

STATE OF NEW YORK
DEPARTMENT OF STATE
OFFICE OF ADMINISTRATIVE HEARINGS

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In the Matter of the Application of

BRIAN DUNNE

DECISION

For a License as a Private Investigator

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The above noted matter came on for hearing before the undersigned, Roger Schneier, on November 21, 1997 at the office of the Department of State located at 270 Broadway, New York, New York.

The applicant, of 41 Beech 221st Street, Breezy Point, New York 11697, 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 District Manager Richard Drew.

ISSUE

The issue before the tribunal is whether the applicant should be denied registration as a private investigator because of a prior criminal conviction.

FINDINGS OF FACT

1) By application dated February 25, 1997 the applicant applied for a license as a private investigator. He answered "yes" to question #8: "Have you ever been convicted of any criminal offense in this state or elsewhere or has any license, permit commission, registration or application for a license, permit, commission, or registration held by or submitted by you or a company in which you are or were a principal ever been revoked, suspended or denied by any state, territory or governmental jurisdiction or foreign country for any reason?" (State's Ex. 2).

2) On September 7, 1995 the applicant was convicted of Sale of Prohibited Intercepting Devices, 18 USC §2512[1][b], a crime committed when he was 47 years old (States Ex. 3).

3) On January 31, 1996 the applicant, who was at the time licensed as a private investigator, entered into a consent order wherein he plead *nolo contendere* to a complaint alleging that he had been convicted of a license disqualifying offense and it was ordered:

"The respondent shall...surrender said license and shall not make application for licensing as a private investigator, until on or after August 1, 1996, and shall further present proof at the time of any such future application that he has obtained a Certificate of Relief from Disabilities with respect to the above conviction in the U.S. District Court for the Southern District of New York. It is expressly understood that the Department of State will consider the above conviction, and the facts underlying said conviction, in determining respondents (sic) eligibility for future licensing as a private investigator" (State's Ex. 5).

4) On January 17, 1997 the applicant was granted a Certificate of Relief From Disabilities (State's Ex. 4).

5) By letter dated June 9, 1997 the applicant was advised by DLS that it proposed to deny his application because of the conviction, and that he could request an administrative review, which he did by request form dated June 10, 1996. By letter dated July 24, 1997 the applicant was advised by DLS that after review it continued to propose to deny the application, and that he could request an administrative hearing. By letter dated August 7, 1997 the applicant requested a hearing, and, accordingly, notice of hearing was served on the applicant by certified mail (State's Ex. 1).

6) The applicant's conviction arose from the operation of a business known as "The Spy Store" in which the applicant had a twenty per cent interest. He was originally arrested by the United States Customs Service for importing items without paying the required duty. The conviction was for the sale of a telephone transmitter which, when attached to a telephone line, enables the operator of the device to listen to telephone conversations without the knowledge of the participants.

7) The applicant is a former New York City Police officer, having retired as a 2nd grade detective after 20 years service.

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 license as a private investigator. 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 determining whether there is a direct relationship between the crime of which the applicant was convicted and a license as a private investigator, it is first necessary to consult the definition of "private investigator" in GBL §71[1], where it is stated that a private investigator, *inter alia*, investigates the habits, conduct, movements and whereabouts of persons. It is also necessary to take note that a private investigator serves in a quasi-law enforcement capacity, *Codelia v Department of State, supra*, and that, therefore, any crime would appear to be related to a license as a private investigator. *Matter of the Application of McCurdy*, 87 DOS 93. There is a particularly direct relationship between the crime of Sale of Prohibited Intercepting Devices, and, in particular, the investigation of the habits, conduct, movements and whereabouts of persons, inasmuch as the unlawful use of such illegal devices would obviously facilitate such investigations.

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 private investigator (§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 has a direct bearing on his fitness to perform those duties and to meet those responsibilities (§753[1][c]).

Only about 2½ years have passed since the commission of the crime (§753[1][d]), which occurred when the applicant was 47 years old (§753[1][e]), and, therefore, presumably sufficiently mature to appreciate the seriousness of his conduct.

The crime is a Federal felony and, therefore, should be considered serious (§753[1][f]).

In the applicant's 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 2½ years have passed since the commission of the crime, and the applicant has presented no evidence of any employment or other activities which would demonstrate that he has been rehabilitated. When question by the tribunal as to whether prior to his arrest he was aware that wiretapping without a court order

is illegal the applicant responded that he was not. The applicant was a police officer for 20 years, and retired as a detective. In light of that background I find that denial not to be credible, and to be a strong indication of a lack of honesty and integrity on the part of the applicant.

The applicant seeks a license as a private investigator because, he says, he has been an investigator all of his adult life and it is too late for him to start a new career. There is, however, nothing to prevent him from seeking employment with a licensed private investigator and earning his living conducting investigations for, and under the direct supervision of, such a licensee. Perhaps after several years of such employment without his engaging in any acts of misconduct the applicant would be better able to demonstrate his rehabilitation and that he has the good character and integrity required of a private investigator.

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 not established that the direct relationship between his conviction and a license as a private investigator has been attenuated sufficiently, and that he lacks the requisite good character and integrity to be licensed as a private investigator.

DETERMINATION

WHEREFORE, IT IS HEREBY DETERMINED THAT the application of Brian Dunne for a license as a private investigator is denied.

Roger Schneier
Administrative Law Judge

Dated: December 19, 1997