

STATE OF NEW YORK  
DEPARTMENT OF STATE  
OFFICE OF ADMINISTRATIVE HEARINGS

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In the Matter of the Application of

**THEODORE CIPOLLA**

**DECISION**

For a License to Engage in the  
Practice of Cosmetology

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The above noted matter came on for hearing before the undersigned, Roger Schneier, on September 17, 1997 at the New York State Office Building located at 65 Court Street, Buffalo, New York.

The applicant, of 103 Baker Street, Webster, New York 14580, having been advised of his right to be represented by an attorney, chose to represent himself.

The Division of Licensing Services (hereinafter "DLS") was represented by District Manager Marcia Reinagel.

**ISSUE**

The issue before the tribunal is whether the applicant should be denied licensure to engage in the practice of cosmetology because of his record of criminal convictions.

**FINDINGS OF FACT**

1) By application dated February 1, 1997 the applicant applied for a license to engage in the practice of cosmetology, answering "yes" to the question "(h)ave you ever been convicted of a crime or offense...in this state or elsewhere...?"(State's Ex. 2).

2) The respondent has the following record of criminal convictions in the states of California and Florida, all of which convictions occurred when he was over twenty-nine years old (State's Ex. 2):

9/8/87--Sale of a Controlled Substance;

8/31/89--Driving While Under the Influence;

11/20/92--Resisting Arrest Without Violence;

11/7/95--Purchase of Cocaine, Possession of Cannabis (2 counts), Disorderly Intoxication, and Resisting Arrest Without Violence.

The convictions arose out of a drug and alcohol problem. The applicant claims to have been "clean and sober since my last altercation with the law" (transcript p.8, lines 22-23), and to have attended Alcoholics Anonymous. He is not, however, currently participating in any rehabilitation program.

3) By letter dated April 14, 1997 the applicant was advised by DLS that it proposed to deny his application because of his criminal convictions, and that he could request an administrative review, which he did on May 12, 1997. By letter dated June 10, 1997 he was advised by DLS that it continued to propose to deny the application, and that he could request a hearing, which he did by letter received on July 15, 1997. Accordingly, notice of hearing was served on him by certified mail delivered on July 31, 1997 (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 fit to be licensed to engage in the practice of cosmetology. General Business Law (GBL) §406; 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 §410 provides that a license to engage in the practice of cosmetology may be revoked if the licensee has demonstrated untrustworthiness. Certainly, if a license may be revoked upon a showing of untrustworthiness, its original issuance may be denied for the same reason.

In considering whether the license should be granted, it is necessary to consider together GBL §406, 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).

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 among other things, crimes involving and/or arising out of the possession and/or use of cocaine and cannabis. The duties of a cosmetologist include, among other things, the use on customers of sharp instruments and dyes and reactive chemicals. GBL §400. Since, it cannot be disputed, the use of cocaine and/or cannabis can strongly impact on a person's reason and coordination, the applicant's criminal conduct clearly bears directly on his fitness and trustworthiness to perform the duties of a cosmetologist.

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

Only two years have passed since the last conviction (§753[1][d]), and at the time of the crime the applicant was nearly thirty-eight years old (§753[1][e]).

As most of the crimes involved unlawful illegal drugs the crimes were serious (§753[1][f]).

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]) is a factor weighing in the applicant's favor, as is the fact that, at some time, he attended Alcoholics Anonymous (§753[1][g]).<sup>1</sup>

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<sup>1</sup> The applicant was selected an "Outstanding Man of America for 1987." That award precedes at least some of the convictions and, therefore, is not relevant to the issuance of the applicant's  
(continued...)

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.

Just over two years ago the applicant was convicted of crimes arising out of conduct directly related to his fitness and trustworthiness to engage in the practice of cosmetology. While he has attended some sessions of Alcoholics Anonymous, he is not currently participating in any program of rehabilitation. Under these circumstances, and considering the obligation of the Department of State to take steps to protect the consuming public from harm at the hands of unfit and untrustworthy cosmetologists, it is not possible at this time to say that there is a sufficient support for a conclusion that the applicant can be relied upon to avoid the use illegal and/or intoxicating drugs while working.

#### **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 convictions and a license to engage in the practice of cosmetology has been attenuated sufficiently and that he is now fit and trustworthy to engage in such practice; 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, pursuant to General Business Law §411, application of Theodore Cipolla for a license to engage in the practice of cosmetology is denied.

Roger Schneier  
Administrative Law Judge

Dated: October 24, 1997

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<sup>1</sup>(...continued)  
rehabilitation.