

BEFORE THE BOARD OF COUNTY COMMISSIONERS  
FOR MULTNOMAH COUNTY, OREGON

In the Matter of the Appeal            )  
of Robert W. Burnell from the        )  
Hearings Officer's Order Denying    )  
an Application for Approval of an    )  
Adult Care Home Resident Manager    )

ORDER  
95-238

The Board of County Commissioners has reviewed the record, Hearings Officer's Order, exceptions and rebuttal regarding the appeal of Robert W. Burnell from a determination of the Hearings Officer that the Manager of the Multnomah County Adult Care Program properly denied appellant's application for approval of Ms. Phyllis Jenkins as resident manager of an adult care home. The Hearings Officer found that Ms. Jenkins had been convicted of the offense of driving under the influence of intoxicants on March 7, 1994; that this offense was an offense involving "alcohol abuse" under MCAR 890-020-230(c); and that the Manager's denial of the application was therefore authorized by MCAR 890-020-230(a).

The Board accepts the Hearings Officer's Order, attached hereto as Exhibit A. The Board has also reviewed the applicant's exceptions to the Hearing's Officer's Order, attached as Exhibit B, the Adult Care Program's rebuttal to the applicant's exceptions, attached as Exhibit C, supplemental memoranda submitted by the applicant dated November 9 and November 19, 1995 (included in the record), and a supplemental memorandum submitted by the Office of County Counsel dated November 17, 1995 (included in the record). The Board finds that the Adult Care Program's submittals fully respond to the applicant's exceptions and supplemental memoranda, and that there are no grounds for rejecting or modifying the Hearing's Officer's order.

It is hereby Ordered that the decision of the Hearings Officer on the Appeal of Robert W. Burnell is accepted.

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Review of this Final Order may be taken solely and exclusively by writ of review in the manner set forth in ORS 34.020 to ORS 34.100.

Approved this 21st day of November, 1995.



MULTNOMAH COUNTY, OREGON

By *Beverly Stein*  
Beverly Stein  
Multnomah County Chair

REVIEWED:  
PETER KASTING, SPECIAL COUNSEL  
FOR MULTNOMAH COUNTY, OREGON

By *Peter Kasting*  
Peter Kasting



CITY OF  
**PORTLAND, OREGON**  
HEARINGS OFFICE

1120 S.W. 5th Avenue, Room 1017  
Portland, Oregon 97204-1960  
Elizabeth A. Normand, Land Use Hearings Officer  
(503) 823-7719  
William W. Shatzer, Code Hearings Officer  
(503) 823-7307  
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HEARINGS OFFICER'S DETERMINATION AND ORDER

APPEAL OF ROBERT W. BURNELL

HEARING NO. 153070

DATE OF HEARING: September 22, 1995

APPEARANCES:

Ms. Mary Fassell for Multnomah County

Mr. Robert W. Burnell, appellant

HEARINGS OFFICER: Mr. William W. Shatzer

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

This is an appeal from a determination by the Multnomah County Adult Care Home Program denying Mr. Burnell's application to have Phyllis Jenkins certified as a resident manager for Mr. Burnell's adult care facility.

MCAR 890-020-230(a) provides, "Persons who have been convicted of one or more crimes which are substantially related to the qualifications, functions, or duties of ... a manager ... shall be prohibited from operating, working in, or being in an Adult Care Home on a regular basis." MCAR 890-020-230(c) provides, "Such related crimes include ... offenses involving ... alcohol abuse...." After determining that Ms. Jenkins had been convicted of the offense of driving under the influence of intoxicants on March 7, 1994, the Adult Care Program found that this offense was, indeed, an offense involving alcohol abuse and denied Mr. Burnell's application to approve Ms. Jenkins as a resident manager under the above-quoted provisions of MCAR 890-020-230. This appeal followed.

The facts in this proceeding are undisputed. Ms. Jenkins does not dispute the fact of her DUII conviction. Nor does there seem to be any dispute that the offense of DUII is an offense involving "alcohol abuse".

Under these facts, the hearings officer's powers are really quite limited. It is not within the proper exercise of my functions to seek to substitute my judgment for that of the Director nor to second-guess the Director's determinations simply because I might have reached a different decision. Rather, it is only my

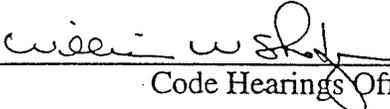
function to ensure that any determinations reached by the Director are authorized by law and are neither arbitrary nor capricious. In view of the clear and mandatory language of MCAR 890-020-230(a), which mandates that persons convicted of "crimes which are substantially related ... shall be prohibited" from working in an Adult Care Home, and the language of MCAR 890-020-230(a), which mandates that offenses involving alcohol abuse, such as DUII, are to be considered "related crimes", clearly the Director's determination was authorized by law and was neither arbitrary nor capricious.

Accordingly, the Director's determination must be sustained.

