

STATE OF NEW YORK  
DEPARTMENT OF STATE

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In the Matter of the Application of

**LEO SMITH**

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 2, 1992 at the office of the Department of State located at 270 Broadway, New York, New York 10007.

The respondent, of 114-56 142 Street, Jamaica, New York 11436, having been advised of his right to be represented by an attorney, appeared pro se.

The Division of Licensing Services was represented by Supervising License Investigator Michael Coyne.

**COMPLAINT**

The issues in the hearing were whether the applicant has sufficient experience to qualify for a license as a private investigator, and whether he should be denied such a license by reason of his have been convicted of a crime.

**FINDINGS OF FACT**

1) On July 9, 1991 the applicant took and passed the qualifying examination for a license as a private investigator, and on August 29, 1991 he submitted an application for such a license to the Division of Licensing Services (Dept. Ex. 2). On that application and supplemental documents he disclosed that on January 7, 1987 he had been convicted of the crime of grand larceny in the second degree, committed in 1983 (Comp. Ex. 3).

By letter date January 14, 1992 the applicant was advised by the Division of Licensing Services that it proposed to deny his application on the grounds that he has insufficient qualifying experience and that there is a direct relationship between the crime of which he was convicted and a license as a private investigator. By letter dated March 30, 1992 the applicant requested a formal hearing on the application (Dept. Ex. 1).

2) The applicant bases his application on experience gained since June 1988 as a process server working for various employers. In some cases that work involved locating the persons who were to be served with papers when those persons were no longer at the

addresses given to the applicant. He is, however, unable to state what part of his activities involved such work in locating persons.

According to one of the applicant's employers, Always Reliable Process Services Inc., the applicant also "recorded and secured evidence that related to losses from real or personal property." (Dept. Ex. 4). I take official notice of the records of the Department of State that the corporation is not a licensed private investigator.

On his application the applicant also indicated that he had been employed by Barnes Detective Agency from August 1990 through December 1990. He has, however, submitted no supporting documentation regarding that claimed employment, and did not testify regarding it.

3) The applicant's criminal conviction arose out of events which occurred at a time when the applicant was approximately twenty-six years of age and was student at the City University of New York. He had been granted student loans in both his own name and in two aliases, and when the checks were issued in his that particular colleges' names he endorsed the checks by himself and appropriated the money to himself. After he was caught the applicant pled guilty to the charges and agreed to make full restitution of \$27,000.00 to the Higher Education Services Corporation in return for a sentence of five years probation. On August 8, 1991 the applicant was granted a Certificate of Relief from Disabilities (Dept. Ex. 3).

#### OPINION

I- General Business Law (GBL) section 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 section 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's experience has been as a process server. He was not employed by a licensed private investigator or as a sheriff, police officer, or employee of a licensed private investigator (his claim of such employment is not supported by any documentary evidence or testimony), 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...."

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), section 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.).

The applicant has failed to establish that the part of his employment which entailed the locating of persons comprised the major portion of his primary duties. He has, therefore, failed to prove, by substantial evidence, that his experience as a process server qualifies as equivalent position and experience in the context of GBL section 72. It should also be noted that, even if the applicant had established that there was such a preponderance of investigatory duties, his experience in securing evidence relating to losses from real or personal property while employed by Always Reliable Process Service Inc. would not be qualifying, inasmuch as that corporation is not a licensed private investigator and may not, therefore, engage in such unlicensed investigatory activities. Experience gained in violation of law may not be used to qualify for a license.

II- Article 23-A of the Correction Law 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 section 752(1)), or where the license...would involve an unreasonable risk to persons or property (Correction Law section 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).

"The interplay of the two exceptions and section 753(1) is awkward, but to give full meaning to the provisions, as we must, it is necessary to interpret section 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....Section 753 must also be applied to the direct relationship exception...however, a different analysis is required because 'direct relationship' is defined by section 750(3), and because consideration of the factors contained in section 753(1) does not contribute to determining whether a direct relationship exists. We read the direction of section 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 section 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 section 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).

In determining whether there is a direct relationship between the crime to which the applicant pled guilty and a license as a private investigator, it is necessary to consider the functions of

a private investigator, as discussed supra. Certainly, such a direct relationship exists between the crime of larceny and a private investigator's functions in investigating crimes and locating and recovering stolen property.

Such a direct relationship having been found, it is necessary to consider the factors contained in Correction Law section 753(1) to determine whether the issuance to the applicant of a license as a private investigator would involve an unreasonable risk to the property or to the safety or welfare of specific individuals or the general public.

The public policy of the state to encourage licensure and employment of persons previously convicted of criminal offenses (section 753(1)(a)), which is to the benefit of the applicant, is counterbalanced by the legitimate interest of the Division of Licensing Services in the protection of the safety and welfare of those persons who avail themselves of the services of its licensees (section 753(1)(b) and (h)). In this case, the possibility of the applicant stealing property which might come into his control during the course of his acting as a private investigator must be weighed against the fact that he is apparently adequately supporting himself as a process server.

As previously noted, the direct relationship of the crime to the duties of a private investigator is a factor which weighs against the issuance of the license (section 753(1)(c)), as do the applicant's mature age at the time of the commission of the crime (section 753(1)(e)), and the fact that the crime, a felony, was a serious offense (section 753(1)(f)).

The facts that the crime occurred nine years ago (section 753(1)(d)), and that the applicant has received a Certificate of Relief from Disabilities (section 753(2)), which creates a presumption of rehabilitation, are in his favor. Also in his favor are his efforts at rehabilitation through his employment as a licensed process server, which employment has not resulted in any disciplinary action being brought by the licensing agency (New York City Department of Consumer Affairs); the fact that he was a commissioned notary public from May 31, 1990 through May 31, 1992 without any disciplinary proceeding being commenced against him by the Department of State; and the fact that he has been issued a registration as a motor vehicle dealer by the Department of Motor Vehicles (section 753(1)(g)).

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 N.Y.S.2d at 524.

The most compelling facts in this case are the length of time since the commission of the crime and the applicant's apparent

avoidance of criminal conduct since then. Had he engaged in abusive conduct in his employment as a process server it could be expected that some action would have been taken against his license. Likewise, the lack of evidence regarding misconduct as a notary public or as a motor vehicle dealer supports the presumption of rehabilitation arising out of the Certificate of Relief from Disabilities.

#### **CONCLUSIONS OF LAW**

1) The applicant has failed to meet his burden of establishing by substantial evidence that he has sufficient experience to qualify for a license as a private investigator. GBL section 72; SAPA section 306(1). Accordingly, his application should be denied.

2) After having given due consideration to the factors set forth in Correction Law section 753, it is concluded that the direct relationship between the applicant's conviction and a license as a private investigator has been attenuated sufficiently, and that should he ever re-apply for a license as a private investigator that conviction should not be considered as a detriment to such licensure.

#### **DETERMINATION**

**WHEREFORE, IT IS HEREBY DETERMINED THAT**, pursuant to General Business Law sections 72 and 79(2), the application of Leo Smith 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 Coon  
Deputy Secretary of State