

STATE OF NEW YORK
DEPARTMENT OF STATE

In the Matters of the Application of

STANLEY J. GONGOL,
Applicant

For Renewal of a License to
Practice Barbering and the Complaint of

DECISION

DEPARTMENT OF STATE
DIVISION OF LICENSING SERVICES,
Complaint

-against-

STANLEY GONGOL,
Respondent

Pursuant to the designation duly made by the Hon. Gail S. Shaffer, Secretary of State, the above noted matter came on for hearing before the undersigned, Roger Schneier, on May 12, 1992 at the New York State Office Building located at 65 Court Street, Buffalo, New York 14202.

The applicant/respondent, of 11 W. Main Street, Springville, New York 14141, was represented by Herbert L. Greenman, Esq., of Lipsitz, Green, Fahringer, Roll, Salisbury & Cambria, 42 Delaware Avenue, Suite 300, Buffalo, New York 14202-3901.

The Division of Licensing Services was represented by A. Marc Pelligrino, Esq.

ISSUE

The issue in the hearing was whether the applicant/respondent should be denied renewal of his license as a master barber and whether his existing license should be revoked because he had been convicted of a crime of moral turpitude.

FINDINGS OF FACT

1) Notice of hearing together with a copy of the complaint was served on the applicant/respondent by certified mail (Dept. Ex. 1).

2) Stanley Gongol, who is forty-seven years old, has been a licensed master barber for approximately 25 or years. On April 14, 1991 he submitted an application for renewal of his license (which was scheduled to expire on April 30, 1991 and which, because of his

timely application, remains in effect pending the final determination of this matter, pursuant to State Administrative Procedure Act (SAPA) section 401(2)). On that application he disclosed that he had been convicted of a crime since his last renewal, and he submitted materials that on March 21, 1991 he had pled guilty to the crime of sexual abuse in the first degree (Penal Law section 130.65 (3)) and on April 21, 1991 had been sentenced to 5 years probation and a mandatory surcharge of \$100.00 and had been issued a Certificate of Relief from Disabilities (Comp. Ex. 2).

Gongol's conviction arose out of a charge which had been made against him by his wife one week after she had been denied a divorce in a proceeding in which she was the plaintiff, and just a custody proceedings were to begin. She charged that in October 1987 he had sexually abused their four year old daughter. Although Gongol consistently denied the truth of the charges, and although a court appointed psychologist concluded that there was a strong possibility that the charge has been fabricated, Gongol, so as to spare his daughter the trauma of having to testify, entered what is known as an "Alford" plea to one count of the four count indictment, but which he was permitted to plead guilty without admitting the truth of the charges. The lack of a jail sentence was the result of what the District Attorney stated at the plea hearing was an unusual departure from normal practice by his office based on considerations of fairness.

OPINION

General Business Law (GBL) section 434(1)(b) provides that an applicant for a license to engage in the practice of barbering must produce satisfactory evidence of good moral character. GBL section 441(a)(9) permits the suspension or revocation of such a license upon the conviction of the holder of any crime or offense involving moral turpitude.

"Moral turpitude" is "the quality of crime involving grave infringement of the moral sentiment of the community as distinguished from statutory mala prohibita...an act of baseness, vileness or depravity in the private or social duties which man owes to his fellowmen or to society in general, contrary to the accepted and customary rule of right and duty between man and man." People v Ferguson, 55 Misc.2d 711, 286 N.Y.S.2d 976, 981 (1968) (citations omitted). "In general it mean neither more nor less than 'turpitude', i.e., anything done contrary to justice, honesty, or good morals." Black's Law Dictionary (5th ed. 1979). There can be no doubt that the sexual abuse of one's infant daughter is a crime of moral turpitude.

Article 23-A of the Correction Law imposes an obligation on licensing agencies

"to deal equitably with ex-offenders while also protecting society's interest in assuring performance by reliable and trustworthy persons. Thus, the statute sets out a broad general rule that...public agencies cannot deny...a license to an applicant solely based on status as an ex-offender. But the statute recognizes exceptions either where there is a direct relationship between the criminal offense and the specific license...sought (Correction Law section 752(1)), or where the license...would involve an unreasonable risk to persons or property (Correction Law section 752(2)). If either exception applies, the employer (sic) has discretion to deny the license...." Matter of Bonacorsa, 71 N.Y.2d 605, 528 N.Y.S.2d 519, 522 (1988).

In exercising its discretion, the agency must consider the eight factors contained in Correction Law section 753(1).

"The interplay of the two exceptions and section 753(1) is awkward, but to give full meaning to the provisions, as we must, it is necessary to interpret section 753 differently depending on whether the agency is seeking to deny a license...pursuant to the direct relationship exception...or the unreasonable risk exception.... Undoubtedly, when the...agency relies on the unreasonable risk exception, the eight factors...should be considered and applied to determine if in fact an unreasonable risk exists.... Having considered the eight factors and determined that an unreasonable risk exists, however, the...agency need not go further and consider the same factors to determine whether the license...should be granted....Section 753 must also be applied to the direct relationship exception...however, a different analysis is required because 'direct relationship' is defined by section 750(3), and because consideration of the factors contained in section 753(1) does not contribute to determining whether a direct relationship exists. We read the direction of section 753 that it be applied '(i)n making a determination pursuant to section seven hundred fifty-two' to mean that, notwithstanding the existence of a direct relationship, an agency...must consider the factors contained in section 753, to determine whether...a license should, in its discretion, issue." Bonacorsa,

supra, 528 N.Y.S.2d at 523.

