

STATE OF NEW YORK
DEPARTMENT OF STATE
OFFICE OF ADMINISTRATIVE HEARINGS

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In the Matter of the Application of

GINA ROWELL

DECISION

For a License as a Cosmetologist

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The above noted matter came on for hearing before the undersigned, Roger Schneier, on October 21, 1999 at the New York State Office Building located at 65 Court Street, Buffalo, New York.

The applicant, having been advised of her right to be represented by an attorney, chose to represent herself.

The Division of Licensing Services (hereinafter "DLS") was represented by Supervising License Investigator Michael Coyne.

ISSUE

The issue before the tribunal is whether the applicant's application for a license as a cosmetologist should be denied because her record of criminal arrests and convictions.

FINDINGS OF FACT

1) By application dated May 24, 1999 the applicant applied for a license as a cosmetologist, answering "yes" to question #3: "Have you ever been convicted of a crime or offense (other than a minor traffic violation) in this state or elsewhere or has any license, permit, commission, registration or application held or submitted by you or a company in which your are or were a principal ever been revoked or denied by any state, territory, governmental jurisdiction or foreign country for any reason?" (State's Ex. 4).

2) The applicant has the following record of criminal convictions (State's Ex. 6):

6/6/90, 7/9/91, 5/11/93, and 3/22/94-Attempted Petit Larceny, a class B misdemeanor;

9/6/90 and 6/30/94-Criminal Possession of Stolen Property in the 5th degree, a class B misdemeanor;

9/17/92, 10/17/96, and 1/6/98-Petit Larceny, a class A misdemeanor;

12/28/92-Bail Jumping in the 3rd degree, a class A misdemeanor;

3/22/94-Assault in the 3rd degree, a class A misdemeanor; and

5/15/98-Robbery in the 3rd degree, a class D felony.

In addition, her criminal record shows the following:

11/15/89-Arrest for Petit Larceny, adjourned in contemplation of dismissal;

7/9/90-Pled guilty to Disorderly Conduct, a violation;

7/15/93-Probation revoked for technical violation; and

10/1/93-Conditional discharge on a charge of Petit Larceny;

3) The applicant's criminal conduct was the result of her drug addiction, and of her need to support both her drug habit and her two children. Since her most recent conviction she has participated, and continues to participate, in drug rehabilitation and other support programs, and she has been drug free since March, 1998. She has had two successful job placements through Liberty Resources, Inc., the counseling organization to which she was referred by her probation officer: Working with children at Catholic Charities, and as a seasonal salesperson in a retail outlet of a major clothing chain (State's Ex. 7, App. Ex. A). Her caseworker at Liberty Resources, Inc. testified on her behalf, and spoke very positively about the applicant's efforts at rehabilitation through her voluntary participation in various programs. The applicant has been totally compliant with the conditions of her probation, and, according to her probation officer, "has a very positive attitude" (State's Ex. 5).

6) By letter dated June 25, 1999 the applicant was advised by DLS that it proposed to deny her application because her "criminal history indicates a lack of good character and trustworthiness required for licensure," and that she could request an administrative hearing (State's Ex. 2), which she did by letter received on July 22, 1999. Accordingly, the matter having been referred to this tribunal on August 19, 1999, notice of hearing was served on the applicant by certified mail (State's Ex. 1).

OPINION

I- As the person who requested the hearing, the burden is on the applicant to prove, by substantial evidence, that she is entitled to be licensed as a cosmetologist. State Administrative Procedure Act (SAPA), §306(1). Substantial evidence is that which a reasonable mind could accept as supporting a conclusion or ultimate fact. *Gray v Adduci*, 73 N.Y.2d 741, 536 N.Y.S.2d 40 (1988). "The question...is whether a conclusion or ultimate fact may be extracted reasonably--

probatively and logically." *City of Utica Board of Water Supply v New York State Health Department*, 96 A.D.2d 710, 465 N.Y.S.2d 365, 366 (1983)(citations omitted).