ORDER AND DETERMINATION:

1. The determination of the Multnomah County Adult Care Program dated July 26, 1995, denying the appellant Burnell's application for certification of Phyllis Jenkins as a resident manager is SUSTAINED.
2. This order and determination has been mailed to the parties on September 26, 1995 and shall become final on October 16, 1995, unless written exceptions are file with the Board of County Commissioners prior to such date.

Dated: 9-26-95

  
Code Hearings Officer

WWS:db

#153070

Robert W. Burnell  
Pioneer Care Homes  
P.O. Box 892  
Sherwood, OR 97140  
(503) 590-5202  
October 11, 1995

Board Clerk  
Multnomah County Board of Commissioners  
1120 SW 5th Avenue  
Portland, OR 97204

To Whom It May Concern:

This letter is written in exception to the hearings officer's determination and order in the appeal of Robert W. Burnell, Hearing No. 153070, done by Hearings Officer William W. Shatzer. Ms. Jenkins has changed her employment field and life style since the DUI, indicating good judgement and a desire to learn from her past mistakes. Resident family members, co-workers and employers see her in the home daily and have seen no sign of any use of alcohol, let alone abuse of it. I am responsible for the well-being of the five residents of our adult foster home, and I have no fear of leaving them in the hands of Ms. Jenkins. We request that the Board of Commissioners reverse this decision. Thank you.

Sincerely,



Robert W. Burnell

RECEIVED

OCT 16 1995

HEARINGS OFFICE

BOARD OF  
COUNTY COMMISSIONERS  
MULTNOMAH COUNTY  
OREGON  
1995 OCT 13 PM 2:31

BEFORE THE BOARD OF COUNTY COMMISSIONERS

MULTNOMAH COUNTY

In the Matter of the Disapproval of  
Resident Manager Application for  
Burnell Adult Care Home

City Hearings Office  
No. 1530700

REBUTTAL TO  
APPELLANT'S EXCEPTIONS

Following a hearing, Hearings Officer Shatzer upheld the determination of the Manager of the Multnomah County Adult Care Home Program, Department of Aging Services (Department), denying appellant's application for approval of Ms. Phyllis Jenkins as resident manager of applicant's adult care home. He sustained the Manager's findings that Ms. Jenkins had been convicted of the offense of driving under the influence of intoxicants on March 7, 1994. He also upheld the Manager's determination that driving under the influence of intoxicants was an offense involving "alcohol abuse" under MCAR 890-020-230(c) and held that the Manager's denial of the application was therefore authorized by MCAR 890-020-230(a). (Copy of September 26, 1995 order attached). On October 13, 1995 appellant filed exceptions to the order. (Copy attached).

REBUTTAL TO EXCEPTIONS

Appellant raises three exceptions to the decision. He asserts that the resident manager applicant, Ms. Perkins, has changed her employment and lifestyle since her last Driving Under the Influence

1 of Intoxicants (DUII) conviction, that no one who has observed her  
2 care of residents in the home has seen signs of alcohol abuse, and  
3 that he has no concerns about her care of residents. Each of these  
4 exceptions is in fact a challenge to the fairness of the rule.  
5 There is no dispute that applicant was convicted of DUII offenses.

6 To understand the appeal, it is essential to understand the  
7 rule at issue. MCAR 890-020-230(a) provides that "persons who have  
8 been convicted of one or more crimes which are substantially  
9 related to the qualifications, functions, or duties of...a  
10 manager...shall be prohibited from operating, working in, or being  
11 in an Adult Care Home on a regular basis." MCAR 890-020-230(c)  
12 defines related crimes to include "offense involving . . .alcohol  
13 abuse." MCAR 890-020-230(j) permits the Director to consider  
14 approving applicants convicted of the "related" crimes only if ten  
15 years have elapsed since the conviction. Pursuant to this scheme,  
16 Ms. Jenkins is clearly disqualified from serving as a resident care  
17 manager at this time, because she was convicted of a related  
18 offense in March, 1994. Consequently, the Board is being asked to  
19 consider not whether the rule was properly applied, but whether the  
20 rule leads to an unfair result.

21 1. Necessity for Rule. The Department has determined that a  
22 history of alcohol abuse, as documented by a conviction or  
23 convictions for alcohol-related offenses, is inconsistent with the  
24 provision of safe care to vulnerable elderly and disabled residents  
25 in adult care homes. In this case, Ms. Jenkins was denied approval  
26 to be a resident manager in the care home based on her DUII

1 convictions. As the hearing record indicates, Ms. Jenkins had had  
2 two convictions over six years for DUII offenses, and had completed  
3 a second diversion program only a month before the current  
4 application. (See Transcript at 9 - 11).

