

STATE OF NEW YORK
DEPARTMENT OF STATE

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In the Matter of the Application of

JAMES GREENE

DECISION

For 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 March 31, 1994 at the office of the Department of State located at 270 Broadway, New York, New York.

The applicant, of 211 Houston Street, Lindenhurst, New York 11757, was represented by John J. Maguire, Esq., 1983 Marcus Avenue, Suite C-100, Lake Success, New York 11042.

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

ISSUE

The issue before the tribunal is whether the applicant is qualified to be licensed as a private investigator inasmuch as the experience with which he seeks to support his application was obtained as an independent contractor.¹

FINDINGS OF FACT

1) On July 1, 1993 the applicant took and passed the examination for a license as a private investigator. By an undated application, received by the Division of Licensing Services on July 27, 1993, he applied for a license as a private investigator (Dept. Ex. 2).

2) By letter dated December 27, 1993 the Division of Licensing Services advised the applicant that it proposed to deny his application because his claimed experience was obtained as an unlicensed hourly contract employee. By letter dated February 23,

¹ During the course of the hearing the Division of Licensing Services conceded that the applicant's experience is sufficient in quantity and type, and that its sole objection to granting credit is the applicant's status as an independent contractor.

1994 the applicant requested an administrative hearing on the proposed denial, and in response a notice of hearing was served on him by certified mail on March 21, 1994 (Dept. Ex. 1).

3) The experience with which the applicant supports his application was obtained as an independent contractor pursuant to contracts with the Long Island Railroad under which he was paid on an hourly basis (Dept. Ex. 3, 4, 5 and 9).² He received specific assignments from management personnel, to whom he was required to report several times a day by telephone and in periodic written reports. His status as an independent contractor was required by the railroad for its convenience.³ He worked full time for the rail road.

OPINION

I- As the person who requested the hearing, the burden is on the applicant to prove, by substantial evidence, that he has acquired the required experience. 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- General Business Law (GBL) §72 establishes certain experience requirements which must be met by an applicant before a license as a private investigator may be issued:

"Every such applicant for a license as a private investigator shall establish to the satisfaction of the secretary of state...(that he) has been regularly employed , for a period of not less than three years, undertaking such investigations as those described as performed by a private investigator in subdivision one of section seventy-one of this article, as a sheriff, police officer in a city or county police department, or the division of state police, investigator in an agency of the state, county or United States government, or employee of a

² Prior to his work for the Long Island Railroad the applicant was a New York City police officer. There is, however, insufficient evidence in the record to make possible the proper evaluation of the applicant's investigative activities while so employed.

³ The railroad ceased hiring independent contractors to conduct employee investigations in October, 1993, and now uses its own employees.

licensed private investigator, or has had an equivalent position and experience." (emphasis added).

GBL §71(1) defines "private investigator" to

"mean and include the business of private investigator and shall also mean and include, separately or collectively, the making for hire, reward or for any consideration whatsoever, of any investigation for the purpose of obtaining information with reference to any of the following matters...; crime or wrongs done or threatened against the government of the United States of America or any state or territory of the United States of America; the identity, habits, conduct, movements, whereabouts, affiliations, associations, transactions, reputation or character of any person, group of persons, association, organization, society, other groups of persons, firm or corporation; the credibility of witnesses or other persons; the whereabouts of missing persons; the location or recovery of lost or stolen property; the causes and origin of, or responsibility for fires, or libels, or losses, or accidents, or damage or injuries to real property; or the affiliation, connection or relation of any person, firm or corporation with any union, organization, society or association, or with any official, member or representative thereof; or with reference to any person or persons seeking employment in the place of any person or persons who have quit work by reason of any strike; or with reference to the conduct, honesty, efficiency, loyalty or activities of employees, agents, contractors, and sub-contractors; or the securing of evidence to be used before any authorized investigation committee, board of award, board of arbitration, or in the trial of civil or criminal cases."

The applicant has established that he has experience as an independent contractor investigator for the Long Island Railroad. He has not established that he obtained investigative experience while employed by a licensed private investigator or as a sheriff, police officer, or employee of a licensed private investigator, nor is his application supported by a claim of experience or evidence regarding employment as a government investigator. Therefore, for his experience to be used to enable the applicant to be licensed as a private investigator, that experience would have to constitute "equivalent positions and experience" as defined in 19 NYCRR 172.1 as:

"...investigations as to the identity, habits, conduct, movements, whereabouts, affiliations, reputation, character, credit, business or financial responsibility of any person, group of persons, association, organiza-

tion, society, firm or corporation, or as to the origins or responsibility for crimes and offenses, the location or recovery of lost or stolen property, the cause or origin of or responsibility for losses or accidental damage or injury to persons or to real or personal property, or to secure evidence to be used before any authorized investigation committee, board of award, board of arbitration or in the trial of civil or criminal cases including as to the credibility of any witnesses. Such investigations shall be have performed for a period of three years, for an employer, firm, organization or governmental agency, whether subject to the provision of Article 7 of the General Business Law or otherwise, which required such investigations in the course of its regular operations, and which such investigations were conducted on a full-time basis in a position the primary duties of which were to conduct investigations and same comprised the major portion of the applicant's activities therein...."

The Division of Licensing Services has conceded that were it not for his status as an independent contractor the applicant's experience would be acceptable.

"It has been held on several occasions that, inasmuch as unlicensed persons may conduct investigations on behalf of licensed private investigators only when those unlicensed persons are employees of the licensees, and not when they work as independent contractors, experience gained as an unlicensed independent contractor is unlawful and may not be used to qualify for a license as a private investigator. Application of Smith, 121 DOS 92; Application of Green, 13 DOS 90; Department of State v Bernstein, 58 DOS 87. That holding must, however, be applied in the light of the ruling in Gulla v Lomenzo, 344 NYS2d 962, 42 AD2d 592 (1973), which directed that experience credit be granted for work as an independent contractor in a situation where the applicant worked as an investigator for a single employer." Application of Marsico, 16 DOS 93.

In such a situation the applicant has the burden of proving that in spite of the independent contractor status his or her work was regularly and fully supervised. Application of Rogal, 21 DOS 93.

Applying the above standards, the applicant is entitled to full credit for his experience with the Long Island Railroad. Although, as required by the railroad, he had independent contractor tax status, he was actually fully supervised in his full time employment as an investigator. He received specific assignments from management personnel and was required to report to those persons on a regular and frequent basis. There is no evidence that had he been a regular employee he would or should have been subject to a higher level of supervision.

CONCLUSIONS OF LAW

The applicant has met his burden of proving by substantial evidence that he has sufficient experience to qualify for a license as a private investigator, and, accordingly, his application should be granted. SAPA §306[1]; GBL §72.

DETERMINATION

WHEREFORE, IT IS HEREBY DETERMINED THAT the application of James Greene for a 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