

STATE OF NEW YORK
DEPARTMENT OF STATE
OFFICE OF ADMINISTRATIVE HEARINGS

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In the Matter of the Application of

LUIS E. AGUILAR

DECISION

For a License as a Real Estate
Salesperson

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The above noted matter came on for hearing before the under-
signed, Roger Schneier, on August 7, 1997 at the office of the
Department of State located at 270 Broadway, New York, New York.

The applicant, of 69-15 60th Lane, Ridgewood, New York 11385,
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 Supervising License Investigator Bernard Friend.

ISSUE

The issue before the tribunal is whether the applicant should
be denied a license as a real estate salesperson because of a prior
criminal conviction.

FINDINGS OF FACT

1) By application dated February 4, 1997 the applicant applied
for a license as a real estate salesperson. He answered "yes"
response to the question "(h)ave you ever been convicted of a crime
or offense (not a minor traffic violation) or has any license,
commission or registration ever been denied, suspended or revoked in
this state or elsewhere?" (State's Ex. 2).

2) On March 3, 1993 the applicant was convicted of Assault in
the 2nd degree, a felony, and was sentenced to 5 years probation
(State's Ex. 3). The conviction arose out of a fight in a bar.

3) Since his conviction the applicant has abided by the terms
of his probation (State's Ex. 3). As of the date of the hearing he
had been employed in the charter department of Carey Transportation
for approximately one month, having lost his prior employment of ten
years as an airport cargo agent when he was convicted. Pursuant to
a letter of authorization issued by DLS when he filed his license
application, the applicant worked as a real estate salesperson

associated with ERA Top Services Realty Inc., his sponsoring broker, for a period of 30 days commencing on February 4, 1997. During that period time he was essentially undergoing training, and he did not obtain any listings or effectuate any sales or rentals.

4) On April 9, 1997 the applicant was granted a Certificate of Relief From Disabilities (State's Ex. 3).

5) By letter dated February 14, 1997 the applicant was advised by DLS that it proposed to deny his application because of his conviction, and that he could request an administrative review, which he did on February 26, 1997. By letters dated April 11 and May 22, 1997 he was advised by DLS that it still proposed to deny the application, and that he could request an administrative hearing, which he did by letter dated June 3, 1997. Accordingly, notice of hearing was served on him by certified mail delivered to him on June 17, 1997 (State's Ex. 1).

OPINION

In considering whether the license should be granted, it is necessary to consider together the provisions of Real Property Law §441[1-A][e], which require that an applicant for a license as a real estate salesperson establish his or her trustworthiness, and the provisions of Correction law Article 23-A. See, *Codelia v Department of State*, No. 29114/91 (Supreme Court, NY County, May 19, 1992).

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 §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 excep-

tion...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.

The applicant was convicted of an assault which occurred during a fight in a bar. Although in the course of his employment a real estate salesperson deals with the public, his or her duties are not of the type that would create any particular expectation that he or she will be involved in aggressive physical confrontations. Accordingly, I find that there is no direct relationship between that applicant's conviction and a license as a real estate salesperson.

It is next necessary to consider the factors contained in Correction Law §753[1] to determine whether the issuance to the applicant of a license as a real estate salesperson would create an unreasonable risk to persons or property.

The public policy of the state to encourage the licensure and employment of persons previously convicted of criminal offenses (§753[1][a]), which is to the benefit of the applicant, is counterbalanced by the legitimate interest of DLS in the protection of the safety and welfare of those persons who avail themselves of the services of its licensees (§§753[1][b] and [h]), although, as noted above, there is no particular likelihood that, if granted a license, the applicant would be especially likely to be involved in fights.

There is no direct relationship between the crime and the duties of a real estate salesperson (§753[1][c]). However, the seriousness of the crime, a felony, weighs against the issuance of the license (§753[1][f]).

There is no evidence on the record regarding the age of the applicant at the time of the commission of the crime (§753[1][e]), of which he was convicted 4½ years ago (§753[1][d]).

In support of the granting of the application is the fact of the applicant's compliance with the terms of his probation (§753[1][g]), and the Certificate of Relief From Disabilities (§753[2]).

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.

4½ years ago the applicant was convicted of a crime which is not directly related to a license as a real estate salesperson. There is no evidence that he has engaged in any further unlawful activities, and he has complied with the terms of his probation. Under these circumstances, there is no legitimate public interest in denying his application.

CONCLUSIONS OF LAW

After having given due consideration to the factors set forth in Correction Law §753, and having weighed the rights of the applicant against the rights and interests of the general public, it is concluded that the issuance to the applicant of a license as a real estate salesperson would not involve an unreasonable risk to the safety and welfare of the public.

DETERMINATION

WHEREFORE, IT IS HEREBY DETERMINED THAT the application of Luis Aguilar for a license as a real estate salesperson is granted. The Division of Licensing Services is directed to issue the license forthwith.

Roger Schneier
Administrative Law Judge

Dated: August 27, 1997