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STATE OF NEW YORK
DEPARTMENT OF STATE

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In the Matter of the Application of

ANDREW T. OSTER DECISION

For a License to Practice Barbering

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This matter came on for hearing before the undersigned, Roger Schneier, on July 11, 1995 at the office of the Department of State located at 270 Broadway, New York, New York.

The applicant, of 62-66 60th Road, Maspeth, New York 11378, was represented by Henri Shawn, Esq., Baum & Shawn, 285 Broadway, P.O. Box 1438, Monticello, New York 12701-5105.

The Division of Licensing Services (DLS) was represented by Compliance Officer Michael Coyne.

ISSUE

The issue before the tribunal is whether the applicant should be denied renewal of his license to engage in the practice of barbering because of his conviction of the crime sexual abuse, 2nd degree.

FINDINGS OF FACT

1) By application dated August 4, 1994 the applicant applied for renewal of his license to engage in the practice of barbering, which was to expire on August 31, 1994. He answered "yes" in response to question #1: "Since last renewal, were you convicted of a crime (not a minor traffic violation), or had a license, permit, commission or registration denied, suspended or revoked in this state or elsewhere?" (State's Ex. 2).

2) On April 26, 1994 the applicant pled guilty to a charge of sexual abuse, 2nd degree, a class A misdemeanor, in the Town Court of Guilford, New York, in response to an appearance ticket issued on June 10, 1993 (State's Ex. 3). At the time of his commission of the crime the applicant was fifty two years old.

The charges arose out of the applicant's rubbing against and touching, through clothing, the sexual parts of a twelve year old boy who was receiving, or had just received, a haircut from the applicant in the applicant's barber shop. The applicant had previously engaged in a series of approximately ten incidents in his barber shop in which he had

oral and anal intercourse with a thirteen or fourteen year old boy. Those events did not result in an arrest.

At the time of his plea the applicant was granted a Certificate of Relief From Disabilities by the presiding Town Justice (State's Ex. 3).

3) By letter dated February 8, 1995 the applicant was advised by DLS that it proposed to deny his application because of his conviction, and that he could request an administrative review. By letter dated March 14, 1995 Mr. Shawn, acting on behalf of the applicant, requested such a review, and by letter dated May 3, 1995 the applicant was advised that DLS continued to propose to deny the application. By letter dated May 19, 1995 Mr. Shawn requested a hearing on the denial and, accordingly, notice of hearing was served on the applicant by certified mail on June 24, 1995 (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 to engage in the practice of barbering. General Business Law §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- GBL §441[9] provides that a license to engage in the practice of barbering may be revoked if the licensee has been convicted of any crime or offense involving moral turpitude. Certainly, if a license may be revoked after conviction of such a crime, its renewal may be denied for the same reason.

The applicant has conceded, through his counsel, that the crime of which he was convicted is a crime involving moral turpitude. However, in considering whether the license should be renewed, it is necessary to consider together GBL §441[9], 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).

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.

Correction Law §750[3] provides that there is a direct relationship between criminal conduct and a particular license where that conduct has a direct bearing on the applicant's fitness or ability to perform one or more of the duties necessarily related to the license. The applicant was convicted of engaging in sexual abuse of a customer who was in his barber shop for a haircut. The duties of a barber include, among other things, the cutting of hair, GBL §431[4][a], which includes the giving of haircuts to young boys. Since, it cannot be disputed, the cutting of hair requires close contact between the barber and the customer, the applicant's criminal conduct clearly bears directly on his fitness to perform the duties of a barber.

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 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 has direct bearing on

his fitness to perform the duties and to meet the responsibilities of a barber (§753[1][c]).

Only two years have passed since the occurrence of the crime (§753[1][d]), and at the time of the crime the applicant was fifty two years old (§753[1][e]).

While denominated a misdemeanor, the crime, being one of moral turpitude, was serious (§753[1][f]). That seriousness is highlighted by the applicant's contention that his conduct arose out of psychological problems connected with having been sexually molested as a child, an indication of the effect that the commission of such a crime can have on a child.

