

STATE OF NEW YORK
DEPARTMENT OF STATE
OFFICE OF ADMINISTRATIVE HEARINGS

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In the Matter of the Application of

JOSEPH MANZI

DECISION

For a Commission as a Notary Public

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The above noted matter came on for hearing before the undersigned, Roger Schneier, on November 10, 1999 at the office of the Department of State located at 123 William Street, New York, New York.

The applicant, 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 Legal Assistant II Thomas Napierski.

ISSUE

The issue before the tribunal is whether the applicant should be denied a commission as a notary public because of a criminal conviction.

FINDINGS OF FACT

1) By application dated May 17, 1999 the applicant applied for a commission as a Notary Public, answering "yes" to question number 6: "Have you ever been convicted of a crime or offense (not a minor traffic violation) or has any license, commission or registration ever been denied, suspended or revoked in this state or elsewhere?" (State's Ex. 2).

2) On or about April 2, 1993 the applicant was convicted in United State District Court, Southern District of New York, on his plea of guilty to felony charges of Receiving a Bribe, 18 USC 215[a][2] (2 counts), Bank Fraud, 18 USC 1344, and False Statements, 18 USC 10001, and was sentenced to a term of imprisonment of 36 months followed by 24 months of supervised release and to make restitution in the amount of \$630,000. The convictions arose out of the applicant's solicitation and receipt of bribes to influence him in connection with business and transactions of Citibank, of which he was a vice-president. (State's Ex. 4).

3) At the time of the commission of the most recent criminal act the applicant was approximately 44 years old.

4) After his conviction the applicant was incarcerated at the Lewisburgh Federal correctional facility for 21 months, in the Philadelphia Federal correctional facility for 6 months, and in a halfway house in New York City for 6 months. He subsequently served, and successfully completed, a term of probation (App. Ex. A). All of his personal assets were applied to the required restitution. He was issued a Certificate of Good Conduct by the New York State Board of Parole on or about May 7, 1999 (State's Ex. 3).

5) Since his release from prison the applicant has been employed as a wire puller by Lucent Technologies, in a clerical capacity by a dye company, and, since April, 1997, as vice-president in charge of administration of Toshoku America, an export/import company. He would like to be commissioned as a notary to be able to guarantee signatures on letters of credit and bills of lading.

OPINION AND CONCLUSIONS OF LAW

I- As the person who requested the hearing, the burden is on the applicant to prove, by substantial evidence, that he is of sufficiently good moral character to hold a commission as a Notary Public. Executive Law §§130 and 131[2]; 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- In considering whether the commission 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 commission, 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 Good Conduct creates a presumption of rehabilitation, as explained by the Court in *Bonacorsa*,¹ 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.

As a Notary Public the applicant would be charged with performing acts which establish the authenticity of documents. There is a direct relationship between the crimes of which he was convicted, which involved fundamental acts of dishonesty, and a Notary commission.

¹ The Court was discussing Certificates of Relief From Disabilities, but the same principles apply to Certificates of Good Conduct.

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 Notary Public have already been discussed. Thus, as noted above, the conduct underlying his convictions reflect directly on his fitness to perform those duties and to meet those responsibilities (§753[1][c]).

About 8 years have passed since the commission of the most recent criminal act (§753[1][d]), which occurred when the applicant was approximately 44 years old (§753[1][e]), and, therefore, presumably sufficiently mature to appreciate the seriousness of his conduct.

The crimes, which involved large sums of money and were Federal felonies, were serious (§753[1][f]).

In the applicant's favor are the public policy of encouraging licensure of ex-offenders (§753[1][a]), the issuance to him of a Certificate of Relief Good Conduct (§753[2]), and his successful completion of probation along with his employment in a responsible position (§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.

"A notary public is a public officer and the responsibilities of the Secretary of State extend to protecting the public against misconduct by notaries, the caliber of a notary and his right to remain in office to be measured not only by his activities as such but also by trustworthiness and competence exhibited in other areas in which the public is concerned." *Patterson v Department of State*, 35 AD2d 616, 312 NYS2d 300 (1970)(citations omitted).

The respondent was convicted of serious acts of dishonesty. As a result he was incarcerated for nearly 3 years and had to give up essentially all of his assets. He has successfully completed a term of supervised release, and is supporting himself and his family through his employment in a responsible position. In his testimony he demonstrated what appeared to be sincere repentance.

While he does not absolutely need to be commissioned as a Notary Public, the issuance of such a commission to him would facilitate the performance of his duties in his current employment and the business of his employer.

Under the above particular circumstances, and after having given due consideration to the factors set forth in Correction Law §753 and to the requirements of Executive Law §§130 and 131[2], 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 commission as a notary public has been attenuated sufficiently, and that he has the requisite good character to be so commissioned. He is admonished, however, that to avoid revocation of the commission he must abide scrupulously with all of the requirements of the office of Notary Public, in particular that he may not notarize documents without the signatory appearing personally before him and, where required, taking the required oath.

DETERMINATION

WHEREFORE, IT IS HEREBY DETERMINED THAT the application of Joseph Manzi for a commission as a Notary Public is granted.

Roger Schneier
Administrative Law Judge

Dated: November 12, 1999