A direct relationship is one wherein the offense bears directly on the applicant's ability or fitness to perform one or more of the duties or responsibilities necessarily related to the license, Correction Law section 750(3). There is no statutory definition of "unreasonable risk" which "depends upon a subjective analysis of a variety of consideration relating to the nature of the license...and the prior misconduct." Bonacorsa, supra, 528 N.Y.S.2d at 522.

"A direct relationship can be found where the applicant's prior conviction was for an offense related to the industry or occupation at issue (denial of a liquor license warranted because the corporate applicant's principal had a prior conviction for fraud in interstate beer sales); (application for a license to operate a truck in garment district denied since one of the corporate applicant's principals had been previously convicted of extortion arising out of a garment truck racketeering operation), or the elements inherent in the nature of the criminal offense would have a direct impact on the applicant's ability to perform the duties necessarily related to the license or employment sought (application for employment as a traffic enforcement agent denied; applicant had prior convictions for, inter alia, assault in the second degree, possession of a dangerous weapon, criminal possession of stolen property, and larceny)." Marra v City of White Plains, 96 A.D.2d 865 (1983) (citations omitted).

In determining whether there is a direct relationship between the crime to which Gongol pled guilty and a license as a master barber, it is first necessary to consider the functions of a barber.

GBL section defines the functions of a barber as being various cosmetic and grooming operations. While performing such functions the barber must, of necessity, come into close contact with his customers, which may include children who have been left in the barber shop by their parents or guardians. Such a situation may create circumstances conducive to sexual abuse. Division of Licensing Services v Antinore, 64 DOS 90.

It is now necessary to consider the factors contained in Correction Law section 753(1) to determine whether the retention by Gongol of a master barber's license would involve an unreasonable risk to the property or to the safety or welfare of specific individuals or the general public.

The public policy of the state to encourage licensure and employment of persons previously convicted of criminal offenses (section 753(1)(a)), which is to the benefit of the applicant, is counterbalanced by the legitimate interest of the Division of Licensing Services in the protection of the safety and welfare of those persons who avail themselves of the services of its licensees (sections 753(1)(b) and (h)). In this case, the possibility of Gongol sexually abusing a customer (the crime to which he pled guilty involved an allegation of an isolated incident occurring in the home with a family member, and there is no record of any other such charges having been made), must be balanced against the facts that he has worked as a barber for his entire adult life and that there is nothing on the record to indicate that he is capable of earning a living in any other way.

As previously noted, the direct relationship of the crime to the duties of a barber is a factor which weighs against the issuance of the license (section 753(1)(c)), Gongol's mature age at the time of the crime to which he pled (section 753(1)(e)), and the fact that the crime, a felony, was a serious offense (section 753(1)(f)).

The facts that acts alleged in the indictment occurred almost five years ago (section 753(1)(d)), and that Gongol has received a Certificate of Relief From Disabilities (section 753(2)), which creates a presumption of rehabilitation, are in his favor.

There was no evidence offered with regards to attempts at rehabilitation (section 753(1)(g)) which, considering Gongol's consistent insistence on his innocence and the lack of the imposition of any terms on his probation, is not of particular importance.

The weighing of the factors is not a mechanical function and cannot be done by some mathematical formula. Rather, as the Court of Appeals said in Bonacorsa it must be done through the exercise of discretion to determine whether the direct relationship between the "convictions and the license has been attenuated sufficiently." Bonacorsa, supra, 528 N.Y.S.2d at 524.

The concern of the Division of Licensing Services in this matter cannot be faulted. Gongol pled guilty to the commission of a serious crime. Certainly, based on the information before the persons who reviewed the renewal application, there might have been a legitimate fear that he might engage in similar conduct in the future.

I have paid particular attention to the circumstances of Gongol's "Alford plea." He was in a situation in which if he insisted on his right to a trial he would subject his daughter, who at the time was only eight years old, to the terrible trauma of

having to recount in open court and with the purpose of convicting her father the story of the alleged sexual assault which, according to the court appointed psychologist, may very well have been concocted under the influence of Gongol's estranged wife. Given the choice of that, or of a promised sentence of probation and a Certificate of Relief From Disabilities, it is not surprising that Gongol entered the plea which, as noted, was not an admission of the truth of the charges. Even if one assumes that the charge was true, it involved a single incident occurring in the home and involving a relative, and not an event in the barber shop or some other public place involving an unrelated person. In the circumstances, I find that it cannot be said that the conviction indicates that there is any reasonable likelihood that Gongol will use his license as a master barber in any way which would endanger the public.

CONCLUSIONS OF LAW

After having given due consideration to the factors set forth in Correction Law section 753, it is concluded that the direct relationship between Gongol's conviction and a license as a master barber has been attenuated sufficiently, and that his continued licensure as a master barber would not involve an unreasonable risk to the safety and welfare of the public.

DETERMINATION

WHEREFORE, IT IS HEREBY DETERMINED THAT the charges herein against Stanley J. Gongol are dismissed and his application for renewal of his license as a master barber is granted. The Division of Licensing Services is directed to issue the license forthwith.

These are my findings of fact together with my opinion and conclusions of law. I recommend the approval of this determination.

Roger Schneier
Administrative Law Judge

Concur and So Ordered on:

GAIL S. SHAFFER
Secretary of State
By:

James Coon
Deputy Secretary of State