC and Alexander Lehrer, Managing Member (collectively Applicant), regarding Lehrer's Gastro Pub, to be located at 8775 SW Canyon Lane, Portland, Oregon. The Notice advised that the Public Safety Program was proposing to deny Applicant's application for a Full On-Premises Sales license pursuant to ORS 471.313(4)(d) and OAR 845-005-0325(5) based on Mr. Lehrer's record of convictions for Driving Under the Influence of Intoxicants (a Class A Misdemeanor), Unlawful Possession of Cocaine (a Class C felony), and Minor in Possession (a Class B violation). Applicant timely requested a hearing.

The Commission referred Applicant's hearing request to the Office of Administrative Hearings on August 9, 2012.

A contested case hearing was held in this matter in Tualatin, Oregon, on October 3, 2012, before Senior Administrative Law Judge Alison Greene Webster. Licensee was represented by Sarah Laidlaw, Attorney at Law. Anna Davis presented the case for the OLCC.

The following witnesses testified at the hearing: Deborah Tenenholz, OLCC License Investigator; Alexander Lehrer; Victoria Loehner; and Michael Luna.

The record closed at the conclusion of the hearing on October 3, 2012. On October 8, 2012, the OLCC requested that the record be reopened for further hearing based on negative intervening circumstances. On October 12, 2012, the OLCC withdrew the request. The hearing record remained closed.

The Administrative Law Judge considered the record of the hearing and the applicable law and issued a Proposed Order mailed November 7, 2012.

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:

EVIDENTIARY RULINGS

OLCC Exhibits A1 through A7 were admitted at hearing without objection. Applicant's Exhibits P1 through P8, P11 and P12 were also admitted without objection. Applicant's Exhibits P9 and P10 were admitted over OLCC's relevancy objections. Applicant's Exhibits P13 and P14, pleading documents, were withdrawn.

ISSUES

1. Whether the Commission has grounds to refuse to issue Applicant a Full On-Premises Sales license under ORS 471.313(4)(d) based on Mr. Lehrer's record of convictions for violations of law.

2. If so, has Applicant shown good cause under OAR 845-005-0325 to overcome the Commission's proposed refusal to grant the sales license?

FINDINGS OF FACT

1. On or about February 2, 2012, Lehrer LLC and Alexander Lehrer, Managing Member, using the trade name Lehrer's Gastro Pub, submitted a Liquor License Application to the Commission. Applicant sought a Full On-Premises Sales license for a Change of Ownership for premises located at 8775 SW Canyon Lane, Portland, Oregon.¹ (Ex. A1.)

2. On or about February 15, 2012, OLCC received from Washington County, the county in which the premises is located, an unfavorable recommendation on Applicant's application. The county recommended rejecting the license based on Mr. Lehrer's recent (August 2010) felony conviction on drug charges and a conviction for DUII after completing diversion on an earlier DUII arrest. (Ex. A3; test. of Tenenholz.)

3. Mr. Lehrer has the following conviction history:

<u>Offense</u>	<u>Incident Date</u>	<u>Conviction Date</u>	<u>Jurisdiction</u>	<u>Level</u>
MIP ²	8-26-03	10-16-03	Coos Co.	Violation
MIP	1-29-04	5-18-04	Coos Co.	Violation
DUII ³	8-7-10	11-2-10	Multnomah Co.	Misdemeanor A
PCS-Cocaine ⁴	8-7-10	11-2-10	Multnomah Co.	Felony C
DWS ⁵	10-13-10	11-28-10	Multnomah Co.	Violation

(Exs. A1 at 4, A4, A5, A6, A7, P1 and P2; test. of Lehrer.)

¹ Applicant Lehrer LLC originally listed Alex Lehrer and Timothy Furman as principals of the corporation, but Mr. Furman subsequently resigned from the LLC and withdrew his name from the license application. (Test. of Tenenholz.)

² Minor in Possession of Alcohol, ORS 471.430(1). (Exs. A5 and A6.)

³ Driving Under the Influence of Intoxicants, ORS 813.010. (Exs. A4 and P1.)

⁴ Unlawful Possession of a Controlled Substance (Cocaine), ORS 475.884 (Exs. A4 and P1.)

⁵ Driving While Suspended, ORS 811.175 (Ex. A7.)

4. Additionally, Mr. Lehrer has the following arrest/citation history:

<u>Offense</u>	<u>Incident Date</u>	<u>Disposition</u>
DUII	2006 approx.	Completed Diversion
PCS-Marijuana (less than an ounce)	July 2010	Dismissed, upon presenting proof of medical marijuana card ⁶

(Ex. A1 at 4; test. of Lehrer.)

