188 DOS 98

STATE OF NEW YORK
DEPARTMENT OF STATE
OFFICE OF ADMINISTRATIVE HEARINGS
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In the Matters of the Complaint of

DEPARTMENT OF STATE
DIVISION OF LICENSING SERVICES,

Complainant,

-against-

JEROME DAVIS,

Respondent, **DECISION**

And of the Applications of

JEROME DAVIS and ENRIQUE SEWER

For Licenses as Qualifying Officers
of 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 23, 1998 at the office of the Department of State located at 270 Broadway, New York, New York.

Jerome Davis, having been advised of his right to be represented by an attorney, chose to represent himself. He also represented Enrique Sewer, who was not present and had authorized him to do so.

The Division of Licensing Services was represented by Litigation Counsel Laurence Soronen, Esq.

COMPLAINT/ISSUES

The complaint against Mr. Davis alleges that he has been convicted of Offering a False Instrument For Filing in the 2nd degree, that the acts underlying the conviction demonstrate that he lacks the good character and trustworthiness to hold a commission as a notary public and to be licensed as the qualifying officer of a Watch, Guard or Patrol Agency, and that by reason thereof his notary commission should be revoked and his application to renew his license as qualifying officer of Statewide Protective Service of NY, Inc. (hereinafter "Statewide") should be denied. With regards to Mr. Sewer, the issue is whether his application for a

license as a qualifying officer of Statewide should be denied because Mr. Davis is one of the owners and officers of that corporation.

FINDINGS OF FACT

1) Notice of hearing together with a copy of the complaint was served on Mr. Davis by certified mail delivered on May 14, 1998 (State's Ex. 1-Davis).

2) By application dated July 9, 1997 Mr. Davis and Mr. Sewer, respectively vice president and president of Statewide, applied for renewal of their registrations as qualifying officers of that Watch, Guard, or Patrol corporation, answering "yes" to question number 2: "Since your last renewal have you been convicted of any criminal offense (except minor traffic violations) in this State or elsewhere or are any criminal, administrative or civil charges presently pending against you....?" (State's Ex. 4-Davis).

3) On September 12, 1997 Mr. Davis was convicted of Offering a False Instrument For Filing in the 2nd degree, a class A misdemeanor (State's Ex. 3-Davis). He was granted a Certificate of Relief From Disabilities on January 23, 1998 (State's Ex. 8-Davis).

4) By letter dated September 12, 1997 Mr. Davis was advised by the complainant that it proposed to deny his application because of the conviction and that he could request an administrative review (State's Ex. 5-Davis). By form dated October 18, 1997 Mr. Davis requested such a review (State's Ex. 6-Davis), and by letter dated January 12, 1998 he was advised by the complainant that after review it continued to propose to deny his application and that he could request a hearing, which he did by letter received on January 29, 1998 (State's Ex. 8-Davis). Accordingly, the matter was referred to this tribunal on April 13, 1998.

5) Mr. Davis is a notary public pursuant to a commission expiring on September 5, 1999 (State's Ex. 1-Davis).

6) By letter dated October 2, 1997 Mr. Sewer was advised by the complainant that it proposed to deny his application because "Applicant's firm submitted fraudulent Security Guard Training information to DCJS thus indicating a lack of good character and trustworthiness for licensure", and that he could request an administrative review, which he did on a form received on October 20, 1997. By letter dated January 12, 1998 he was advised that the complainant continued to propose to deny his application, and that he could request a hearing, which he did by letter received on March 2, 1998. The matter having been referred to this tribunal on April 27, 1998, notice of hearing was served on Mr. Sewer by certified mail delivered on May 14, 1998 (State's Ex. 1-Sewer).

7) Mr. Davis' 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 distinct from Statewide, the Watch, Guard or Patrol agency involved in these proceedings. 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 (State's Ex. 2, 6, and 9-Davis, Resp. Ex. A).

OPINION

I- As the person who requested the hearing, the burden is on an applicant to prove, by substantial evidence, that he is entitled to be licensed as the qualifying officer of 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 neces-

> sarily 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 Mr. Davis, 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]).

Only about one year has passed since the commission of the crime (§753[1][d]), which occurred when Mr. Davis 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 Mr. Davis' favor are the public policy of encouraging licensure of ex-offenders (§753[1][a]), and the issuance to him of a Certificate of Relief From Disabilities (§753[2].

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.

