

STATE OF NEW YORK
DEPARTMENT OF STATE

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In the Matter of the Application of

RONALD ROGAL

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 3, 1993 at the office of the Department of State located at 270 Broadway, New York, New York.

The applicant, of 41 Euclid Avenue, Dix Hills, New York 11746, having been advised of his right to be represented by an attorney, appeared pro se.

The Division of Licensing Services was represented by District Manager Michael Coyne.

ISSUE

The issue before the tribunal is whether the applicant has sufficient qualifying experience to be licensed as a private investigator. Specifically, it is alleged by the Division of Licensing Services that the experience submitted by the applicant was obtained as an unlicensed independent contractor and is not, therefore, qualifying.

FINDINGS OF FACT

1) By application dated July 1, 1991 the applicant applied for a license as a private investigator (Dept. Ex. 2). By letter dated April 14, 1992 he was advised by the Division of Licensing Services that it proposed not to grant him any experience credit and to deny his application because "(a)pplicant worked as an independent contractor which is not qualifying," but that he could request an administrative review. Apparently such a review was requested and undertaken, as in an undated letter received by the Division of Licensing Services on July 15, 1992 the applicant made reference to a letter of June 11, 1992 and requested a hearing on his application (Dept. Ex. 1).

2) The applicant bases his application on the following experience:

a) September 25, 1975 through July 14, 1978. Consolidated Mutual Insurance Company. Claims investigator (Dept. Ex. 11, App. Ex. A). No evidence presented as to his employment status, i.e. employee or independent contractor.

b) July 24, 1978 to February 10, 1981. Crum & Forster Insurance Co. Claims supervisor. Supervised and reviewed the work of four insurance investigators. Status was that of an employee (Dept. Ex. 7, App. Ex. B, D, and E).

c) February 1981 through January, 1983. Commercial Union Insurance Companies. Claims supervisor and senior adjuster. Supervised and reviewed the work of four insurance investigators. Status was that of an employee (Dept. Ex. 9, App. Ex. F).

d) October 17, 1983 to August 29, 1984. American International Group, Inc. Claims adjuster (Dept. Ex. 10, App. Ex. H). No evidence presented as to his employment status, i.e. employee or independent contractor.

e) July, 1989 to February, 1990. Claim & Risk Control, Inc., a licensed independent insurance adjuster. Claims adjuster. Duties involved conducting of investigations into the circumstances underlying insurance claims. Status was that of an employee (Dept. Ex. 12).

f) 1985 (month not stated) to date of application. Long Island Investigation Service Inc., a licensed private investigator. Investigator. Status was that of employee at hiring, but then changed as of 1986 to that of independent contractor (Dept. Ex. 6).

g) March 27, 1991 to date of application. Long Island Railroad. Investigator. Hired as an independent contractor pursuant to "a fixed rate Contract to provide observations and testing services...." (Dept. Ex. 6).

OPINION

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).

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."

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."

"Equivalent positions and experience" are 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...."

Pursuant to 19 NYCRR 172.1, up to two years' experience supervising and reviewing the work of at least three investigators may be applied toward the three year requirement.

"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.

However, 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 by the licensee. Otherwise, unlicensed persons will be readily able, through the mechanism of what amounts to the availing by a licensee of the use of his or her licensee to the unlicensed individual, to engage in conduct for which they should be licensed. Cf., Application of Kavan, 49 DOS 91.

Applying the above standards to the experience claimed by the respondent results in the following conclusions:

a) Consolidated Mutual Insurance Company. Inasmuch as the applicant has not meet his burden of establishing what his employment status was, no credit can be granted.

b) Crum and Forster Insurance Co. The applicant is entitled to the maximum credit of two years for this supervisory experience.¹

c) Commercial Union Insurance Companies. No additional credit can be granted for this supervisory experience as to do so would be to exceed the limit set by 19 NYCRR 172.1.

d) American International Group, Inc. Inasmuch as the applicant has not meet his burden of establishing what his employment status was, no credit can be granted.

e) Claim & Risk Control, Inc. The applicant is entitled to eight months credit for his work as an investigator with the status of an employee.

f) Long Island Investigation Service, Inc. The applicant has not offered sufficient evidence as to specifically when this employment commenced and how long his status was that of an employee, and has failed, therefore, to meet his burden of establishing how much credit might be granted for that period of employment. With regards to the subsequent period during which he was an independent contractor, the applicant has offered no

¹ Since the notice of proposed license denial which was sent to the applicant by the Division of Licensing Services raised only the question of independent contractor status, and did not dispute or question the nature and amount of experience claimed, that is not an issue here. An applicant has the right to be informed of the issues which are to be addressed in a hearing on his or her application. Therefore, the failure to raise the question of the nature or amount of experience prior to the hearing is to be considered an implicit admission by the Division of Licensing Services that were it not for the claim that the experience was gained as an independent contractor that experience could properly be applied as qualifying experience.

evidence to show that his work was sufficiently supervised by the licensee to enable him to receive credit for that work. Therefore, no credit may be granted.

g) Long Island Railroad. The applicant worked as an independent contractor conducting investigations for a paying client, exactly what a licensed private investigator does and is licensed for. Therefore, this conduct was unlawful and cannot be granted experience credit.

CONCLUSIONS OF LAW

The applicant has established that he is entitled to credit for two years and eight months of qualifying experience, and has not, therefore, met his burden of establishing that he has three years of qualifying experience. His application should be denied. GBL §72; SAPA §306(1).

DETERMINATION

WHEREFORE, IT IS HEREBY DETERMINED THAT, pursuant to General Business Law §§72 and 79, the application of Ronald Rogal for a license as a private investigator 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:

GAIL S. SHAFFER
Secretary of State
By:

James N. Baldwin
Executive Deputy Secretary of State