

STATE OF NEW YORK
DEPARTMENT OF STATE
OFFICE OF ADMINISTRATIVE HEARINGS

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In the Matter of the Application of

RONALD ALVAREZ

DECISION

For a License as a Barber

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The above noted matter came on for hearing before the undersigned, Roger Schneier, on December 22, 1999 at the office of the Department of State located at 41 State Street, Albany, New York.

The applicant, who is currently incarcerated at the Sullivan Correctional Facility, was not present. By letter dated November 29, 1999 he had requested that he be assigned counsel and that the tribunal issue an order to produce so that he could appear at the hearing. In response, by letter dated December 8, 1999, I advised him that those requests could not be granted, and that he could either appear himself or by a representative, or that he could submit evidence and written argument "including an explanation of the facts underlying any criminal conviction and any evidence of rehabilitation, prior to the hearing...." (State's Ex. 1). In response he made a submission (App. Ex. A), which although it was not received by the tribunal until after the hearing, having been mailed to Albany rather than to the tribunal's New York City address as directed, has been placed in evidence and considered.

The Division of Licensing Services (hereinafter "DLS") was represented by License Investigator III Richard Drew.

ISSUE

The issue before the tribunal is whether the applicant should be denied a license as a barber because his criminal conviction, and the actions and circumstances underling that conviction, indicate a lack of good character and trustworthiness for licensure.

FINDINGS OF FACT

1) By application received on July 6, 1999 the applicant applied for a license as a barber, answering "yes" to question number 6: "Have you ever been convicted of a crime or offense...in this state or elsewhere...?" (State's Ex. 3).

2) On May 16, 1991 the applicant, who at the time was approximately 48 years old, was convicted of Robbery in the 1st degree on his guilty plea in satisfaction of a 1989 indictment for Attempted Murder in the 1st degree, and was sentenced to a term of 6 to 18 years in prison (State's Ex. 3).

3) The applicant has been denied parole once, and is entitled to another parole hearing in March, 2001, which is now his earliest possible date of release (State's Ex. 4).

4) By letter dated September 16, 1999 the applicant was advised by DLS that it proposed to deny his application because "(A)pplicant's conviction, actions and circumstances underlying said conviction indicates lack of good character and trustworthiness required for licensure," and that he could request a hearing, which he did by letter dated September 20, 1999. Accordingly, the matter having been referred to this tribunal on November 10, 1999, notice of hearing was served on the applicant by certified mail delivered on November 22, 1999 (State's Ex. 2).

5) As an inmate, the applicant has worked as a barber in the Woodbourne and Sullivan Correctional Facilities for a total of between 4 and 5 years. He has earned 28 credits in a program administered by Marist College, has participated in the Aggression Replacement Training program, has been certified as an H.I.V, Drug Therapy and Peer Counselor, as an Inmate Peer Aide, and as an assistant teaching volunteer, and for Alcohol and Substance Abuse therapy, and is a volunteer fire fighter. He has been President and Vice-President of "the cultural progress for substance abuse and hispanic culture" (App. Ex. A).

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 barber. General Business Law (GBL) §434; 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- Pursuant to GBL §434, an applicant for a license as a barber must establish to the satisfaction of the Secretary of State that he or she is of sufficiently good moral character to be so licensed. Since pursuant to GBL §441[9] the license of a barber who has been convicted of a crime of moral turpitude may be revoked, such a conviction, as for Robbery in the 1st degree, a crime involving the use or threat of violence (Penal Law §160.15), should be considered in determining the moral character of an applicant.

In considering whether the license should be granted, it is necessary to consider, together with the provisions of GBL Article 28, the provisions of Correction Law Article 23-A, which 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 crime relied upon by DLS in considering the applicant's character and fitness, and licensure as a barber, it is first necessary to consider the functions and duties of barbers, all of which involve the provision of personal services while in close physical contact with customers, often with the use of sharp and potentially dangerous instruments (GBL §431). There is a direct relationship between the respondent's conviction Robbery in the 1st degree and a license as a barber.

There being a direct relationship, it is necessary to consider the factors set forth in Correction Law §753.

The pertinent duties and responsibilities of a barber (§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 creates a negative inference regarding his fitness to perform those duties and to meet those responsibilities (§753[1][c]).

At least 10 years have passed since the commission of the crime (§753[1][d]).

There is no direct evidence in the record as to the age of the applicant at the time of the commission of the crime (§753[1][e]), but it is fair to infer that he was approximately 46 years old, his age at the time of his indictment.

The degree of seriousness of the crime (§753[1][f]) is indicated by the fact that it was a class B felony.

In the applicant's favor are the public policy of encouraging licensure of ex-offenders (§753[1][a]). In addition, his history of barbering while incarcerated, and his participation in various self improvement programs, weighs in his favor (§753[1][g]).

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.

The applicant has been convicted of a very serious crime. While he has submitted some evidence of rehabilitation, he has not responded to the tribunal's request for an explanation of the facts underlying the crime. The fact that he was denied parole on his first appearance before the parole board indicates that the authorities having the most direct contact with him are not yet convinced that he has been fully rehabilitated, and there is no evidence before the tribunal that he has been granted a Certificate of Relief From Disabilities or a Certificate of Good Conduct.

CONCLUSIONS OF LAW

After having given due consideration to the factors set forth in Correction Law §753 and to the requirements of GBL Article 28, and having weighed the rights of the applicant against the rights and interests of the general public, it is concluded that the applicant has not established either that the direct relationship between his conviction and a license as a barber has been sufficiently attenuated or that he is of sufficiently good moral character to warrant the issuance to him of a license as a barber.

DETERMINATION

WHEREFORE, IT IS HEREBY DETERMINED THAT the application of Ronald Alvarez for a license as a barber is denied.

Roger Schneier
Administrative Law Judge

Dated: December 28, 1999