

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

In the Matter of the Revocation of the Service Permit Held By:) **FINAL ORDER ON DEFAULT**
)
) **OLCC-14-SPR-005**
)
ALLISON R. RUSS)

HISTORY OF THE CASE

On December 26, 2013, the Oregon Liquor Control Commission (OLCC or Commission) issued a Service Permit Revocation Notice to Allison R. Russ (Permittee). The OLCC proposed to revoke Permittee's service permit because she has a DUII diversion and a DUII conviction in the last three years and at least one 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 (the OAH) on March 5, 2014. The OAH assigned the case to Administrative Law Judge (ALJ) Andrew J. Holmes-Swanson. ALJ Holmes-Swanson held a contested case hearing by telephone on July 21, 2014. Gwenn McNeal appeared on behalf of the OLCC. Permittee did not appear. The record closed at the conclusion of the hearing.

ISSUES

1. Whether Permittee's service permit should be revoked because, within three years, Permittee has had two DUII diversions or convictions, with at least one occurring within the last twelve months. ORS 471.385(1)(b), OAR 845-009-0020(7)(a)(A).
2. If the application for a service permit should be denied because of Permittee's convictions, whether Permittee has good cause to overcome the denial. OAR 845-009-0020(3) and (7)(b).

EVIDENTIARY RULINGS

Exhibits A1 through A4 were admitted to the record without objection.

FINDINGS OF FACT

1. On June 25, 2010, Permittee was arrested and cited for DUII. On July 15, 2010, Permittee entered into a diversion agreement in Multnomah County Circuit Court based on her June 25, 2010, arrest. That diversion ended on July 14, 2011. (Ex. A2.)
2. The OLCC issued Service Permit No. 448985 to Permittee on October 11, 2013. (Ex. A1.)
3. On October 18, 2013, Permittee was arrested and cited for DUII. On December 6, 2013, Permittee was convicted of DUII in Multnomah County Circuit Court based on her October 18, 2013, arrest. (Ex. A2.)
4. On December 26, 2013, the OLCC notified Permittee of its intent to revoke her service permit.

CONCLUSIONS OF LAW

1. Permittee's service permit should be revoked because Permittee has one DUII diversion and one DUII conviction within three years, one of which was within the past 12 months. ORS 471.385(1)(b), OAR 845-009-0020(7)(a)(B).
2. Permittee has not demonstrated good cause to overcome the denial.

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 because of her DUII diversion and conviction.

ORS 471.385(1)(b) provides that the OLCC may revoke a service permit if a 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." The OLCC consistently holds that DUII convictions are relevant to an individual's

fitness to serve and sell alcoholic liquor. *Dorothy J. Hamblin* (OLCC Final Order, 03-SPR-036, December 2003).

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.¹ The OLCC has previously concluded that convictions involving controlled substances are relevant to an individual's fitness to serve and sell alcoholic liquor because it indicated poor judgment with respect to the controlled substance. *John O. Myshak* (OLCC Final Order, 88-V-002, May 1988). In this matter, Permittee has a diversion and a conviction of charges that involve the abuse of an intoxicant. As with the *Myshak* case, Permittee's convictions are related to her fitness and judgment to sell and serve alcoholic beverages, and provide a basis for the proposed revocation of her permit.

The OLCC also relies on its service permit denial rules to support the proposed revocation of Permittee's permit. See *Michelle L. Haynes* (OLCC Final Order, 006-SPR-022, December 2006) (holding that it is reasonable to apply service permit rules to determine whether revocation of a service permit is warranted). In this case, the OLCC seeks to revoke Permittee's service permit under the provisions of OAR 845-009-0020(7)(a)(A), which provides that the OLCC will deny a service permit application if an applicant has had one diversion and one conviction for DUII, any one of which was within 12 months.²

In the present case, Permittee has one DUII diversion, ending on July 14, 2011, and one DUII conviction on December 6, 2013. As of December 26, 2013, the date OLCC proposed to revoke Permittee's service permit, Permittee had one conviction within the last 12 months and a diversion within the last three years. Therefore, under OAR 845-009-0020(7)(a)(A), the OLCC has the authority to revoke Permittee's service permit, unless Permittee can show good cause to overcome the revocation.

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 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 [.]

* * * * *

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

OAR 845-009-0020(7)(b) provides that a permittee may show good cause to overcome the denial of a service permit. The OLCC relies on this rule to determine whether there is good cause to overcome a proposed revocation. *Michelle L. Haynes* (OLCC Final Order, OLCC-006-SPR-022, December 2006). OAR 845-009-0020(7) states that to show good cause, a permittee must have had a drug addiction disability or an alcohol addiction disability at the time of the DUII convictions or diversions. Also, to show good cause to overcome a denial or revocation, a permittee must provide a sworn statement that the permittee 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. See OAR 845-009-0020(7)(b).

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

PROPOSED ORDER

It is ordered that service permit No. 448985, issued to Allison R. Russ on October 11, 2013, be REVOKED.

/s/ John Mann

John Mann for Andrew Holmes-Swanson
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 September 3, 2014, I served the attached Final Order on 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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/s/ Ryan Clark
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