

STATE OF NEW YORK
DEPARTMENT OF STATE
OFFICE OF ADMINISTRATIVE HEARINGS

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In the Matter of the Application of

THERESA M. CANNIZZARO

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 June 24, 1999 at the office of the Department of State located at 270 Broadway, New York, New York.

The applicant, having been advised of her right to be represented by an attorney, chose to represent herself.

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

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 20, 1999 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. 2).

2) On April 15, 1998 the applicant pled guilty to Grand Larceny in the 3rd degree, Penal Law §155.35, a class D felony, and was sentenced to six months incarceration, five years probation, and restitution of \$23,520.00 (State's Ex. 4). The plea was in settlement of an indictment arising out of a felony complaint in which it was alleged that the applicant had forged checks on her employer's account to pay her own bills (State's Ex. 3).

3) At the time of the commission of the crime the applicant was approximately 38 years old.

4) The applicant served 4 months incarceration, and was released on September 10, 1998. She has since reported to her probation

officer monthly, as required, and has made restitution installments of \$400.00 per month.

5) Since her release the applicant has been employed by licensed real estate broker Patricia Ford as a bookkeeper. In that capacity she has, without untoward incident, handled large amounts of cash and had access to 4 checking accounts. In the course of Ms. Ford's property management business the applicant pays bills, receives checks, and has unsupervised access to apartments to facilitate the making of repairs. Ms. Ford, who is the sponsoring broker on the application, indicates that she fully trusts the applicant, who she says "has proven to be honest, responsible and most of all, an asset to my business" (App. Ex. A).

6) The applicant was granted a Certificate of Relief From Disabilities by the sentencing judge on February 17, 1999 (State's Ex. 3).

5) By letter dated April 15, 1999 the applicant was advised by DLS that it proposed to deny her application because of the conviction, and that she could request a hearing, which she did on April 30, 1999. Accordingly, the matter having been referred to this tribunal on May 21, 1999, notice of hearing dated May 24, 1999 was served on the applicant by certified mail posted by DLS on June 3, 1999 and delivered to her on June 8, 1999 (State's Ex. 1).

OPINION

I- As the person who requested the hearing, the burden is on the applicant to prove, by substantial evidence, that she 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 she demonstrate that she 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 principal 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 pled guilty to a crime which demonstrated a lack of honesty. There is a direct relationship between that crime 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 crime 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 crime was serious (§753[1][f]). A further negative factor is the fact that the applicant was approximately 38 years old at the time that she committed the crime (§753[1][e]), and, thus, of sufficient maturity to recognize the seriousness and wrongfulness of her conduct.

Slightly more than 2 years have passed since the commission of the crime (§753[1][d]).

The applicant's employment in a responsible position with her sponsoring broker since her release from prison and her compliance with the terms of her probation is a positive factor (§753[1][g]), as is the issuance to her 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 crime of which the applicant was convicted was serious, and involved significant acts of dishonesty. However, in her testimony, which appeared honest and sincere, she acknowledged her wrongdoing and, although she testified that they arose out of an abusive relationship, freely accepted full responsibility for her acts. She seems to have learned from her incarceration, and to be sincere in her expressed intent to conduct herself honestly in the future. The fact that her sponsoring broker, who will supervise her activities as a salesperson and be responsible for her conduct, has already entrusted her with the handling of significant sums of money and relies on her to receive checks and pay bills, all with no untoward events occurring, supports the belief that the applicant has been rehabilitated. That she will be on probation for 4 more years and can expect to be reincarcerated should she commit any further crimes during that time is also a factor in her favor.

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 demonstrated that she has the requisite good character, integrity and trustworthiness to be licensed as a real estate salesperson, and has established that the direct relationship between her conviction and a license as a real estate salesperson has been attenuated sufficiently. Thus, it is further concluded that the issuance to her 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 Theresa M. Cannizzaro for a license as a real estate salesperson is granted.

Roger Schneier
Administrative Law Judge

Dated: June 24, 1999