II- Pursuant to General Business Law (GBL) §406, an applicant for a license as a cosmetologist must establish to the satisfaction of the Secretary of State his or her fitness to be so licensed. Since pursuant to GBL §410[1][f] the license of a cosmetologist who has been convicted of Robbery may be revoked, such a conviction should be considered in determining that fitness. There is, however, no basis upon which any arrests which did not result in convictions should be considered.

In considering whether the license should be granted, it is necessary to consider, together with the provisions of GBL Article 27, the provisions of Correction Law Article 23-A, which 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 §752[1]), or where the license...would involve an unreasonable risk to persons or property (Correction Law §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 §753[1].

"The interplay of the two exceptions and §753[1] is awkward, but to give full meaning to the provisions, as we must, it is necessary to interpret §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....§753 must also be applied to the direct relationship exception...however, a different analysis is required because 'direct relationship' is defined by §750[3], and because consideration of the factors contained in §753[1] does not contribute to determining whether a

direct relationship exists. We read the direction of §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 §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 §750[3]. There is no statutory definition of "unreasonable risk" which "depends upon a subjective analysis of a variety of considerations 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 crimes relied upon by DLS in considering the applicant's character and fitness, and licensure as a cosmetologist, it is first necessary to consider the functions and duties of cosmetologists, all of which involve the provision of personal services while in close physical contact with customers. At first glance there would appear to be a direct relationship between the practice of cosmetology and the applicant's conviction for Assault in the 3rd degree. However, since that lowest degree of Assault is not one of the crimes enumerated in GBL §410[1][f] as being grounds for the suspension or revocation of a cosmetology license, I conclude that the Legislature has determined that there is not a direct relationship between Assault in the 3rd degree and a license as a cosmetologist. However, since all degrees of Robbery are enumerated in that section, it is concluded that there is a direct relationship between the respondent's conviction for that crime and the license applied for. There is no direct relationship with the other crimes of which she was convicted.

There being both a direct relationship with one conviction and no direct relationship with the other convictions, it is necessary to consider the factors set forth in Correction Law §753.

The pertinent duties and responsibilities of a cosmetologist (§753[1][b]) have already been discussed in regards to the question of direct relationship. The fact that the applicant was convicted of a crime directly related to those duties creates a negative inference regarding her fitness to perform those duties and to meet those responsibilities (§753[1][c]).

Less than two years have passed since the commission of the crime (§753[1][d]).

There is no evidence in the record as to the age of the applicant (§753[1][e]).

The degree of seriousness of the crimes (§753[1][f]) is indicated by the fact that one was a felony, while the others were misdemeanors.

In the applicant's favor are the public policy of encouraging licensure of ex-offenders (§753[1][a]). In addition, her history of post conviction employment, her attendance at various self-improvements programs, and her remaining drug free weigh heavily in her favor (§753[1][g]).

All of the above must be considered in the light of the legitimate interest of DLS in the protection of the safety and welfare of the public (§753[1][h]).

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 NYS2d at 524.

The applicant has been convicted of numerous crimes. However, all of those convictions arose out of a drug addiction which she now seems to have under control. Since her last conviction she has held two jobs, and has performed well in them. She has attended, and continues to attend, activities designed to enable her to lead a lawful and productive life.

CONCLUSIONS OF LAW

After having given due consideration to the factors set forth in Correction Law §753 and to the requirements of GBL Article 27, and having weighed the rights of the applicant against the rights and interests of the general public, it is concluded that the applicant has established that she possess the required fitness to warrant the issuance to her of a license as a cosmetologist. GBL §406[1][b].

DETERMINATION

WHEREFORE, IT IS HEREBY DETERMINED THAT, pursuant to General Business Law §411, the application of Gina Rowell for a license as a cosmetologist is granted.

Roger Schneier
Administrative Law Judge

Dated: October 22, 1999