5. Upon pleading guilty to the offense of DUII (the August 7, 2010 arrest), Mr. Lehrer was sentenced to 24 months of supervised probation. He was ordered to complete 80 hours of community service, alcohol and drug treatment and evaluation and a victim impact panel. (Ex. A4 at 1.) Upon pleading guilty to the offense of Unlawful Possession of Cocaine, Mr. Lehrer was sentenced to 18 months supervised probation and directed to submit to drug and alcohol evaluation and treatment. (Ex. A4 at 2.) In January 2011, the court found Mr. Lehrer in compliance with his probation conditions following the DUII and PCS convictions. The court also ordered that he pay restitution of \$993.18 to the victim in the matter. (Ex. A4 at 4.)

6. On October 13, 2010, when Mr. Lehrer was stopped and cited in Portland for Driving While Suspended, he was unaware that his driver license had been suspended effective October 3, 2010. Mr. Lehrer subsequently cleared the suspension of his driving privileges by presenting proof of his participation in the medical marijuana program. (Test. of Lehrer.)

7. As he was required to do in connection with his DUII and PCS-Cocaine convictions, Mr. Lehrer underwent a drug and alcohol evaluation, followed up by a DUII treatment program. He enrolled in treatment with the Sandy Counseling Center in March 2011 and completed his treatment on August 16, 2011. Mr. Lehrer's counselor determined that Mr. Lehrer did not have a diagnosis of alcohol dependency or alcohol abuse, but rather alcohol misuse, as evidenced by his poor decisions in driving after drinking. (Exs. P3 and P4; test. of Luna.)

8. As part of his treatment at Sandy Counseling Center, Mr. Lehrer submitted urine samples for analysis. His first urine sample, on March 8, 2011, came back negative for alcohol and all drugs except for a positive marijuana metabolite. The remainder of his urine tests, in April, May and July 2011, all came back negative for alcohol and drugs. (Exs. A3 and P3; test. of Luna.)

9. In December 2011, Mr. Lehrer was released from supervised probation. He will remain on bench probation until November 28, 2012. (Test. of Lehrer; test. of Tenenholz.)

10. In July 2012, Applicant entered into a Management Agreement with Vernon and Virginia Loehner, the owners of Canyon Bar & Grill, located at 8775 SW Canyon Lane, Portland. (Ex. P5.) The Loehners plan to sell their business to Applicant, if Applicant is

⁶ Mr. Lehrer had an Oregon Medical Marijuana card for one year, from approximately June 2010 to June 2011. He did not renew the card upon its expiration. (Test. of Lehrer.)

successful in obtaining a liquor license. They consider Mr. Lehrer to be sincere, hard-working and dedicated to the business. Business has improved significantly since Applicant took over as the manager. (Test. of Loehner.) Applicant has invested significant money and Mr. Lehrer has invested significant time making improvements to the premises and the business generally. Applicant's goal is to establish a successful pub and eatery, a family-friendly fine dining gourmet establishment serving pizza, pasta and other Italian fare. (Test. of Lehrer.)

11. In support of Applicant's application for licensure Mr. Lehrer submitted a letter from his treatment counselor, Michael Luna. Mr. Luna reported that Mr. Lehrer fully participated in treatment, passed all of his urinalyses and completed all treatment work. Mr. Luna also reported that Mr. Lehrer did not have a problem with alcohol, though he made a poor decision to drive after drinking. (Ex. P3.) In Mr. Luna's assessment, Mr. Lehrer is not at risk to drive while intoxicated again. (Test. of Luna.) Mr. Lehrer also submitted a letter from an employer, who described Mr. Lehrer as a "sober, dependable, and responsible employee." (Ex. A2 at 5.) Finally, as set out above, Mr. Lehrer has the support of the Loehners. (Test. of Loehner.)

CONCLUSIONS

1. The Commission has grounds to refuse to issue Applicant a Full On-Premises Sales license under ORS 471.313(4)(d) based on Mr. Lerner's record of convictions for violations of law.

2. Applicant has not shown sufficient good cause under OAR 845-005-0325 to overcome the Commission's proposed refusal to grant the sales license.

