

STATE OF NEW YORK
DEPARTMENT OF STATE

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In the Matter of the Application of

PETER L. HOFFMAN

DECISION

For a License as a Private Investigator

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Pursuant to the designation duly made by the Hon. Gail S. Shaffer, Secretary of State, the above noted matter came on for hearing before the undersigned, Roger Schneier, on July 14, 1994 at the office of the Department of State located at 270 Broadway, New York, New York.

The applicant, of Subtle Engineering Co., 340 East 74th Street, Suite 8B, New York, New York 10021, was represented by Stevens R. Miller, Esq., 150 Nassau Street #1805, New York, New York 10038. Affixed hereto and made a part hereof is copy of Mr. Miller's proposed findings of facts, with my rulings marked thereon.

The Division of Licensing Services was represented by Supervising License Investigator Bernard Friend.

ISSUE

The issue before the tribunal is whether the applicant has sufficient lawful experience to qualify for a license as a private investigator.

FINDINGS OF FACT

1) By application dated November 15, 1993 the applicant applied for a license as a private investigator (Dept. Ex. 2). By letter dated March 18, 1994 he was advised by the Division of Licensing Services that it proposed to deny his application for lack of sufficient qualifying experience, with the explanation that "(u)nlicensed activity requiring a license may not be used for qualifying experience." In that letter he was advised that he could request an administrative review, and by letter dated April 4, 1994 he did so. In response, by letter dated April 20, 1994, he was advised that the Division of Licensing Services stood by the proposed denial, and that he could request an administrative hearing. By letter dated April 22, 1994 the applicant requested such a hearing, and a notice of hearing was served on him by certified mail on June 8, 1994 (Dept. Ex. 1).

2) The applicant bases his application on a claim of experience gained during two time periods:

January 1987 to January 1990. Investigations conducted for the law firm of Raggio, Jaffe & Kayser to locate individuals and assets, and into the honesty, loyalty and efficiency of the subjects of the investigations.

November 1991 to date of application. Investigations conducted for Milliken & Michaels Inc., a debt collection firm headquartered in Louisiana which is not licensed as a private investigator in the State of New York, concerning: the whereabouts, habits, affiliations, and financial status of subjects; the loss, theft, and illegal transfer of property; and the business relationships of parties. The work was billed for by the applicant on invoices bearing the name "Subtle Engineering Co." (Dept. Ex. 8), a name for which he filed a business certificate on November 10, 1987 (Dept. Ex. 4), and payment for the investigations was made by way of checks payable to Subtle Engineering Co. (Dept. Ex. 6 and 7). Those payments were subsequently reflected on forms 1099 issued by Milliken & Michaels Inc. to Subtle Engineering Co. (Dept. Ex. 5). The applicant has two employees who provide him with administrative and clerical assistance.

In both instances, the experience was obtained by the applicant working in the capacity of an independent contractor.

OPINION

I- As the person who requested the hearing, the burden is on the applicant to prove, by substantial evidence, that he has acquired the required experience. 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- General Business Law (GBL) §72 establishes certain experience requirements which must be met by an applicant before a license as a private investigator may be issued:

"Every such applicant for a license as a private investigator shall establish to the satisfaction of the secretary of state...(that he) has been regularly employed , for a period of not less than three years, undertaking such investigations as those described as performed by a private investigator in subdivision one of section seventy-one of this article, as a sheriff, police officer in a city or county police department, or the division of

state police, investigator in an agency of the state, county or United States government, or employee of a licensed private investigator, or has had an equivalent position and experience." (emphasis added).

