

STATE OF NEW YORK  
DEPARTMENT OF STATE

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In the Matter of the Application of

**MARK MC CURDY**

**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 May 27, 1993 at the office of the Department of State located at 270 Broadway, New York, New York.

The applicant, of 1432 Pacific Street, Brooklyn, New York 11216, was represented by Robert P. Sharron, Esq., Frost & Berenholtz, Suite 1008, 225 Broadway, New York, New York 10007.

The Division of Licensing Services was represented by Special Projects Manager Bernard Friend.

**ISSUES**

The issues in the hearing were whether the applicant has established that he has sufficient qualifying experience to be issued a license as a private investigator, and whether, in light of his criminal record and dismissal from the New York City Police Department, he has the integrity and good character required to be so licensed.

**FINDINGS OF FACT**

1) By application dated February 10, 1992 the applicant applied for a license as a private investigator (Dept. Ex. 2). By letter dated June 29, 1992 he was advised by the Division of Licensing Services that it proposed to deny his application for failure to establish that he has sufficient qualifying experience and because his criminal record and dismissal from the New York Police Department reflect a lack of integrity and good character. The applicant requested an administrative review of the proposed denial and, by letter dated December 2, 1992, a formal hearing was requested by his attorneys. In response, a notice of hearing was served on the respondent's attorneys, as they had requested be done in their letter (Dept. Ex. 1).

2) The applicant supports his application with a claim of investigative experience gained while a New York City Police Officer from March 17, 1969 through either May 16 or July 1, 1980 (both dates appear in the record) (Dept. Ex. 11). During that period he was assigned to various units: Tactical Patrol Force, Police Commissioner's Investigation Unit, auto crime, intelligence, and burglary. In those assignments, particularly during the period of 1974 through 1977, his duties included engaging in investigations. However, at the same time he also engaged in non-investigative police duties, and he has failed to offer any evidence to show how much of his time was spent conducting investigations, and how much was spent in patrol and other activities.

The applicant has also offered evidence that he conducted investigations on behalf of his attorneys (App. Ex. E), and on behalf of licensed private investigator Lawrence Frost (App. Ex. F). Again, however, there is no evidence as to the amount of time actually expended on such investigations.

3) On May 8, 1984 the applicant was sentenced to a term of one to eight years imprisonment after conviction on a charge of Assault in the first degree (Penal Law §120.10), arising out of an off duty incident in March, 1977, when he was twenty nine years old, in which the respondent shot his former business partner with his pistol (Dept. Ex. 3). That conviction was the result of a second trial on the charge, his conviction from that first trial, which had resulted in his dismissal from the Police Department, having been reversed on appeal. The second conviction was affirmed on appeal, and the applicant commenced serving his sentence on March 5, 1987 (Dept. Ex. 8). After nine months in prison the applicant was granted parole, and he was granted early release from parole two and one half years later.

On June 10, 1985, when he was thirty seven years old, and while the appeal of his assault conviction was pending, the applicant was arrested on charges of unlawful possession of marijuana (Penal Law §221.05) and criminal impersonation (Penal Law §190.25), in an incident in which the arresting officer alleged that he found a bag of marijuana in the applicant's car and the applicant falsely represented to him that he was a member of the Internal Affairs Division of the Police Department. On December 2, 1985, after a bench trial, the applicant was convicted of both charges and received a sentence of a fine of \$150.00 or ten days in jail (Dept. Ex. 5).

On March 31, 1988 the applicant was granted a certificate of relief from disabilities, relating only to the assault conviction, by the New York State Board of Parole, (Dept. Ex. 4).

Since his dismissal from the Police Department the applicant has been employed as a cab driver, as a stationary salesman, and,

for the last year and a half, as a process server, for which he has a license from the New York City Department of Consumer Affairs (App. Ex. A). He is also commissioned as a notary public (App. Ex. B).

### 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 and is sufficiently trustworthy 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- 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 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's claimed experience has been as a police officer and as an employee both of a law firm and of a licensed private investigator. Therefore, his claimed experience falls within both categories of experience.

"Equivalent positions and experience" is 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, organization, 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 applicant, while presenting evidence that he has obtained investigative experience, has failed to present credible, competent evidence as to the quantity of that experience. While a letter from the Police Department states "Mr. McCurdy gained his three years investigative work by working in special investigative division" (Dept. 11), that statement is merely a conclusion which is unsupported by any details as to the nature of the work or when it occurred. It is also contradicted by the applicant's testimony that at the time he was assigned to the investigative unit he was also assigned to other units. It is impossible, therefore, to reach an conclusion based on the evidence submitted as to the amount of qualifying experience the applicant has.

