

**CITY OF MADISON  
OFFICE OF THE CITY ATTORNEY  
Room 401, CCB  
266-4511**

Date: July 7, 2009

**MEMORANDUM**

TO: City of Madison Common Council

FROM: Steven C. Brist, Assistant City Attorney

RE: Application of Roy Schmitz for Operator's License, Legistar #14258

Mr. Roy Schmitz has applied for an operator's license, so that he may be employed as a bartender at the Edgewater Hotel. In May, the Alcohol License Review Committee recommended denying the license on a 4-3 vote. After that vote, Attorney Ron Trachtenberg became Mr. Schmitz's attorney and requested that the Common Council refer this matter back to the ALRC and the Common Council did so by consent. At the second ALRC hearing on this matter in June, Mr. Trachtenberg argued that Mr. Schmitz's conviction was not substantially related to an operator's license. At the June ALRC meeting the ALRC made no recommendation on the application on a 3 to 3 vote. One member of the ALRC who had previously voted in favor of denying the license was not present. This matter is now again before the Common Council

The application of Mr. Schmitz presents particular legal issues related to his arrest and conviction record, because he was convicted of a felony under Sec. 941.41(1), Wis. Stats., manufacturing a controlled substance. This particular crime is different from other felonies because state statutes specifically state that consideration of this crime is not employment discrimination. When this felony is considered, Mr. Schmitz does not meet the minimum statutory requirements for the license.

The state alcohol beverage laws are generally contained in Chapter 125, Wisconsin Statutes and the general licensing requirements are found in Section 124.04, Wis. Stats. Sec. 125.04(5)(b), Wis. Stats., provides that a person who is convicted of a felony may not be issued a license, subject to sections 111.321, 111.322 and 111.335, Wis. Stats. Sec.125.04(5)(b), states:

"125.04(5)(b) *Criminal offenders*. No license or permit related to alcohol beverages may, subject to ss. 111.321, 111.322 and 111.335, be issued under this chapter to any person who has habitually been a law offender or has been convicted of a felony unless the person has been duly pardoned."

The cross referenced provisions from Chapter 111 are part of Wisconsin's Fair Employment Act, and provide that the City cannot discriminate on the basis of an arrest or conviction record, unless the circumstances of the offense substantially relate to the

licensed activity. Section 111.335 (1)(cs) Wis. Stats., specifically states that it is not employment discrimination to deny a license under Chapter 125 to a person who has been convicted of the offense for which Mr. Schmitz has been convicted. Sec. 111.335(1)(cs), provides:

“111.335(1)(cs) Notwithstanding Sec. 111.322, it is not employment discrimination because of conviction record to revoke, suspend or refuse to renew a license or permit under Chapter 125 if the person holding or applying for the license or permit has been convicted of one or more of the following:

1. *Manufacturing, distributing or delivering a controlled substance or controlled substance analog under s. 961.41 (1).*
2. Possessing, with intent to manufacture, distribute or deliver, a controlled substance or controlled substance analog under s. 961.41 (1m).
3. Possessing, with intent to manufacture, distribute or deliver, or manufacturing, distributing or delivering a controlled substance or controlled substance analog under a federal law that is substantially similar to s. 961.41 (1) or (1m).
4. Possessing, with intent to manufacture, distribute or deliver, or manufacturing, distributing or delivering a controlled substance or controlled substance analog under the law of another state that is substantially similar to s. 961.41 (1) or (1m).
5. Possessing any of the materials listed in s. 961.65 with intent to manufacture methamphetamine under that section or under a federal law or a law of another state that is substantially similar to s. 961.65.” (emphasis added).

Therefore, based solely on Sec. 111.335(1)(cs), Wis. Stats., a conviction such as the one that Mr. Schmitz received should be considered in the licensing process. When such consideration is given, Mr. Schmitz’s felony conviction means that he does not meet the minimum state statutory licensing requirements.

The Supreme Court and Chapter 125.12 support the conclusion that consideration of a conviction of this nature is not employment discrimination because it is job related. In State ex rel. Smith v City of Oak Creek 139 Wis.2d 788, 407 N.W.2d 901 (1987), the Wisconsin Supreme Court stated that “There is undoubtedly a substantial relationship between the illegal purchase, use, and sale of controlled substances and the licensed activity in which Smith wishes to engage, the purchase and sale of a closely regulated substance.” The “closely regulated substance” to which the court refers is alcohol. The Court’s decision indicates that the felony of manufacturing a controlled substance is substantially related to the licensed activity of a bartender and this decision is consistent with Sec. 111.335, Wis. Stats..

Under Sec 125.12, which is entitled “Revocations, suspensions, *refusals to issue or renew*” (emphasis added), a conviction under Sec. 941.41(1), Wis. Stats., manufacturing a controlled substance, is specifically referenced as grounds for revocation of a license. See

Sec. 125.12(4)(ag)7, Wis. Stats.

Because Sec. 125.04, Wis. Stats., provides that a person who is convicted of a substantially related felony does not meet the statutory qualifications for a license, unless that person has been “duly pardoned”, Mr. Schmitz does not meet the minimum statutory qualifications for an operator’s license.

While the City’s Ordinance, Sec. 38.05(9)(n)2.c i, MGO, provides for the additional consideration of whether the person would be a threat to the safety or welfare of the patrons of a bar, the decision in this case is not a safety or welfare consideration, because this applicant does not meet the minimum state statutory requirements for the license. The felony of which Mr. Schmitz was convicted is substantially related to the licensed activity of a bartender under, Sec. 111.335(1)(cs), Wis. Stats. Based solely on that state statute, Mr. Schmitz’s is ineligible for a license under Chapter 125. Case law supports this conclusion. Additionally, Mr. Schmitz’s offense is an offense which is grounds for license revocation. The offense is a felony so he is barred by Sec. 125.04(5)(b), Wis. Stats., from obtaining a license under Chapter 125. For these reasons Mr. Smith does not meet the minimum statutory requirements for the license.