GBL §71[1] defines "private investigator" to

"mean and include the business of private investigator and shall also mean and include, separately or collectively, the making for hire, reward or for any consideration whatsoever, of any investigation for the purpose of obtaining information with reference to any of the following matters...; crime or wrongs done or threatened against the government of the United States of America or any state or territory of the United States of America; the identity, habits, conduct, movements, whereabouts, affiliations, associations, transactions, reputation or character of any person, group of persons, association, organization, society, other groups of persons, firm or corporation; the credibility of witnesses or other persons; the whereabouts of missing persons; the location or recovery of lost or stolen property; the causes and origin of, or responsibility for fires, or libels, or losses, or accidents, or damage or injuries to real property; or the affiliation, connection or relation of any person, firm or corporation with any union, organization, society or association, or with any official, member or representative thereof; or with reference to any person or persons seeking employment in the place of any person or persons who have quit work by reason of any strike; or with reference to the conduct, honesty, efficiency, loyalty or activities of employees, agents, contractors, and sub-contractors; or the securing of evidence to be used before any authorized investigation committee, board of award, board of arbitration, or in the trial of civil or criminal cases."

The applicant has established that he has experience as an investigator working as an independent contractor for both a New York law firm and a Louisiana based debt collection firm which is not licensed as a private investigator in the State of New York. He has not established that he obtained investigative experience while employed by a licensed private investigator or as a sheriff, police officer, or employee of a licensed private investigator, nor is his application supported by a claim of experience or evidence regarding employment as a government investigator. Therefore, for his experience to be used to enable the applicant to be licensed as a private investigator, that experience would have to constitute "equivalent positions and experience" as defined in 19 NYCRR 172.1 as:

"...investigations as to the identity, habits, conduct, movements, whereabouts, affiliations, reputation, character, credit, business or financial responsibility of any person, group of persons, association, organization, society, firm or corporation, or as to the origins or responsibility for crimes and offenses, the location or recovery of lost or stolen property, the cause or origin of or responsibility for losses or accidental damage or injury to persons or to real or personal property, or to secure evidence to be used before any authorized investigation committee, board of award, board of arbitration or in the trial of civil or criminal cases including as to the credibility of any witnesses. Such investigations shall be have performed for a period of three years, for an employer, firm, organization or governmental agency, whether subject to the provision of Article 7 of the General Business Law or otherwise, which required such investigations in the course of its regular operations, and which such investigations were conducted on a full-time basis in a position the primary duties of which were to conduct investigations and same comprised the major portion of the applicant's activities therein...."

The definition of equivalent experience, under which the applicant seeks to qualify, tracks the definition of private investigator. Therefore, since it is unlawful to engage in the business of private investigator without a license to do so (GBL §70[2]), unless the experience was gained in some activity which is exempt from licensure it was gained unlawfully. In other words, the applicant must establish that his activities are the same as those engaged in by a licensed private investigator but, because of a statutory exemption from licensure, he was not required to be licensed. Matter of the Application of Smith, 121 DOS 92.

The question of the applicant's experience with Raggio, Jaffe and Kayser was previously addressed in Matter of the Application of Peter Hoffman, 91 DOS 92, which decision resulted from a hearing held on the applicant's May 1990 application for a license as a private investigator. In that decision it was found that because the applicant had engaged, during the same time period, in investigations both for the law firm and for individual attorneys, he could not rely on the licensing exemption for attorneys and their employees contained in GBL §83, and, therefore, that his investigative activities were unlawful and could not be used in meeting the experience requirements.

The applicant contends that he should not be precluded from using that experience in the current application because, he says, the prior decision did not consider the question of whether some of his experience was obtained during a time that he was working

exclusively for the law firm, and merely held that he did not have sufficient experience without addressing the specifics of what, if any, experience he might be credited with. In the instant matter he testified that during the time period in which he conducted investigations for the law firm he did not conduct investigations for anyone else. His claim to having sufficient lawful experience in conducting investigations for Raggio, Jaffe & Kayser rests, therefore, on his testimony that he did not conduct investigations for anyone else during the same time period. That testimony is, however, suspect and not credible.

An analysis of the applicant's testimony in conjunction with the prior decision and the current application leads to the conclusion that there are glaring inconsistencies in the contentions made by him in the two proceedings.

