261 DOS 98

STATE OF NEW YORK
DEPARTMENT OF STATE
OFFICE OF ADMINISTRATIVE HEARINGS
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In the Matter of the Application of

HOWARD BRODERSON **DECISION**

For a License as a Real Estate Salesperson

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The above noted matter came on for hearing before the undersigned, Roger Schneier, on September 8, 1998 at the office of the Department of State located at 270 Broadway, New York, New York.

The applicant was present and was represented by Ian C. Daiter, Esq. of the Law Office of Michael Ian Black, Esq., 342 Madison Avenue, Suite 1002, New York, New York.

The Division of Licensing Services (hereinafter "DLS") was represented by Legal Assistant Thomas Napierski.

ISSUE

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

FINDINGS OF FACT

1) By application dated March 3, 1998 the applicant applied for a license as a real estate salesperson, answering "yes" to question number 6: "Have 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. 3).

2) On August 1, 1994 the applicant was found guilty after a jury trial in United State District Court, Eastern District of New York, of violating multiple counts of: 18 USC 1031, Major Fraud Against The United States, a class C felony; 18 USC 1342, Wire Fraud, a class D felony; and 18 USC 1001, False Statement, a class D felony, and was subsequently sentenced to a term of imprisonment of one year and a day (State's Ex. 4 and 5).

3) The crimes arose out of the applicant's then employment as Vice President of Business Operations of Grumman Aircraft Engineering Corporation (hereinafter "Grumman"). In the course of the performance of his duties in that position the applicant was

required to certify to the United States government that the cost and pricing data used in a proposal which resulted in the granting to Grumman of a contract with the National Aeronautic and Space Administration were current and accurate. Although subsequent to submitting its proposal Grumman had obtained a lower interest rate on the financing of the equipment that it was leasing to the government than that which was stated in the proposal, the applicant certified that the older, higher interest rate was still in effect. The result was that Grumman increased its profit by approximately $1,500,000.00.

3) At the time of the commission of the crimes the applicant was approximately 50 years old.

4) The applicant was granted a Certificate of Relief From Disabilities by the New York State Board of Parole on February 20, 1998 (State's Ex. 3).

5) By letter dated March 18, 1998 the applicant was advised by DLS that it proposed to deny his application because of the convictions, and that he could request an administrative review, which he did on March 30, 1998. By letter dated April 22, 1998 the applicant was advised by DLS that after review it continued to propose to deny his application, and that he could request an administrative hearing, which he did by letter dated April 26, 1998. He repeated that request in letters received by DLS on May 20, 1998 and June 22, 1998. Accordingly, the matter having been referred to this tribunal on July 7, 1998, notice of hearing of the same date was served on the applicant by certified mail posted by DLS on July 22, 1998 (State's Ex. 1 and 2).

6) The applicant was forced to resign from his employment with Grumman when it was disclosed that over a period of three years he had submitted travel vouchers accompanied by fraudulent receipts (State's Ex. 5).

OPINION

I- As the person who requested the hearing, the burden is on the applicant to prove, by substantial evidence, that he is sufficiently trustworthy to be licensed as a real estate salesperson. Real Property Law (RPL) §441[1-A][e]; 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- In considering whether the license should be granted, it is necessary to consider together the provisions of RPL §441[1-A][e], which require that he demonstrate that he possesses the required 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 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 or of Good Conduct 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.

A real estate salesperson acts as an agent on behalf of various principals. The relationship of agent and principal is fiduciary in nature, "...founded on trust or confidence reposed by one person in the integrity and fidelity of another." *Mobil Oil Corp. v Rubenfeld*, 72 Misc.2d 392, 339 NYS2d 623, 632 (Civil Ct. Queens County, 1972). Included in the fundamental duties of such a fiduciary are good faith and undivided loyalty, and full and fair disclosure. Such duties are imposed upon real estate licensees by license law, rules and regulations, contract law, the principals of the law of agency, and tort law. *L.A. Grant Realty, Inc. v Cuomo*, 58 AD2d 251, 396 NYS2d 524 (1977). The object of these rigorous standards of performance is to secure fidelity from the agent to the principal and to insure the transaction of the business of the agency to the best advantage of the principal. *Department of State v Short Term Housing*, 31 DOS 90, conf'd. *sub nom Short Term Housing v Department of State*, 176 AD 2d 619, 575 NYS2d 61 (1991); *Department of State v Goldstein*, 7 DOS 87, conf'd. *Sub nom Goldstein v Department of State*, 144 AD2d 463, 533 NYS2d 1002 (1988). In addition, real estate brokers and salespersons have a fundamental duty to deal honestly with members of the public other than their principals. *Division of Licensing Services v John Linfoot*, 60 DOS 88, conf'd. *sub nom Harvey v Shaffer*, 156 AD2d 1013, 549 NYS2d 296 (1989).

The applicant was convicted, after a jury trial, of crimes which demonstrated a basic lack of honesty and forthrightness. While he claims that there was no finding of a breach of trust placed in him by the United States government, that claim is based upon a technical interpretation of Federal law. Clearly, he deceived the government, and the government relied on his deception. Thus, in light of the obligation for a real estate salesperson to act with the highest degree of honesty in his dealings with both his principals and the general public, there is a direct relationship between the crimes for which the applicant was convicted and a license as a real estate salesperson.

The direct relationship having been established, it is 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 involve an unreasonable risk to the safety or welfare of specific individuals or the general public.

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 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 (§§753[1][b] and [h]).

As previously noted, the direct relationship of the crimes to the duties of a real estate salesperson is a factor which weighs against the issuance of the license (§753[1][c]), as does the fact that the crimes, being felonies, were serious offenses (§753[1][f])). A further negative factor is the fact that the applicant was approximately 50 years old at the time that he committed the crimes (§753[1][e], and, thus, of sufficient maturity to recognize the seriousness and wrongfulness of his conduct.

The fact that approximately 9 years have passed since the commission of the crimes (§753[1][d]) is in the applicant's favor, as are his employment since his release from prison (App. Ex. C) and his compliance with the terms of his supervised release (App. Ex. B) (§753[1][g]), and the issuance to him of a 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.

The crimes of which the applicant was convicted are serious. They involved extreme acts of dishonesty. His contention that he derived no personal benefit from his crimes, while perhaps literally true, is misleading. As with any employee, the applicant must have anticipated that if Grumman did particularly well on the contract it might reflect well on him and in some way further his career, just as a dishonest real estate salesperson might conclude that by misleading customers he could benefit his clients and/or employing broker and in so doing reap future benefits. Thus, when the conduct which led to his conviction is considered together with the fact that the applicant was forced to resign from his employment with Grumman when it was disclosed that over a period of three years he had submitted travel vouchers accompanied by fraudulent receipts, the tribunal can only conclude that to grant this application would be in derogation of its obligation to protect the public from untrustworthy licensees.

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 applicant has not demonstrated that he has the requisite good character, integrity and trustworthiness to be licensed as a real estate salesperson, and has not established that the direct relationship between his conviction and a license as a

real estate salesperson has been attenuated sufficiently. Thus, it is further concluded that the issuance to him of a license as a real estate salesperson would involve an unreasonable risk to the safety and welfare of the public.

DETERMINATION

WHEREFORE, IT IS HEREBY DETERMINED THAT the application of Howard Broderson for a license as a real estate salesperson is denied.

Roger Schneier
Administrative Law Judge

Dated: October 30, 1998