OPINION

A. Grounds for Refusing to Issue License.

As set out above, in proposing to refuse the license, the Commission relies on ORS 471.313(4)(d), which provides as follows:

The Oregon Liquor Control Commission may refuse to license any applicant under the provisions of this chapter if the commission has reasonable ground to believe any of the following to be true:

* * * * *

(4) That the applicant:

* * * * *

(d) Has been convicted of violating any of the laws, general or local, of this state or another state if the conviction is substantially related to the fitness and ability of the applicant to lawfully carry out activities under the license.

The Commission also relies on OAR 845-005-0325(5), which addresses license refusal reasons and applicant qualifications:

If any of the following criteria apply, the Commission will deny a license unless the applicant shows good cause that overcomes the criterion involved:

* * * * *

(5) The applicant has been convicted of a felony when there is a relationship between the facts that support the conviction and applicant's fitness to exercise the license privileges. When there is a relationship between the applicant's fitness and the felony, the Commission considers any intervening circumstances since the commission of the crime in determining whether the applicant is an acceptable future compliance risk.

Also pertinent to this case is ORS 670.280, which prohibits a licensing agency from denying an occupational or professional license solely for the reason that the applicant has been convicted of a crime, but authorizes the agency to consider the relationship of the facts which the support the conviction to the specific occupational or professional standard in determining the applicant's fitness for the license.

As the managing member of Lehrer LLC, Mr. Lehrer individually is also considered an applicant for the liquor license.⁷ Mr. Lehrer has five convictions that are substantially related to his fitness and ability to carry out activities under a liquor license: two MIP convictions in 2003 and 2004, a November 2010 DUII conviction, a November 2010 Unlawful Possession of Cocaine felony conviction and an October 2010 DWS conviction.

Convictions for offenses involving the use of alcohol, such as MIP and DUII, are related to a person's fitness to hold a liquor license. Similarly, the Commission has long held that convictions involving illegal controlled substances are related to the fitness to hold a liquor license because alcohol is also a controlled substance. *See, e.g., John O. Myshak* (OLCC Final Order, 88-V-002, May 1988) (convictions for cocaine possession and distribution); *Tumbleweed Café* (OLCC Final Order, 95-L-004, January 1996) (applicant was using cocaine when he engaged in acts constituting sex abuse, a Class C felony); *Swan Mart* (OLCC Final Order, 05-L-008, October 2006) (conviction for intent to distribute pseudoephedrine). The Commission has also found convictions for driving while suspended are related to the fitness to serve alcoholic liquor, reasoning that driving offenses show an overall disregard for law and licensing requirements. *See e.g., Duke's Landing* (OLCC Final Order, 10-L-006, April 2011); *T-Mini Mart* (OLCC Final Order, 02-L-007, October 2002).

Considering Mr. Lehrer's record of five convictions over the past nine years, including an alcohol-related misdemeanor and a drug-related felony in 2010, the Commission has grounds to refuse to license Applicant pursuant to 471.313(4)(d). Applicant asserts that Mr. Lehrer's

⁷ As used in ORS 471.313, "applicant" includes the principal officers of a corporation. OAR 845-006-0301(1) and (2); 845-006-0475(1)(d).

November 2010 conviction for driving while suspended should not count against his record because he did not know his license had been suspended. But, as held in *Kimmel's Little Giant* (OLCC Final Order, 95-V-028, June 1996), the Commission will not question or retry the underlying facts involved in a conviction. The evidence establishes that Mr. Lehrer drove with a suspended driver license in disregard of the law. Furthermore, even if this DWS conviction is not considered, Mr. Lehrer's 2010 felony and misdemeanor convictions provide sufficient grounds to deny the license absent a showing of good cause.

B. Good Cause Factors.

As set out above, pursuant to OAR 845-005-0325(5), where the applicant has been convicted of a felony related to fitness to exercise the license privileges, the Commission will deny the license unless the applicant shows good cause to overcome the denial criterion. The Commission has identified the factors to be considered in determining whether the applicant will be a poor risk for compliance with liquor laws in the future:

- (1) Passage of time since the last relevant conviction (exclusive of time spent incarcerated);
- (2) Probation or parole status;
- (3) Recommendations from counselor(s), probation officer(s), employer(s);
- (4) Successful completion of (or participation in) treatment (if treated for something relevant to the felony act);
- (5) Severity of record (in number and nature); and
- (6) Previous record of compliance as a licensee.

Swan Mart, Final Order at 9. Each of these factors is addressed below.

(1) *Passage of Time*. Applicant applied for the license in February 2012, approximately 18 months after Mr. Lehrer committed the felony in August 2010 and 15 months after his felony conviction in November 2010. As of the October 2012 hearing date, 25 months had passed since he committed the crime and 23 months had passed since his conviction.