In the prior proceeding the applicant introduced evidence to show that until as late as April 16, 1991 he was still conducting investigations for the law firm, but in his current application he indicated that he ceased working for that firm in January 1990. In the prior proceeding the applicant introduced evidence that as of May 7, 1992 he was conducting investigations for Alan Tarzy, Esq., but in this proceeding he testified that since starting to conduct investigations for the collection agency in November 1991 he has not conducted investigations for anyone else. Based on that I find that the applicant has failed to establish that his experience conducting investigations for Raggio, Jaffe & Kayser was obtained while working lawfully for a single law firm.¹ Therefore, that experience may not be applied toward meeting the requirements for licensure as a private investigator.

Milliken & Michaels Inc., the collection agency for which the respondent worked is not licensed as a private investigator in the State of New York, and the applicant has not established that it is exempt from such licensure. Therefore, if the applicant's experience conducting investigations for that firm meets the definition of equivalent experience it was obtained unlawfully. It would be contrary to public policy to credit the applicant with such experience, as to do so would have the effect of rewarding and encouraging unlicensed activity. Matter of the Application of Bernstein, 58 DOS 87.

¹ The decisions in Matter of the Application of Barani, 93 DOS 91, and Matter of the Application of Gagliardi, 1 DOS 91, cited by counsel for the applicant, support the proposition that qualifying experience can be obtained by working for various employers sequentially, and need not be obtained in one continuous period. They do not, however, support the proposition that an unlicensed person may conduct investigations for more than one attorney at a time.

This case is not affected by the holding in Gulla v Lomenzo, 42 AD2d 592, 344 NYS2d 962 (1973), in which the Court held that experience gained as an unlicensed independent contractor conducting investigations for a law firm could be used to qualify for a license as a private investigator. That is because attorneys and persons employed by them are statutorily exempt from the requirement of being licensed (GBL §83), while Milliken & Michaels Inc. is not a law firm.

Neither is Matter of the Application of James Greene, 41 DOS 94 of any help to the applicant. In that case the applicant had been employed by the Long Island Railroad to conduct investigations in connection with its own affairs, an activity not requiring licensure (GBL §83). In this case the applicant was employed by an out of state collection agency to perform investigations in New York to further that agency's efforts on behalf of third party creditors, an activity requiring licensure. Likewise, since the investigations conducted by the applicant were not for the purposes of Milliken & Michaels Inc. own affairs, but, rather, to assist that firm in activities undertaken on behalf of third party creditors, the opinion of the Attorney General set forth in 256 Op. Atty. Gen. 256 does not support the applicant's argument that his activities were lawful.

Also of concern is the fact that, as discussed supra, the applicant, contrary to his testimony in this proceeding, appears to have conducted investigations for Alan Tarzy, Esq. at the same time that he was conducting investigations for Milliken & Michaels Inc., thereby losing any benefit which might have accrued from working exclusively for one employer. Further, rather than operating as an individual independent contractor, the applicant used and was paid under a trade name and was assisted in the operation of his business by two employees. The obvious conclusion is that the applicant was not merely an independent contractor working for one employer at a time, but was in fact operating an unlicensed private investigation firm. His continuing unlicensed activity is particularly disturbing in light of his having been placed on notice by the 1992 decision that such conduct is not to be condoned, and indicates that the holding in that decision that the applicant did not intend to circumvent the requirements of the law is not applicable in this proceeding.

CONCLUSIONS OF LAW

The applicant has failed to establish by substantial evidence that he has sufficient lawful experience to qualify for a license as a private investigator, and, accordingly, his application should be denied. SAPA §306; GBL §72[1].

DETERMINATION

WHEREFORE, IT IS HEREBY DETERMINED THAT the application of Peter L. Hoffman for a license as a private investigator is denied.

These are my findings of fact together with my opinion and conclusions of law. I recommend the approval of this determination.

Roger Schneier
Administrative Law Judge

Concur and So Ordered on:

GAIL S. SHAFFER
Secretary of State
By:

James N. Baldwin
Executive Deputy Secretary of State