380 DOS 00

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

JEROME DAVIS **DECISION**

For a License as a Watch, Guard, or Patrol Agency

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The above noted matter came on for hearing before the undersigned, Roger Schneier, on June 28, 2000 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 License Investigator III Richard Drew.

ISSUE

The issue before the tribunal is whether the applicant should be denied a license as a Watch, Guard, or Patrol Agency because of a prior criminal conviction.

FINDINGS OF FACT

1) By application received on January 21, 2000 the applicant applied for a license as a Watch, Guard, or Patrol Agency d/b/a Jerome Davis Security Specialist, answering "yes" to question number 10: "Have you ever been convicted of any criminal offense in this State or elsewhere ....?" (State's Ex. 2).

2) On September 12, 1997 the applicant was convicted of Offering a False Instrument For Filing in the 2nd degree, a class A misdemeanor (State's Ex. 3). He was granted a Certificate of Relief From Disabilities on January 23, 1998 (State's Ex. 2).

3) By letter dated February 11, 2000 the applicant was advised by the complainant that it proposed to deny his application because of the conviction and that he could request a hearing, which he did by letter received on March 13, 2000. Accordingly, the matter having been referred to this tribunal on April 24, 2000, notice of hearing was served on the applicant by certified mail delivered on May 6, 2000 (State's Ex. 1).

4) The applicant's conviction arose out of events which occurred when he was approximately 33 years old, and involved the operation of Statewide Protective Service, an unincorporated security guard training school. Specifically, he falsely reported to the Division of Criminal Justice Services that one Michael Moulder had completed a 47 hour firearms training course for armed security guards, while, in fact, the course administered was of a duration significantly shorter than 47 hours and did not encompass all of the required elements. *Division of Licensing Services v Davis*, 188 DOS 98.

5) Since his conviction the applicant has been employed as a courier and cashier by a check cashing company, working 52 hours per week. In that capacity he processes and handles large sums of money, and "he is considered a valued and trusted employee" (App. Ex. A). To facilitate that employment he is a Registered Security Guard pursuant to a registration issued by DLS and expiring on August 26, 2001 (App. Ex. C), and is licensed to possess four pistols by the Commissioners of Police of the Counties of Nassau and Suffolk (App. Ex. E and D). He is also licensed as a Precious Metal Dealer by the Suffolk County Office of Consumer Affairs (App. Ex. B), pursuant to which license he buys and sells gold subject to the regular and frequent supervision of the police.

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 as a Watch, Guard, or Patrol agency. State Administrative Procedure Act (SAPA), §306(1); General Business Law (GBL) §§72 and 74. 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 license 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 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.

In view of the fact that a Watch, Guard, or Patrol agency employs, and supplies the services of, security guards who are required pursuant to GBL§89-n[c] to receive just the kind of training which was involved in the crime committed by the applicant, it is clear that there is a direct relationship between that crime and the license sought. It is also important to take note that since a Watch, Guard, or Patrol agency serves in a quasi-law enforcement capacity, *cf. Codelia v Department of State, supra,*

any crime would appear to be related to a license as a Watch, Guard, or Patrol agency. *cf. Matter of the Application of McCurdy*, 87 DOS 93.

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 Watch, Guard, or Patrol Agency (§753[1][b]), are essentially the prevention of crime and other unlawful activity. Thus, as noted above, any criminal activity on an applicant's fitness to perform those duties and to meet those responsibilities (§753[1][c]).

About three years have passed since the commission of the crime (§753[1][d]), which occurred when the applicant was approximately 33 years old (§753[1][e]), and, therefore, presumably sufficiently mature to appreciate the seriousness of his conduct.

The seriousness of the crime is somewhat mitigated by the fact that it was a misdemeanor (§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 From Disabilities (§753[2], and his post conviction employment (§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.

Nearly three years have passed since the commission of the crime. While in 1998, in a decision on both the applicant's application for renewal of his then extant license as qualifying officer of a Watch, Guard, or Patrol Agency and whether his commission as a Notary Public should be revoked, this tribunal found that the application should be denied, *Division of Licensing Services v Davis, supra,* the circumstances now are markedly different. Not only have an additional two full years transpired, but through his post conviction employment the applicant has demonstrated that he has been rehabilitated and can be trusted to operate his business in a lawful manner.

CONCLUSIONS OF LAW

After having given due consideration to the factors set forth in Correction Law §753 and to the requirements of GBL §§72 and 74, 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 license as a Watch, Guard, or Patrol agency has been attenuated sufficiently, and that he has the requisite good character and integrity to be licensed as a Watch, Guard, or Patrol Agency.

DETERMINATION

WHEREFORE, IT IS HEREBY DETERMINED THAT, pursuant to General Business Law §§72, 74, and 79, the application of Jerome Davis for a license as a Watch, Guard, or Patrol Agency is granted.

Roger Schneier
Administrative Law Judge

Dated: June 28, 2000