III- In considering whether the issuance of the license should be affected the applicant's record of criminal convictions, it is necessary to consider together the provisions of GBL §72(1), which requires that an applicant for a license as a private investigator establish his trustworthiness, 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).

In determining whether there is a direct relationship between the crimes for which applicant was convicted and a license as a private investigator it is first necessary to consult the definition of "private investigator" in GBL §71(1), supra, and to bear in mind that private investigators serve in a quasi-law enforcement capacity. Codelia v Department of State, supra.

A private investigator is licensed to investigate and, pursuant to his right to engage in the business of watch, guard or patrol agency (GBL §70[1]), to prevent the commission of crimes (GBL §71[2]). Accordingly, it would appear that there is a direct relationship between any crime and a license as a private investigator. More specifically, it can be seen that the Legislature considered that the crime of assault in the first degree, arising out of the use of a deadly weapon, is directly related to a license as a private investigator, inasmuch as it prohibited the issuance of such a license to persons who have been convicted of illegally using a pistol or other dangerous weapon and who have not received certificates of relief from disabilities. The crime of criminal impersonation of which the applicant was convicted is directly related to the GBL §84(1) prohibition against a private investigator representing that he has official police status.

The direct relationship having been established, it is necessary to consider the factors set forth in Correction Law section 753. The pertinent duties and responsibilities of a private investigator (§753[1][b]) have already been discussed in regards to the question of the existence of a direct relationship. The fact that the applicant was convicted of crimes directly related to those duties has a direct bearing on his fitness to perform those duties and to meet those responsibilities (§753[1][c-]). The applicant's age at the time of the commission of the crimes (§753[1][e]), twenty nine and thirty seven, and his having been a police officer, indicates a substantial degree of maturity.

The seriousness of two of three of the convictions (§753[1][f]) is evident from the fact that the Legislature has seen fit to make one of the elements of the assault conviction, illegally using a dangerous weapon, an automatic bar to licensure, and has singled out as a prohibited act false representation of official police status, for which conduct the applicant was convicted of criminal

impersonation.<sup>1</sup> That must be considered in the light of the legitimate interest of the agency in the protection of the property, safety and welfare of the public (§753[1][h]).

The preceding factors must be weighed against the fact that sixteen years have passed since the assault and eight years have passed since the criminal impersonation and marijuana offenses (§753[1][d]). Also to be considered are the applicant's early parole and the early termination of that parole, the affidavits submitted which attest to the applicant's character (§753[1][g]), the certificate of relief from disabilities with regards to the assault conviction, and the public policy encouraging the licensure of ex-offenders (§753[1][a]). Because of the quasi-law enforcement nature of a private investigator's status and the high standard of trustworthiness which that entails, the fact that he has been issued a license as a process server and a commission as a notary public is not significant. Codelia v Department of State, supra.

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 am particularly concerned by the fact that his conviction for the assault arose out of the applicant's conduct while he was a police officer, albeit off duty, and that while his appeal from that conviction was pending he engaged in further criminal behavior. I am also concerned that most of his employment after leaving the Police Department did not involve the type of responsibility and implied authority that accompanies a license as a private investigator, and, therefore, carries little weight in demonstrating his rehabilitation.

It should be noted that there is nothing in the applicant's record which would bar him from conducting investigations as an employee and under the supervision of a licensed private investigator. Such employment would serve two purposes. First, it would enable the applicant to gain three years of documentable qualifying

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<sup>1</sup> I have not taken into consideration the applicant's denials of his guilt in the various criminal matters. In both cases he was convicted after a trial by a court of competent jurisdiction. In the case of the assault, the conviction was sustained on appeal, while in the case of the other conviction the applicant, for whatever reason, did not chose to appeal. The matters are res judicata, and the applicant cannot be heard to attack them collaterally in this forum.



experience and, second, it would enable him to demonstrate his trustworthiness.

**CONCLUSIONS OF LAW**

1) The applicant has failed to establish by substantial evidence that he has sufficient experience to qualify for a license as a private investigator. GBL §72(1); SAPA §306(1).

2) There is a direct relationship between the offenses of which the applicant was convicted and the duties imposed by law upon a private investigator. After having given due consideration to the factors set forth in Correction Law §753, it is concluded that the applicant has not established that the direct relationship has been attenuated sufficiently and that he is sufficiently trustworthy to be licensed as a private investigator, and that the issuance of such a license to him would 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 Mark McCurdy for a license as a private investigator is denied, without prejudice to his re-applying at a future date.

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