

STATE OF NEW YORK
DEPARTMENT OF STATE

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In the Matter of the Application of

MURRAY BAUER

DECISION

For Renewal of a License as a
Private Investigator

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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 February 8, 1984 at the office of the Department of State located at 270 Broadway, New York, New York.

The applicant, of 47 E Route 303, Valley Cottage, New York 10989, was represented by John S. Edwards, Esq., Tracy, Bertolino & Edwards, 317 Little Tor Road South, New City, New York 10956.

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

ISSUE

The issue in the proceeding is whether the applicant should be denied renewal of his license as a private investigator because of his having been convicted of a Federal felony.

FINDINGS OF FACT

1) By application dated June 7, 1993 the applicant applied for renewal of his license as a private investigator, which was to expire on June 21, 1993. On that application and an attachment he disclosed that on May 10, 1993 he had entered a plea of guilty in the United States District Court, Southern District of New York, to a charge of Subscribing a False Income Tax Return in violation of 26 USC §7206 (Dept. Ex. 2).

2) The conviction arose out of the filing by the applicant, in 1990, of a personal income tax return on which he failed to fully disclose the amount of income received from a corporation wholly owned by him. The guilty plea resulted in the imposition of a sentence of five years probation, with the first six months to be served in home confinement when not at work, and an order of restitution in the amount of \$103,124.00. Additional conditions are that the applicant: file all tax returns; continue in therapeu-

tic counseling, such as Gambler's Anonymous; abstain from all gambling; provide financial information as requested by his Probation Officer; not incur new credit charges or open new lines of credit without approval; and complete 300 hours of community service (Dept. Ex. 3).

3) By letter dated September 22, 1993 the applicant was advised by the Division of Licensing Services that it proposed to deny his application because he had been convicted of a felony and had not obtained an Executive Pardon, Certificate of Relief From Disabilities, or a Certificate of Good Conduct, and because issuance of the license would involve an unreasonable risk to property and the safety or welfare of specific individuals or the general public. He was advised that he could request an administrative review, and by letter dated September 29, 1993 Mr. Edwards requested such a review on the applicant's behalf. By letter dated October 21, 1993 the applicant was advised by Mr. Coyne that after review the Division of Licensing Services still proposed to deny the application, and that the applicant could request a formal hearing. By letter dated November 16, 1993 Mr. Edwards requested such a hearing. Enclosed with that letter was a Certificate of Relief From Disabilities issued by the Hon. William A. Kelly of Rockland County Court on November 15, 1993 (Dept. Ex. 1).

OPINION

I- As the person who requested the hearing, the burden is on the applicant to prove, by substantial evidence, that he is entitled to be licensed as a private investigator. State Administrative Procedure Act (SAPA), §306(1); General Business Law (GBL) §72[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- A license as a private investigator may not be issued to a person who has been convicted of a felony and who has not subsequently been granted an Executive Pardon, a Certificate of Good Conduct, or a Certificate of Relief From Disabilities (GBL §74[2]).

The applicant was granted a Certificate of Relief From Disabilities. There is, however, a question as to the validity of that certificate which must be addressed.

There are two ways in which a Certificate of Relief From Disabilities may be issued. Pursuant to Correction Law §702 a court of this state may issue such a certificate in cases where the

convictions occurred in such court and either imposed a revocable sentence or imposed a sentence other than one of commitment to an institution under the jurisdiction of the Department of Correctional Services. Pursuant to Correction Law §703 the Board of Parole may issue such a certificate where the offender has been committed to an institution under the jurisdiction of the Department of Correction, or where the offender resides within New York State but was convicted by a court of another jurisdiction.

A literal reading of the statutes would lead to the conclusion that since the applicant was convicted in a Federal court, a judge of Rockland County Court did not have jurisdiction to issue a Certificate of Relief From Disabilities to him.

In Da Grossa v Goodman, 72 Misc.2d 806, 339 NYS2d 502 (Supreme Ct. NY County 1972), the Court held that a state court has the authority to issue a Certificate of Relief From Disabilities to an offender who was convicted in a Federal court. At the time of that decision, however, Correction Law §73 did not provide for the issuance of such certificates by the Board of Parole to persons not convicted in New York courts, and the Court based its decision on the proposition that the denial to a person who was convicted in a Federal court of the right to be relieved of disabilities, while granting that right to someone who was convicted in a New York State court, was an unconstitutional denial of equal protection of the law.

Subsequent to the Da Grossa decision, Correction Law §73 was amended to give the Board of Parole the authority to grant Certificates of Relief From Disabilities to persons convicted in courts of other jurisdictions (L. 1974 Ch. 475). That amendment would appear to eliminate any justification for the issuance by a State court of a Certificate of Relief From Disabilities to a person who was convicted in a Federal court. However, in Application of Helmsley, 152 Misc.2d 215, 575 NYS2d 1009 (Supreme Court Ct. NY County 1991), while denying an application for a Certificate of Relief From Disabilities because the petitioner had been sentenced to a definite term of imprisonment, the Court held that where a revocable sentence has been imposed by a Federal court a State court may issue a Certificate of Relief From Disabilities to the offender.