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 public policy of encouraging the licensure of ex-offenders (§753[1][a], and the Certificate of Relief From Disabilities (§753[2]),[1] are both factors weighing in the applicant's favor, as is the fact that he has undergone, and continues to undergo, psychological therapy[2] and attends counseling sessions at his church (§753[1][g].

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.

It is not the purpose of this proceeding to determine whether sanctions should be imposed on the applicant. That has already been dealt with by the Town Court. For that reason, the applicant's reliance on Griffith v Aponte, 123 AD2d 260, 506 NYS2d 167 (1986), in which the Court found that a fine of $8,050.00 and revocation of a process server's license was excessive, is misplaced. Rather, this tribunal must determine whether the protection of public safety and welfare is consonant with the

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[1] The affidavit by Justice Kathleen Anderson regarding her motivation in issuing the Certificate of Relief From Disabilities does not increase the value of that certificate. Presumably, a judge will not issue a Certificate of Relief without first believing that such issuance if fully justified.

[2] The applicant's psychologist testified that she would be "shocked" if the applicant ever engaged in pedophilia again (trans. p 69). The credibility of that testimony is greatly undermined, however, by the fact that she has treated only one other pedophile, and by her inabilitiy to give any statistics regarding the success rate of her type of therapy with patients like the applicant.

renewal of the applicant's license as a barber. A denial of the application because of a negative finding is no more a punishment than would be a denial had the applicant failed the licensing examination. What is at issue is nothing more or less than the fundamental question of whether the applicant is qualified to be licensed.

The applicant sexually abused a young boy who was in his shop for a haircut. It was not a single, isolated incident. The applicant had previously engaged in deviate sexual intercourse in his barber shop with another young boy. According to the evidence offered by the applicant, his conduct appears to have been the result of deep seated psychological problems engendered by abuse during his childhood. While the tribunal certainly sympathizes with the applicant's plight, the evidence is simply insufficient to support a conclusion that in the future he can be trusted to control the urges that lead him to engage in sexual abuse.

Counsel for the applicant argues that the applicant can be trusted because he knows that he will be imprisoned if he violates his probation. However, no evidence was offered to show how strong a disincentive such a threat is where the motivation for the applicant's conduct is so deep seated. In any case, the probation will terminate in less than two years, while the license, if granted, would be renewable for life.

Counsel also contends that the matter can be dealt with by issuing the applicant a restricted license, pursuant to which he could work only under supervision.[3] There is no provision in the licensing law which would allow for the placing of such restrictions on a barber's license. K.C.B Bakeries, Inc. v Butcher, 114 AD2d 894, 535 NYS2d 212 (1988), cited by the applicant, does not support of the proposition that such restrictions are possible herein. In that case the Department of Agriculture and Markets had placed a restriction on a bakery's kosher license, pursuant to which restriction the licensee was required to sever all ties with an officer who had been convicted of offering a bribe to an inspector. The Court held that under Agriculture and Markets Law §251-z-3, which provides that an applicant must furnish evidence of his good character, such a restriction was proper. In other words, the Court held that so long as the corporation had an officer who had attempted to bribe an inspector it could not establish it's good character. That is far different from saying that issuance of a license to an individual may be conditioned on his being subject to personal supervision. In any case, supervision in the barber shop would in no way interfere with the applicant's making the acquaintance of boys in the shop and then using that acquaintanceship to facilitate subsequent sexual abuse.

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[3] The offending conduct occurred in the one person barber shop that the applicant operated in his home in Chenango County.

CONCLUSIONS OF LAW

After having given due consideration to the factors set forth in Correction Law §753, 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 that the direct relationship between his conviction and a license to engage in the practice of barbering has been attenuated sufficiently; and that the issuance of such a license would involve an unreasonable risk to the safety and welfare of the public.

DETERMINATION

WHEREFORE, IT IS HEREBY DETERMINED THAT the application of Andrew T. Oster for renewal of his license to engage in the practice of barbering 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:

ALEXANDER F. TREADWELL
Secretary of State
By:

Michael E. Stafford, Esq.
Chief Counsel