

**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**
)
)
JAMES A. BRYANT)
) Agency Case No.: OLCC-12-SPR-020

HISTORY OF THE CASE

On August 23, 2012, the Oregon Liquor Control Commission (the Commission or the OLCC) issued a Service Permit Denial Notice to James A. Bryant (Applicant). On October 29, 2012, the OLCC issued an amended Service Permit Denial Notice to Applicant (the Notice). In its Notice, the OLCC proposed to deny Applicant's service permit application because of the allegation that he has three felony convictions for violent crimes, at least one of which was within the past six years.

Applicant made a timely request for hearing. The OLCC referred the request for hearing to the Office of Administrative Hearings on November 2, 2012. The OAH assigned the case to Administrative Law Judge (ALJ) John R. Lohuis. ALJ Lohuis held a contested case hearing by telephone on January 9, 2013. Gwenn McNeal appeared on behalf of the OLCC and testified. Applicant did not appear.

The record closed at the conclusion of the hearing on January 9, 2013.

ISSUES

1. Whether Applicant's application for a service permit should be denied because he has three felony convictions for the commission of a violent crime, at least one of which was within the past six years. ORS 471.380(1)(d); OAR 845-009-0020(5)(a)(C).

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 (5)(b).

EVIDENTIARY RULING

Exhibits A1 through A3, offered by the OLCC, were admitted into the record.

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FINDINGS OF FACT

1. On June 6, 2011, Applicant was convicted of three counts of rape in the third degree, a class C felony, in Washington County. (Ex. A2.)

2. On August 8, 2012, the OLCC received Applicant's Service Permit Application. (Test. of McNeal, Ex. A1.)

CONCLUSIONS OF LAW

1. Applicant's service permit application should be denied because he has three felony convictions for violent crimes, at least one of which was within the past six years. ORS 471.380(1)(d); OAR 845-009-0020(5)(a)(C).

2. Applicant has not shown good cause to overcome the denial. OAR 845-009-0020(3) and (5)(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(5)(a)(C), which provide that the OLCC will deny a service permit application if the applicant has three felony convictions for violent crimes, any one of which was within six years.¹

¹ OAR 845-009-0020 provides, in relevant part:

(5) Felony Involving the Commission of a Violent Crime:

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

* * * * *

(C) Three felony convictions for the commission of violent crimes, any one of which was within six years[.]

OAR 845-009-0020(5)(c) defines the term “violent crimes” as those crimes which “cause, attempt to cause, or threaten physical injury or harm to another person. Examples are: murder, rape, assault, sodomy, armed robbery.” A person commits the crime of rape in the third degree if the person has sexual intercourse with another person under 16 years of age. ORS 163.355. A person under 18 years of age is incapable of consenting to a sexual act. ORS 163.315.

The phrase “within six years” as used in the administrative rule means within six years 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

In other cases, the OLCC has considered rape convictions, and concluded that rape is a violent crime as that term is defined by ORS 845-009-0020(5)(c) and that a conviction for rape is related to an individual’s fitness to sell and serve alcoholic beverages. *See Gary W. Treadway* (OLCC Final Order, OLCC-12-SPR-049, August 1994) (“The Commission in this case finds that the crime of rape is a violent crime as defined by the rule and involves a danger to the public safety. The Commission concludes that for the purposes of ORS 670.280, the unlawful and violent nature of the crime of rape and the resulting danger to the public safety weigh against finding that Applicant is fit to serve alcoholic liquor.” *Treadway*, pp. 7, 8.) *See also Under the Bridge Cigarettes*, OLCC Final Order, OLCC-05-L-002, February 2006 (“Applicant’s Rape III conviction is a violent crime that is related to his fitness to exercise license privileges.” *Under the Bridge Cigarettes*, p. 7.)

In this matter, Applicant was convicted of three counts of felony rape in the third degree on June 6, 2011. The OLCC has established through administrative rule and by case precedent that the crime of rape is a violent crime. Applicant’s application was received by the OLCC on August 8, 2012, within six years of the convictions. The OLCC has proven all elements required for a denial of Applicant’s application. Under the authority of OAR 845-009-0020(5)(a)(C), the OLCC will deny the application for a service permit, unless there is good cause to overcome the denial.

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

OAR 845-009-0020(5)(b) provides that an applicant may show good cause to overcome the service permit denial if the convictions involved alcohol or controlled substances. OAR 845-009-0020(3) provides that in order to show good cause, an applicant must have had a drug

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.

addiction disability or an alcohol addiction disability at the time of the felony conviction(s). OAR 845-009-0020(5)(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

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

FINAL ORDER

It is ordered that service permit application filed by Applicant James A. Bryant and received by the OLCC on August 8, 2012 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.

³ OAR 845-009-0020(3) and (5)(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:

* * * * *

(B) A felony conviction involving the commission of a violent crime where alcohol or controlled substances were involved (OAR 845-009-0020(5)).]

(5)(b) If the felony conviction(s) involving the commission of a violent crime in (5)(a)(A), (B), or (C) involved alcohol or controlled substances, good cause may apply. The only good cause to overcome the criteria in this section 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.

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 January 17, 2013, I served the attached Final Order by mailing certified and first class mail, in a sealed envelope, with first class postage prepaid, a copy thereof addressed as follows:

Certified Mail # 7012 1640 0000 6325 5747

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