In this case, the applicant was sentenced to a term of probation, which is a revocable sentence. 35 NY Jur2d Criminal Law, §2688. Accordingly, pursuant to the law as formulated by the Court in Helmsley, the Rockland County Court had jurisdiction to issue the Certificate of Relief From Disabilities.

III- In considering whether the license should be granted, it is necessary to consider together the provisions of GBL §72[1], which require that an applicant for a license as a private

investigator establish that he is a person of good character and integrity, and the provisions of Correction law Article 23-A. See, Codelia v Department of State, No. 29114/91 (Supreme Court, NY County, May 19, 1992).

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 §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).

While the issuance of a Certificate Of Relief From Disabilities creates a presumption of rehabilitation, as explained by the Court in Bonacorsa, that presumption is only one factor to be considered along with the eight factors set forth in Correction Law §753[1] in determining whether there is an unreasonable risk or, if a determination has already been made that there is a direct relationship, in the exercise by the agency of its discretion. Hughes v Shaffer, 154 AD2d 467, 546 NYS2d 25 (1989).

"The presumption of rehabilitation which derives from...a certificate of relief from civil disabilities, has the same effect, however, whether the...agency seeks to deny the application pursuant to the direct relationship exception or the unreasonable risk exception. In neither case does the certificate establish a prima facie entitlement to the license. It creates only a presumption of rehabilitation, and although rehabilitation is an important factor to be considered by the agency...in determining whether the license...should be granted (see

§753[1][g]), it is only one of the eight factors to be considered." Bonacorsa, supra, 528 NYS2d at 523.

In determining whether there is a direct relationship between the crime of which the applicant was convicted and a license as a private investigator, it is necessary to consider the fact that "a private investigator serves in a quasi-law enforcement capacity." Codelia v Shaffer, No. 29114/91, slip op. at 7 (Supreme Ct. NY County, May 19, 1992). Accordingly, any crime would appear to be directly related to a license as a private investigator. Matter of the Application of McCurdy, 87 DOS 93.

The direct relationship having been established, it is necessary to consider the factors set forth in Correction Law §753.

The pertinent duties and responsibilities of a private investigator (§753[1][b]), as set forth in GBL §71[1], involve, among other things investigations for the purpose of obtaining information with reference to the commission of crimes. The fact that the applicant was convicted of a crime, and that the crime is directly related to his duties, has a direct bearing on his fitness to perform those duties and to meet those responsibilities (§753[1][c]). The applicant's age of forty years at the time of the commission of the crime (§753[1][e]) indicates a substantial degree of maturity.

Since the crime of which the applicant was convicted was a felony, and carried a sentence of more than six months, it should be deemed serious (§753[1][f]).¹ The legitimate interest of the agency in the protection of the property, safety and welfare of the public (§753[1][h]) must be considered in the light of that seriousness.

The fact that four years have passed since the commission of the crime (§753[1][d]) seem not to be of particular significance. Four years is neither so short as to indicate that there may be an imminent possibility of further criminal activity, nor long enough to assure rehabilitation.

In support of his application, the applicant presented the testimony of five character witnesses (§753[1][g]). Encompassed in the comments of those witnesses, who included an attorney who uses the applicant's professional services and a competitor who stands to gain financially should the applicant be eliminated from the

¹ Guidance in this area can be found in Judiciary Law §90[4]-[d] and People v Bye, 95 Misc.2d 1031, 408 NYS2d 740 (Criminal Ct. Bronx County, 1978), which although not directly applicable to the Correction Law indicate what standards are to be followed in determining whether a crime is "serious."

private investigations business, was testimony to the applicant's good reputation for honesty, to the reliability of his investigations, and to his apparently honest efforts to deal with his gambling problem through attendance at meetings of Gamblers Anonymous. Also submitted, post hearing, was the affidavit of the Hon. William K. Nelson, a judge of the County Court of the County of Rockland, attesting to the applicant's reputation as "an honest, hard working and extremely competent private investigator" (App. Ex. A).

Also tending to support the application is the public policy encouraging the licensure of ex-offenders (§753[1][d]), and the presumption arising out of the Certificate of Relief From Disabilities.

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.

In balancing the factors I have given consideration to the fact that there is no evidence that the respondent was ever guilty of any improper conduct in his activities as an investigator. He appears to be making a sincere effort not to gamble and to thereby avoid the apparent cause of his criminal conduct. In this regard, it is significant that should fail in those efforts he stands to have his probation revoked. Matter of the Application of Moss, 111 DOS 91; Matter of the Application of Moore, 91 DOS 91; Matter of the Application of Holm, 59 DOS 91; Matter of the Application of Rothenberg, 24 DOS 90; Matter of the Application of Holmes, 38 DOS 87.

CONCLUSIONS OF LAW

1) There is a direct relationship between a license as a private investigator and the crime of which the applicant was convicted.

2) The applicant has established that the direct relationship has been attenuated sufficiently, that he is sufficiently trustworthy to be licensed as a private investigator, and the issuance of such a license to him would not pose an unreasonable risk to the property, safety and welfare of the public. GBL §72[1]; SAPA §306(1).

DETERMINATION

WHEREFORE, IT IS HEREBY DETERMINED THAT the application of Murray Bauer for renewal of his license as a private investigator is granted.

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 N. Baldwin
Executive Deputy Secretary of State