

STATE OF NEW YORK
DEPARTMENT OF STATE

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In the Matter of the Application of

DONNA DeFRANCESCO

DECISION

For Renewal of a Commission as a
Notary Public

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This matter came on for hearing before the undersigned, Roger Schneier, on January 4, 1995 at the office of the Department of State located at 270 Broadway, New York, New York.

The applicant, of 140D Heitman Drive, Spring Valley, New York 10977, having been advised of her right to be represented by an attorney, appeared pro se.

The Division of Licensing Services was represented by Supervising License Investigator Michael Coyne.

ISSUE

The issue before the tribunal is whether, in light of her conviction of a felony, the applicant should be granted renewal of her commission as a notary public.

FINDINGS OF FACT

1) By application dated January 17, 1994 the applicant applied for renewal of her commission as a notary public for the period of March 30, 1994 through March 30, 1996. On that application she answered "yes" to the question: "Since your last application, have you been convicted of a crime or offense (not a minor traffic violation) or has any license, commission or registration ever been denied, suspended or revoked in this state or elsewhere?" (State's Ex. 2).

2) Sometime in 1993, the exact date not appearing in the record, the applicant pled guilty to operating a motor vehicle while under the influence of alcohol or drugs (DWI), in violation of Vehicle and Traffic Law (VTL) §1192[2]. (State's Ex. 2 and 3). Inasmuch as that was her second DWI conviction in less than ten years (State's Ex. 3) the crime was classified as a felony. VTL §1192[5].

3) By letter dated April 18, 1994 the applicant was advised by the Division of Licensing Services that it could not process her application until it received, among other things, a "Certificate of Relief From Disabilities/Certificate of Good Conduct." (App. Ex. B). On August 7, 1994, a Certificate of Relief From Disabilities was issued to the applicant by the Hon. William K. Nelson, the judge of Rockland County Court who had presided over the DWI case, and the applicant sent a copy to the Division of Licensing Services. The certificate states that it shall "(r)elieve the holder of all forfeitures, disabilities or bars hereinafter enumerated," followed by the word "all" (State's Ex. 2).

By letter dated August 24, 1994 the Division of Licensing Services advised the applicant that it proposed to deny her application because she had been convicted of a felony, had not obtained an Executive Pardon or Certificate of Good Conduct, and the issuance of the license (sic) would involve an unreasonable risk to property and to the safety or welfare of specific individuals or the general public. The letter stated that the applicant could request an administrative review, and by letter dated October 17, 1994 she did so. By letter dated September 26, 1994 the applicant was advised that after review the Division of Licensing Services continued to propose to deny her application, and that she could request a hearing. By letter dated September 2, 1994 the applicant requested a hearing, and notice of hearing was served on her by certified mail on November 19, 1994 (State's Ex. 1).

OPINION

I- As the person who requested the hearing, the burden is on the applicant to prove that she is entitled to have her commission as a notary public renewed. State Administrative Procedure Act (SAPA), §306[1].

II- Pursuant to Executive Law §130, a commission as a notary public may not be issued to any person who has been convicted of a felony and who has not subsequently received either an executive pardon or a Certificate of Good Conduct from the Parole Board. The applicant has received a Certificate of Relief From Disabilities. That, however, does not entitle her to be commissioned as a notary public. Matter of the Application of Goldberg, 77 DOS 94.¹

¹ The applicant was granted thirty days from the date of the hearing to submit a letter from James Murphy, Director of the Executive Clemency in the New York State Division of Parole, who she said had told her that there was "no way physically possible that I could obtain a Certificate of Good Conduct...." (Trans. p. 9). No such letter has been received.

If read literally, the Certificate of Relief From Disabilities issued to the applicant might be construed as relieving the applicant of the bar to holding public office, since in the space provided for the listing of forfeitures, disabilities and bars the Court inserted the word "all." However, Correction Law §701 provides that "no such certificate shall apply, or be construed so as to apply, to the right of such person to retain or to be eligible for public office."

"A Certificate of Relief From Disabilities does not grant the holder the right to retain or be eligible for public office. Correction Law §701; People v Olensky, 91 Misc.2d 225, 397 NYS2d 565 (Supreme Court Queens County, 1977). A Certificate of Good Conduct provides relief from all disabilities, without exception made with regards to public office. Correction Law §703-a. The difference is significant inasmuch as a notary public is a public officer. People v Wadhams, 176 NY 10 (1903); People v Rathbone, 145 NY 436 (1895); Patterson v Department of State, 35 AD2d 616, 312 NYS2d 300 (1970). Accordingly, the issuance of a Certificate of Relief From Disabilities does not grant the holder the right to be commissioned as a notary public, People v Olensky, supra." Division of Licensing Services v Shanahan, 44 DOS 94, 2-3.

III- The applicant contends that because she received a letter from the Division of Licensing Services advising her that her application could not be considered absent the receipt of a "Certificate of Relief From Disabilities/Certificate of Good Conduct" (App. Ex. B), the Department of State is now estopped from taking the position that the Certificate of Relief From Disabilities does not remove the bar to her being commissioned as a notary public. That letter, dated April 18, 1994, was sent prior to the April 21, 1994 issuance of the decision in Division of Licensing Services v Shanahan, supra, which was the first decision of the Department of State in which the distinction between the two types of certificates was noted. Therefore, the Division of Licensing Services was acting in accordance with what it believed the law to be. Further, it did not say that upon receipt of a "Certificate of Relief From Disabilities/Certificate of Good Conduct" the commission would be issued, but, rather, that without such a certificate the application could not even be considered. In any case, an erroneous act by a government agency does not estop that agency from discharging its statutory duties. Matter of Parkview Associates v City of New York, 71 NY2d 274, 525 NYS2d 176 (1988).

IV- In light of the foregoing, which establishes that a commission as a notary public may not be issued to the applicant, it is not necessary to address the question whether the issuance of the commission would result in an unreasonable risk to property or persons.

CONCLUSIONS OF LAW

The applicant has failed to meet her burden of establishing that she is entitled to be commissioned as a notary public, and accordingly her application should be denied. SAPA §306; Executive Law §130.

DETERMINATION

WHEREFORE, IT IS HEREBY DETERMINED THAT the application of Donna DeFrancesco for renewal of her commission as a notary public is denied.

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:

ALEXANDER F. TREADWELL
Secretary of State
By:

Phillip M. Sparkes
Special Deputy Secretary of State