Applicant contends that because more than two years have passed since Mr. Lehrer committed the felony, this weighs in favor of good cause. Commission Staff, on the other hand, asserts that under the circumstances, the passage of two years is not enough time to weigh in favor of good cause, especially considering Mr. Lehrer's conviction record and the intervening citation and conviction for driving while suspended.

In *Swan Mart*, citing *Juanita Lee Ray* (OLCC Final Order, 90-SP-189, May 1991), the Commission noted that the passage of time must be long enough to allow the Commission to find that the applicant has reformed and will not be a poor risk for compliance. *Swan Mart*, Final Order at 9. The more time that has passed, the greater the inference can be made that the applicant has reformed. *Gail D. Betha'* (OLCC Final Order, 92-SPR-056, September 1992). On at least one occasion, the Commission has found that two or more years without incident can indicate that an applicant has reformed, which weighs in favor of good cause. *Lloyd's of Bandon Restaurant & Lounge* (OLCC Final Order, 88-L-007, November 1988.) But, the Commission

has also held that where there are other factors present that weigh against good cause, such as multiple convictions, the passage of three years since the conviction was not enough time to weigh in favor of good cause. *Thomas Creek Steak and Seafood* (OLCC, Final Order, OLCC-00-L-008, April 2001); *Cf. Martin A. Getzinger* (OLCC Final Order, 92-SPR-159, June 1993) (the Commission found good cause where there was only one felony conviction, the applicant had been abstinent from drugs for four years and three years had passed between the conviction and the hearing date).

Here, as noted above, as of the hearing date, 23 months had passed since Mr. Lehrer's felony conviction. But, because Mr. Lehrer had multiple convictions in 2010, and he committed the offense of driving while suspended subsequent to his arrests for DUII and a drug-related felony, the passage of nearly two years since his November 2010 convictions is not enough time to weigh heavily in favor of good cause. In other words, considering the other factors, specifically, the number of convictions and the intervening driving offense, the passage of 23 months since Mr. Lehrer's felony conviction does not establish good cause sufficient to overcome the denial.

(2) *Probation or parole status.* As set out above, in November 2010, Mr. Lehrer was sentenced to 18 months supervised probation for the drug felony and 24 months supervised probation for the DUII. He completed his community service, treatment and victims' panel in 2011 and, as of December 2011, was released from supervised probation, though he remains on bench probation until November 28, 2012. Because Mr. Lehrer is still on bench probation at this time, this factor does not weigh in favor of good cause.

(3) *Recommendations.* As found above, Mr. Lehrer has a recommendation from his treatment counselor, his former employer and the current owners of the premises he manages. Mr. Luna, the treatment counselor, does not consider Mr. Lehrer at risk for another DUII. Mr. Lehrer's recent employers consider him to be hard-working, dependable and responsible. These recommendations, while some evidence that Mr. Lehrer has reformed over the prior two years, do not directly address the nature of Mr. Lehrer's felony conviction for cocaine possession.

(4) *Treatment.* Mr. Lehrer successfully completed his DUII treatment program. Although he attended education on drug use in connection with the treatment program, he was not treated for conditions relevant to the felony act, unlawful possession of cocaine. Accordingly, this factor is neutral.

(5) *Severity of record.* As discussed above, over the past nine years Mr. Lehrer has a record of five convictions that are substantially related to his fitness and ability to carry out activities under a liquor license. Three of those convictions are within the last two years. This record does not weigh in Applicant's favor.

(6) *Previous record of compliance as a licensee.* Applicant has not been licensed previously, so this factor remains neutral.

The above analysis demonstrates that Applicant has not shown sufficient good cause to overcome the denial criterion. As of the hearing date, Mr. Lehrer was still on bench probation

and only 23 months had passed since his felony conviction. Given the severity of Mr. Lehrer's conviction record, the passage of 23 months is not enough time for the Commission to find that he has reformed and will not be a poor risk for compliance as a licensee. Accordingly, the Commission is entitled to deny Applicant's license pursuant to 471.313(4)(d).

FINAL ORDER

The Commission orders that the Application of Lehrer, LLC and Alexander Lehrer, for an On-Premises Sales License at 8775 SW Canyon Lane, Portland, OR 97225, be REFUSED.

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

Dated this 11th day of December, 2012.

/s/ Merle Lindsey

Merle Lindsay

Interim Executive Director

OREGON LIQUOR CONTROL COMMISSION

Mailed this 12th day of December, 2012.

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.