165 DOS 97

STATE OF NEW YORK
DEPARTMENT OF STATE
OFFICE OF ADMINISTRATIVE HEARINGS
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In the Matter of the Application of

LEONARD MESSINGER 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 June 3, 1997 at the office of the Department of State located at 270 Broadway, New York, New York.

The applicant, of 125 Park Avenue, 14th Floor, New York, New York 10017, an attorney at law, appeared *pro se*.

The Division of Licensing Services (hereinafter "DLS") was represented by Supervising License Investigator William Schmitz.

ISSUE

The issue before the tribunal is whether the applicant should be denied a commission as a notary public because he has been convicted of a felony and has not received a Certificate of Good Conduct or an Executive Pardon.

FINDINGS OF FACT

1) By application dated January 8, 1997 the applicant applied for a commission as a notary public. On the application he answered "yes" to the question "Have you ever been convicted of a crime or offense...or has any license, commission or registration ever been denied, suspended or revoked in this state or elsewhere?" He attached to that application an explanation for that answer, in which he stated that he had been found guilty of assisting in the arranging of tax benefits as part of a scheme of fraudulent transactions whereby false deductions were passed on to investors, and had been suspended from the practice of law (State's Ex. 2).

2) On February 6, 1989 the applicant was convicted in the United States District Court for the Southern District of New York of conspiring to defraud the United States in violation of 18 U.S.C. §371; willfully aiding and assisting in the preparation of false documents in violation of 26 U.S.C. §7206[2]; and willfully making a declaration, under penalties of perjury, that he knew to be false in violation of 26 U.S.C. §7206[1]. Each of those crimes

constituted a federal felony, but none was a felony under New York State law (State's Ex. 3).

3) On July 30, 1992 the Appellate Division of the State Supreme Court, First Judicial Department, suspended the applicant from the practice of law for a period of five years retroactive to July 27, 1989. He was reinstated as an attorney and counselor-at-law by order dated March 30, 1995 (State's Ex. 3), and is currently in good standing (State's Ex. 4).

4) The applicant has not been granted a Certificate of Good Conduct or an Executive Pardon.

5) By letter dated January 31, 1997 the applicant was advised by DLS that it proposed to deny his application because he had been convicted of a disqualifying conviction and had not submitted a Certificate of Good Conduct, and that he could request an administrative review. On a form dated February 12, 1997 the applicant requested a review, and by letter dated March 26, 1997 he was advised that DLS continued to propose to deny his application, but that he could request an administrative hearing. By letter dated April 16, 1997 the applicant made such a request and, the matter having been referred to this tribunal on April 23, 1997, notice of hearing was served on him by certified mail delivered on April 28, 1997 (State's Ex. 1).

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 entitled to be appointed a notary public. 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 Executive Law §130, a person who has been convicted in this state or any other state or territory of a felony, and who has not been granted a Certificate of Good Conduct or an Executive Pardon, may not be appointed a notary public.[1]

The applicant has been convicted of several crimes which are felonies under federal law. However, as determined by the Disciplinary Committee which considered the charges against him as

[1] A Certificate of Relief From Disabilities would not satisfy this requirement. *Matter of the Application of Persaud*, 157 DOS 97.

an attorney and recommended his suspension from the bar, none of those crimes constitutes a felony under New York law. In accepting the Committee's recommendation of suspension and not disbarring the applicant, as would have been mandatory had the convictions been for crimes which constitute felonies under New York State law (Judiciary Law §90), the Appellate Division implicitly agreed that the crimes were not New York felonies.

In *People ex rel Marks v Brophy*, 293 NY 469 (1944), the Court of Appeals said that federal crimes which are unknown to our State Penal Law are not cognizable at all in our State courts. "It is fundamental in the public policy of this State that we do not, if we can avoid it, decree forfeitures in our courts because of violations of criminal laws of another jurisdiction." 293 NY 469 at 474. See also *Barsky v Board of Regents*, 305 NY 89 (1953); *Matter of Donegan*, 282 NY 285 (194). However, in *Chu v Ass'n of Bar of City of New York*, 42 NY2d 491, 398 NYS2d 1001 (1997), the Court modified its holding, stating "(w)hatever may have been the proper evaluation of a felony conviction in courts other than those of our own State in 1940 when *Donegan* was decided, we now perceive little or no reason for distinguishing between conviction of a Federal felony and conviction of a New York State felony as a predicate for professional discipline." 42 NY2d 491 at 494, 398 NYS2d at 1003.[2]

The Legislature addressed the holding in *Chu* by amending the Judiciary Law to provide that, for the purpose of automatic disbarment, a felony is any criminal offense classified as such under the laws of New York, or any criminal offense committed in any other state, district, or territory of the United States and classified as a felony therein which, if committed within this State, would constitute a felony in this State. However, whether through oversight or otherwise, no change was made to the Executive Law.

The result of the foregoing is the anomalous circumstance wherein the applicant, his good character having been established to the satisfaction of the Departmental Disciplinary Committee of the Appellate Division, and of the Appellate Division itself, may be an attorney and counselor-at-law, but may not, without satisfactorily going through another investigation by the Division of Parole, be appointed a notary public. The tribunal can see little, if any, logic in such a situation. However it lacks the authority to remedy it.

III- The provisions of Correction Law Article 23-A, enacted to prevent unfair discrimination in the licensure and employment of

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[2] In a footnote the Court noted that it was not addressing the effect to be accorded felony convictions in the courts of a Sister state or of a foreign country.

persons previously convicted of one or more criminal offenses, do not apply in the circumstances of this case. Where a licensing statute imposes a mandatory disability, as is the case herein, that disability continues to apply. Correction Law §751.

IV- The applicant erroneously contends that the provision of Executive Law §130 which exempts an attorney and counselor-at-law from the requirement that before issuing a commission as a notary public to any applicant the Secretary of State must be satisfied as to the good character of the applicant supersedes the bar to appointment which arises out of a felony conviction. The two provisions are independent. The consideration of an applicant's moral character is discretionary. The bar to appointment upon conviction of a felony is mandatory and applies to all applicants, including attorneys.

DETERMINATION

WHEREFORE, IT IS HEREBY DETERMINED THAT application of Leonard Messinger for a commission as a notary public is denied.

Roger Schneier
Administrative Law Judge

Dated: June 4, 1997