5 As resident manager, Ms Jenkins would live in the home for 12  
6 hour shifts. Unlike care providers in hospitals or nursing homes,  
7 she would have no on-site supervision. She would be the only  
8 caretaker for five elderly or disabled adults. Only those  
9 individuals or their family members could observe her behavior if  
10 there were alcohol or drug use. Residents and family members might  
11 be poor observers, have only casual contact, or be very hesitant to  
12 report problems.

13 Although some of Ms. Perkins responsibilities would be fairly  
14 routine, she could also be called upon to make emergency decisions  
15 in situations such as fire or medical crises. A sober person,  
16 capable of exercising good judgment, is critical at such moments.  
17 Consequently, the Department has determined by rule to permit only  
18 individuals without a history of alcohol abuse related offenses to  
19 serve in this position. Driving while under the influence  
20 demonstrates both a history of alcohol consumption and the exercise  
21 of poor judgment. Because past behavior is a good predictor of  
22 future behavior, the Department is reluctant to approve Ms. Jenkins  
23 as Resident Manager.

24 The Department also needs a consistent, clearly understood  
25 rule on this issue to assure equal treatment from case to case.  
26 Appellant in effect argues that the rule is too harsh as applied to

1 Ms. Jenkins because she has undergone a change. While it is true  
2 that some alcohol abusers stop drinking permanently, it is also  
3 true that many try numerous times to quit drinking without  
4 permanent success. The Department has neither the manpower nor the  
5 expertise to analyze each such situation separately and to  
6 determine who will and who will not return to drinking. Experts in  
7 the field find this determination difficult. Such an ad hoc review  
8 would also result in inconsistent determinations from case to case.  
9 Consequently, the Department has elected to implement a rule that  
10 provides maximum protection for the elderly and disabled clients it  
11 is mandated to protect.<sup>1</sup>

12 DUII convictions are fairly common among applicants wishing to  
13 become Adult Care Home operators, Resident Manager and/or care  
14 givers. Granting an exception for Ms. Jenkins would set a  
15 precedent for other applicants with DUII convictions. While Ms.  
16 Jenkins might never drink again and be an exemplary resident  
17 manager, it can easily be predicted that other applicants with DUII  
18 convictions will not remain sober and perform adequately. Granting  
19 an exception opens the door for these applicants as well.

20 2. Exceptions to the Rule. Implicit in appellant's argument  
21 is the request that an exception be granted in this case. As noted  
22 above, MCAR 890-020-230(j) does not permit approval of individuals  
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24 <sup>1</sup> In his September, 1994 audit of the adult care home program, the  
25 Multnomah County Auditor found that the Department made inconsistent criminal  
26 history decisions, and recommended more careful application of existing rules.  
In particular, he faulted the Department for failing to have disapproved an adult  
care home operator's boyfriend to be in the care home when it knew he had had two  
DUII convictions in ten years.

1 to work in the adult care home unless ten years have elapsed since  
2 the conviction. Given the critical importance of a resident  
3 manager's ability to make good judgments in crisis situations, the  
4 Department believes an extended waiting period between a conviction  
5 and approval as a resident manager is necessary.

6 Nonetheless, the issue of a two year minimum period of  
7 sobriety was discussed at both the informal conference and the  
8 hearing. The Department indicated this is the minimum period of  
9 sobriety required of drug and alcohol counselors who are under  
10 daily supervision under the Oregon Administrative Rules. For a  
11 resident manager who works without supervision, a longer period  
12 would be essential.

13 While an exception is not permitted by MCAR 890-020-230(j),  
14 the Director of the Department is able to grant a variance or  
15 exception to any adult care home rule, including manager standards,  
16 under 890-050-210. However, because the operator has asked for  
17 immediate approval, with no intervening period of sobriety past  
18 applicant's completion of her second diversion in July, 1995, the  
19 Department believes that adherence to the rule specific to criminal  
20 convictions, requiring a longer intervening period, is appropriate  
21 in this case.

### 22 23 CONCLUSION

24 The issue before the Board is whether the Department correctly  
25 applied its rule governing resident manager applicants who have  
26 been convicted of offenses involving alcohol abuse. The Hearings

1 Officer and the record indicate that rule was properly applied.  
2 There is no dispute concerning the facts in the case.

3 Appellant's exceptions in effect argue that the rule should  
4 not be applied to this particular resident manager applicant  
5 because she is fully recovered. The Department has neither the  
6 manpower nor the ability to assess the facts underlying each  
7 criminal conviction. It must be able to apply its rules  
8 consistently. If an exception is granted in this case, an  
9 increasing number of applications and appeals from people with  
10 DUIIs can be anticipated. Consequently, the Department asks that  
11 the Board affirm the Hearing Officer's Order on the record.

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13 DATED this 27 day of October, 1995.

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Respectfully submitted,

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LAURENCE KRESSEL, COUNTY COUNSEL  
FOR MULTNOMAH COUNTY, OREGON

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By Katie Gaetjens  
Katie Gaetjens, OSB #88210  
Assistant County Counsel  
Of Attorneys for Department of Aging  
Services

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