

STATE OF NEW YORK
DEPARTMENT OF STATE
OFFICE OF ADMINISTRATIVE HEARINGS

-----X

In the Matter of the Application of

GARY ZIMMER

DECISION

For a License as a Watch, Guard or
Agency

Patrol

-----X

The above noted matter came on for hearing before the undersigned, Roger Schneier, on October 28, 1999 at the office of the Department of State located at 123 William Street, New York, New York.

The applicant was present and was represented by Michael Buchiccio, Esq., 1937 Williamsbridge Road, Bronx, New York 10461.

The Division of Licensing Services (hereinafter "DLS") was represented by Legal Assistant II Thomas Napierski.

ISSUE

The issue before the tribunal is whether the applicant should be denied licensure as a watch, guard or patrol agency because of a prior criminal conviction.

FINDINGS OF FACT

1) By application received on June 21, 1999 the applicant applied for a license as a watch, guard or patrol agency as qualifying officer of Lion Security, Inc., answering "yes" to question number 10: "Have you ever been convicted of any criminal offense in this state or elsewhere or has any license, permit, commission, registration or application for a license, permit, commission, or registration held by or submitted by you or a company in which you are or were a principal ever been revoked, suspended or denied by any state, territory or governmental jurisdiction or foreign country for any reason?" (State's Ex. 2).

2) On April 3, 1994 the applicant was convicted on his guilty plea to a charge of Assault With Intent To Cause Physical Injury, Penal Law §120.00, a class A misdemeanor, and was sentenced to 3 years probation (State's Ex. 4 and 5). The plea was in satisfaction of an indictment charging him with Burglary in the 2nd degree (3 counts), Criminal Use of a Firearm in the 2nd degree, Burglary in the 3rd degree, Assault in the 2nd degree, Criminal Mischief in the 2nd degree, and Unlawful Imprisonment in the 2nd degree committed on January 25, 1994 (State's Ex. 3).

3) The applicant was approximately 31 years old at the time of the commission of the crime.

4) The applicant was granted a Certificate of Relief From Disabilities on June 8, 1999 (State's Ex. 2).

5) The conviction arose out of the following facts:

The applicant accompanied his brother to the home of a person with whom the brother was engaged in some sort of business dealings. A fight between the brother and that person ensued. The applicant separated the combatants, and then he and his brother left. After his arrest and indictment there were plea negotiations. The District Attorney insisted that for either the applicant or his brother to avoid trial they would both have to plead guilty. According to the applicant, having been assured that he would not be sentenced to incarceration or to the payment of a fine, he pled guilty to the misdemeanor so that his brother, who pled guilty to a felony, could avoid the possibility of a conviction after trial which would result in a mandatory jail sentence for him.

6) The applicant has been employed as Director of Operations of Tristar Patrol Service, a company owned by his family, since December, 1996. In that position he supervises security management personnel, monitors job sites, disciplines and directs security personnel, and deals with clients (State's Ex. 2). He is responsible for overseeing the security of fifty Kmart stores, including the possession of alarm and security codes for all of the stores and overseeing the movement of monies, for supervising security patrols at an eighty acre shopping plaza operated by Prestige Properties & Development Co. Inc., and for providing uniformed security services for more than forty Pathmark stores, and has performed to the great satisfaction of those companies (State's Ex. 2, App. Ex. A).

The applicant was employed by the Port Authority of New York and New Jersey as a police officer from May, 1992 until November, 1994, when he resigned because of his guilty plea, and prior to that as a peace officer at Co-op City. He was never the subject of any disciplinary action in either of those jobs.

7) By letter dated July 20, 1999 the applicant was advised by DLS that it proposed to deny his application because his "conviction, actions and circumstances underlying said conviction indicates lack of good character and trustworthiness for licensure," and that he could request an administrative hearing, which he did by letter dated July 26, 1999. By letter dated August 5, 1999 the reason for the proposed denial was amended to add the caveat: "Applicant was convicted of a disqualifying offense. Certificate of Relief From Disabilities/Good Conduct NOT submitted," and by letter dated August 9, 1999 the applicant forwarded his Certificate of Relief From Disabilities and pointed out, correctly, that he had previously supplied DLS with a copy of it. The matter was referred to this tribunal on August 27, 1999 and, accordingly, a notice of hearing was served by certified mail addressed to the applicant at the address on his application and delivered on September 10, 1999 (State's 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 watch, guard or patrol agency. State Administrative Procedure Act (SAPA), §306(1); General Business Law (GBL) §§72 and 74. 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- In considering whether the license should be granted, it is necessary to consider, together with the provisions of General Business Law Article 7, the provisions of Correction Law Article 23-A. *Codelia v Department of State*, 29114/91, Supreme Court, NY County, 5/19/92.

Correction Law Article 23-A 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 watch, guard, or patrol agency, it is first necessary to consult the definition in GBL §71[2], and to take note that a watch, guard or patrol agency serves in a quasi-law enforcement capacity, *cf.*

Codelia v Department of State, supra, and that, therefore, any crime would appear to be related to a license as a watch, guard or patrol agency. *Matter of the Application of McCurdy*, 87 DOS 93. With regards to the applicant's conviction, it is noted that the services of a watch, guard or patrol agency include the protection of persons (GBL §71[2]).

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 watch, guard or patrol agency (§753[1][b]) have already been discussed in regards to the question of direct relationship. The fact that the applicant was convicted of a crime directly related to those duties has a direct bearing on his fitness to perform those duties and to meet those responsibilities (§753[1][c]).

Almost six years have passed since the commission of the crime (§753[1][d]), which occurred when the applicant was approximately 31 years old (§753[1][e]), and, therefore, presumably sufficiently mature to appreciate the seriousness of his conduct.

The crime was a misdemeanor, and therefore, not as serious as a felony (§753[1][f]).

In the applicant's favor are the public policy of encouraging licensure of ex-offenders (§753[1][a]), and the issuance to him of a Certificate of Relief From Disabilities (§753[2]).

All of the above must be considered in the light of the legitimate interest of DLS in the protection of the safety and welfare of the public (§753[1][h]).

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.

DLS has presented no reason for the denial of the application other than the applicant's single conviction. Nothing was presented to rebut his testimony that his arrest arose out of his being with his brother when that brother got into a fight, and that his guilty plea was the result of a deal that he made to help keep his brother out of prison. He has a record of employment in law enforcement prior to the conviction with no indication that he was subject to any disciplinary action, and has submitted glowing references from corporations for which he has provided security services in his current employment. Under these particular circumstances, the conviction should not serve as an impediment to the applicant's licensure.

CONCLUSIONS OF LAW

After having given due consideration to the factors set forth in Correction Law §753 and to the requirements of GBL §§72 and 74,

and having weighed the rights of the applicant against the rights and interests of the general public, it is concluded both that the applicant has established that the direct relationship between his conviction and a license as a watch, guard or patrol agency has been attenuated sufficiently, and that he possesses the requisite good character and integrity to be licensed as a watch, guard or patrol agency.

DETERMINATION

WHEREFORE, IT IS HEREBY DETERMINED THAT the application of Gary Zimmer for a license as a watch, guard or patrol agency is granted.

Roger Schneier
Administrative Law Judge

Dated: November 29, 1999