

STATE OF NEW YORK
DEPARTMENT OF STATE
OFFICE OF ADMINISTRATIVE HEARINGS

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In the Matter of the Application of

MARION A. MARSTON

DECISION

For a Renewal of a License as a
Cosmetologist

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The above noted matter came on for hearing before the undersigned, Roger Schneier, on April 25, 2000 at the New York State Office Building located at 65 Court Street, Buffalo, New York.

The applicant, having been advised of her right to be represented by an attorney, chose to represent herself.

The Division of Licensing Services (hereinafter "DLS") was represented Assistant Litigation Counsel Scott NeJame.

ISSUE

The issue before the tribunal is whether the applicant should be denied renewal of his license to engage in the practice of cosmetology because she has been convicted of a crime.

FINDINGS OF FACT

1) By application received on October 6, 1999 the applicant applied to renew her license to engage in the practice of cosmetology which was due to expire on that same day (State's Ex. 2 and 3).

2) On April 17, 1998 the applicant plead guilty to a charge of Criminal Possession of a Weapon in the 3rd degree, Penal Law §265.02, a class D felony, and on June 8, 1998 she received a sentence of time served plus five years probation (State's Ex. 2).

3) At the time of the commission of the crime the applicant was approximately 29 years old.

4) The applicant was granted a Certificate of Relief From Disabilities on March 23, 2000 (App. Ex. A).

5) The plea arose out of an incident in her home in which the applicant had pointed an unregistered, unloaded gun at her physically abusive then husband.

OPINION

I- As the person who requested the hearing, the burden is on the applicant to prove, by substantial evidence, that she is entitled to be licensed as a cosmetologist. 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 General Business Law (GBL) §406, an applicant for a license as a cosmetologist must establish to the satisfaction of the Secretary of State his or her fitness to be so licensed. Since pursuant to GBL §410[1][f] the license of a cosmetologist who has been convicted of Criminal Possession of a Weapon in the 3rd degree may be revoked, such a conviction should be considered in determining that fitness.

In considering whether the license should be granted, it is necessary to consider, together with the provisions of GBL Article 27, 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.

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.

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 crimes relied upon by DLS in considering the applicant's character and fitness, and licensure as a cosmetologist, it is first necessary to consider the functions and duties of cosmetologists, all of which involve the provision of personal services while in close physical contact with customers. Since Criminal Possession of a Weapon in the 3rd degree is listed in the statute as ground for revocation of a cosmetology license, I conclude that there is a direct relationship between the respondent's conviction for that crime and the license applied for.

As there is a direct relationship with the conviction, 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 a crime directly related to those duties creates a negative inference regarding her fitness to perform those duties and to meet those responsibilities (§753[1][c]).

About two years have passed since the commission of the crime (§753[1][d]), which occurred when the applicant was about 29 years of age (§753[1][e]).

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

In the applicant's favor are the public policy of encouraging licensure of ex-offenders (§753[1][a]).

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]). I have also considered the very favorable letters of reference submitted by the applicant, which letters attest to her good character and diligence.

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 serious crime. The circumstances of the crime, which involved the applicant attempting to stop an assault in her home by her abusive husband, do not, however, provide any indication that she cannot be trusted to properly perform the duties of a cosmetologist.

CONCLUSIONS OF LAW

After having given due consideration to the factors set forth in Correction Law §753 and to the requirements of GBL Article 27, and having weighed the rights of the applicant against the rights and interests of the general public, it is concluded that the applicant has established that she possess the required fitness to warrant the renewal of her license as a cosmetologist. GBL §406[1][b].

DETERMINATION

WHEREFORE, IT IS HEREBY DETERMINED THAT, pursuant to General Business Law §411, the application of Marion Marston, UID #22MA1061935, for renewal of her license as a cosmetologist is granted.

Roger Schneier
Administrative Law Judge

Dated: April 27, 2000