

STATE OF NEW YORK  
DEPARTMENT OF STATE  
OFFICE OF ADMINISTRATIVE HEARINGS

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In the Matter of the Application of

**THEODORE T. PHILLIPS**

**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 September 30, 1996 at the office of the Department of State located at 270 Broadway, New York, New York.

The applicant, of 86-16 263rd Street, Floral Park, New York 11001, was represented by Clifford J. Ingber, Esq., Ingber & Ingber, 292 Madison Avenue, New York, New York 10017.

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

**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 May 1, 1996 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permit, commission, or registration held by or submitted by you or a company in which you are or were a principal ever been revoked, suspended or denied by any state, territory or governmental jurisdiction or foreign country for any reason?"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 July 15, 1991 the applicant was convicted of filing a false statement with a government agency, 16 USC §1001, a crime committed in 1982 when he was 38 years old. He received a suspended sentence, was placed on probation for five years, and was ordered to make restitution in the amount of \$109,428.20 to the

extent that he is able.<sup>1</sup> On February 19, 1996 he was granted a Certificate of Relief From Disabilities (State's Ex. 3).

3) By letter dated May 28, 1996 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 letter dated June 6, 1996. By letter dated July 22, 1996 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 July 29, 1996 Mr. Ingber requested a hearing, and, accordingly, notice of hearing was served on the applicant by certified mail on August 13, 1996(State's Ex. 1).

4)The applicant's conviction resulted from his having filed with the United States Department of Health and Human Services a statement in which, in order to obtain government benefits, he falsely claimed to be totally disabled.

#### 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

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<sup>1</sup> As of the date of the hearing the applicant had made restitution of approximately \$60,000.

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 crimes and the credibility of witnesses. 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 direct relationship between the crime of filing a false statement with a government agency in order to receive benefits, and the investigation of crimes and, in particular, the investigation of the credibility of witnesses.

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]).

Over fourteen years have passed since the commission of the crime (§753[1][d]), which occurred when the applicant was 38 years old (§753[1][e]).

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.

Over fourteen years have passed since the commission of the crime, and there is no indication that either during that period or prior to the crime the applicant engaged in any other criminal activity. Prior to the conviction the applicant had an excellent record as a New York City Police officer, and, with the exception of some technical violations not related to his good character and integrity (State's Ex. 4), had an unblemished record as a private investigator. He freely admits his guilt, and appears to be sincerely repentant of his conduct. Accordingly, this single conviction, which appears to be an anomaly in an otherwise fine personal history, should not serve to deprive the applicant of the opportunity to support himself and his family in the only field in which, according to his unrefuted testimony, he is particularly competent.

**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 that the applicant has established that the direct relationship between his conviction and a license as a private investigator has been attenuated sufficiently, and that he has the requisite good character and integrity to be licensed as a private investigator.

**DETERMINATION**

**WHEREFORE, IT IS HEREBY DETERMINED THAT** the application of Theodore T. Phillips for a license as a private investigator is granted, and the Division of Licensing Service is directed to issue the license forthwith.

Roger Schneier  
Administrative Law Judge

Dated: October 24, 1996