Only about one year has passed since the commission of the crime. That crime goes to the basic integrity of the industry in which Mr. Davis seeks to continue working. The Legislature has found that the "training of security guards is a matter of state concern and compelling state interest to ensure that such security guards meet certain minimum recruitment and training standards...." Security Guard Act-Licensing, Registration, Training and Insurance, ch. 336, 1992, §1. Mr. Davis, by his conduct, acted directly against that state interest, and, therefore, against the public welfare. In doing that he demonstrated that he lacks the requisite good character to be entrusted with the operation of such a sensitive business.

III- As a notary public Mr. Davis is charged with performing acts which establish the authenticity of documents. The crime of which he was convicted, Offering a False Instrument For Filing certainly indicated that he cannot be trusted to perform those acts honestly.

> "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).

IV- As with Mr. Davis, as an applicant who requested a hearing the burden is on Mr. Sewer to establish his entitlement to the license.

V- So long as the issue has been fully litigated by the parties, and is closely enough related to the stated charges that there is no surprise or prejudice to the applicant, the pleadings may be amended to conform to the proof and encompass a charge which was not stated in the notice of proposed denial. This may be done even without a formal motion being made by the Division of Licensing Services. *Helman v Dixon*, 71 Misc.2d 1057, 338 NYS2d 139 (Civil Ct. NY County, 1972). In ruling on the motion, the tribunal must determine that had the charge in question been stated in the complaint no additional evidence would have been forthcoming. *Tollin v Elleby*, 77 Misc.2d 708, 354 NYS2d 856 (Civil Ct. NY County, 1974). What is essential is that the "matters were raised in the proof, were actually litigated by the parties and were within the broad framework of the original pleadings." *Cooper v Morin*, 91 Misc.2d 302, 398 NYS2d 36, 46 (Supreme Ct. Monroe County, 1977), mod. on other grnds. 64 AD2d 130, 409 NYS2d 30 (1978), aff'd. 49 NY2d 69, 424 NYS2d 168 (1979).

The proposed notice of denial in response to which Mr. Sewer requested a hearing stated that the proposed denial was predicated upon his firm having submitted fraudulent training information to the Division of Criminal Justice Services. The evidence, however, establishes that the fraudulent information was submitted by another firm owned by Mr. Davis. At the hearing it was explained to Mr. Davis, who was acting as Mr. Sewer's authorized representative, that the reason for the proposed denial was that if the renewal were to be granted Mr. Sewer would be representing a firm with which Mr. Davis was connected. Mr. Davis interposed no objection. It is, therefore, proper to consider that reason herein.

VI- Pursuant to GBL §72[2] all of the character requirements applicable to an applicant for a license as a Watch, Guard, or Patrol agency apply to all of the officers of a corporation seeking such a license. According to the application jointly submitted by Mr. Sewer and Mr. Davis, Mr. Davis is the vice president of Statewide. Thus, if Mr. Sewer is licensed as qualifying officer of Statewide, Mr. Davis will be able to continue to work in the business as a non-qualifying officer even if his application is denied. Such a result would clearly be contrary to the public interest and improper.

CONCLUSIONS OF LAW

1) 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 Mr. Davis has not 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 lacks the requisite good character and integrity to be licensed as the qualifying officer of a Watch, Guard, or Patrol agency.

2) As established by his conviction, Mr. Davis engaged in an act of misconduct which establishes that he is not sufficiently trustworthy to retain his commission as a notary public.

3) So long as Mr. Davis is associated as an officer, director, or shareholder of Statewide, or is employed by that corporation in a supervisory capacity, it would be against the public interest for Mr. Sewer to be licensed as a qualifying officer of that corporation, and his application should be denied unless and until he submits satisfactory proof that Mr. Davis has severed all management and ownership connections with Statewide.

DETERMINATION

WHEREFORE, IT IS HEREBY DETERMINED THAT, pursuant to General Business Law §§72, 74, and 79, the application of Jerome Davis for renewal of his license as qualifying officer of Statewide Protective Service of NY, Inc. is denied, and

IT IS FURTHER DETERMINED THAT, pursuant to Executive Law §130, the commission of Jerome Davis as a notary public is revoked, effective immediately, and

IT IS FURTHER DETERMINED THAT, pursuant to General Business Law §§72, 74, and 79, the application of Enrique Sewer for renewal of his license as qualifying officer of Statewide Protective Service of NY, Inc. is denied until such time as he shall produce proof satisfactory to the Department of State that Jerome Davis is no longer an officer, director, or shareholder of that corporation and is not employed by that corporation in any supervisory capacity.

Roger Schneier
Administrative Law Judge

Dated: July 7, 1998