

STATE OF NEW YORK  
DEPARTMENT OF STATE  
OFFICE OF ADMINISTRATIVE HEARINGS

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In the Matter of the Application of

**MARC A. CRIADO-MASTROS**

For a License as a Real Estate Salesperson

**DECISION**

Complaint No.: 2018-1362

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The above noted matter came on for a hearing before the undersigned, Roger Schneier, on December 4, 2018 at the office of the Department of State located at 123 William Street, New York

The applicant was represented by Bonnie Parente, Esq., 190 Jericho Turnpike, Suite 204, Mineola, New York 11501.

The Division of Licensing Services (hereinafter "DLS") was represented by Jenifer Rajkumar, Esq.

**ISSUE**

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

**FINDINGS OF FACT**

1) By on-line application received on August 27, 2018 the applicant applied for renewal of his license as a real estate salesperson which was first issued in 2016 (State's Ex. 2).

2) On March 9, 2017 the applicant was convicted on his plea of guilty to Grand Larceny in the 2<sup>nd</sup> Degree, Penal Law §155.40, and Insurance Fraud in the 2<sup>nd</sup> Degree, Penal Law §176.25. He was sentenced to five years of probation and restitution payments totaling \$124,561 (State's Ex. 3). According to the applicant's testimony those payments will be due in any year in which he has earned income in excess of \$26,000.00, which has not yet occurred.

3) The applicant was granted a Certificate of Relief from Disabilities at the time of sentencing (State's Ex. 4).

4) At the time the crime commenced in June 2007 the applicant was approximately 28 years old, and when the crime ended he was approximately 37 years old (State's Ex.3).

5) According to applicant's testimony the conviction arose out of his employment by the New York City Fire Department (FDNY) as an emergency medical technician and para medic. As one of the benefits of his employment the applicant was covered by AFLAC disability insurance. After he was injured on the job and forced to miss work the applicant made claims on that insurance. Following a procedure which was used by other FDNY employees, which procedure the applicant believed was correct, the applicant completed the required paper work and submitted it to his supervisor for approval. Once it was approved the papers were submitted to AFLAC. However, the correct procedure would have been to submit the papers to an FDNY official who was specifically designated to review them and certify the applicant's eligibility for benefits. The applicant followed the incorrect procedure for ten years. However, when a different FDNY employee was found to have submitted a fraudulent claim all of the FDNY AFLAC claims were reviewed, and the applicant was indicted because he had followed the wrong procedure. After paying his criminal defense attorney \$15,000.00 he no longer could afford to continue with his defense, and, on the advice of counsel, he agreed to plead guilty in return for the sentence of probation and conditional restitution and the issuance of the Certificate of Relief from Disabilities.

6) According to the applicant's testimony, because his injuries are legitimate he has been granted a 75% disability pension and Social Security disability benefits.

7) Since September 19, 2016 the applicant has been associated as a real estate salesperson with licensed real estate broker Keller Williams Realty Landmark. His team leader, licensed Associate Real Estate Broker Allison Gambone, speaks highly of the applicant's honesty, ability, and work ethic, as do a former landlord client and a former tenant client (App. Ex. A, State's Ex. 5). The employment as a real estate salesperson continued after the conviction.

8) By letter dated September 18, 2018 DLS advised the applicant that it proposed to deny his application because of the conviction and that he could request a hearing, which Ms. Parente did on his behalf by letter dated October 2, 2018 (State's Ex. 1).

### **OPINION AND CONCLUSIONS OF LAW**

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 licensed as a real estate salesperson. State Administrative Procedure Act (SAPA), §306(1). Substantial evidence is that which a reasonable mind could accept as supporting a conclusion or ultimate fact. *300 Gramatan Avenue Associates v State Div. of Human Rights*, 45 NY2d 176, 408 NYS2d54, 56-57 (1978); *Tutuiamu v New York State*, 22 AD3d 503, 802 NYS2d 465 (2nd Dept. 2005). "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), quoting *300 Gramatan Avenue Associate, supra*, 408 NYS2d at 57.

II- Pursuant to Real Property Law (RPL) §441(1) (b), an applicant for a license as a real estate salesperson must establish that he or she is trustworthy. Any criminal convictions to which the applicant has been subject must be considered in determining whether that applicant is trustworthy.

In considering whether the license should be granted, it is necessary to consider, together with the provisions of RPL Article 12-A, the provisions of Correction Law Article 23-A, which 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 has discretion to deny the license....” *Matter of Bonacorsa*, 71 NY2d 605, 528 NYS2d 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 applies ‘[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 NYS2d 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 NYS2d 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 AD2d 17, 467 NYS2d 865, 869 (2<sup>nd</sup> Dept. 1983).

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); *Matter of Mahshie*, 192 AD2d 1133, 598 NYS2d 756 (4th Dept. 1993).

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.

Further, an agency which seeks to deny an application has no obligation to rebut the presumption of rehabilitation which derives from the Certificate of Relief so long as it properly considers the other factors set forth in Correction Law §753(1). *Arrocha v Board of Education of the City of New York*, 93 NY2d 361, 690 NYS2d 503 (1999).

In determining whether there is a direct relationship between the crimes of which the applicant was convicted, Grand Larceny and Insurance Fraud, and a license as a real estate salesperson, it is first necessary to consider the functions of a real estate salesperson. A real estate salesperson acts in a fiduciary capacity, and in the course of his or her employment deals with large sums of money, leases, and mortgage applications. There is a direct relationship between the crimes of which the applicant was convicted and those functions.

There being a direct relationship, it is necessary to consider the factors set forth in Correction Law §753.

The pertinent duties and responsibilities of a real estate salesperson (§753(1) (b)) have already been discussed in regards to the question of direct relationship. The fact that the applicant was convicted of crimes directly related to those duties leads a negative inference regarding his fitness to perform those duties and to meet those responsibilities (§753(1) (c)).

Almost three years have passed since the termination of the crime (§753(1) (d)), which occurred when the applicant was approximately 28 to 37 years of age (§753(1) (e)).

The seriousness of the crimes (§753(1) (f)) is established by their status as felonies.

In the applicant's favor is the public policy of encouraging licensure of ex-offenders (§753(1) (a)), his post-conviction continuing employment as a real estate salesperson (§753(1) (g)), 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.

The applicant was convicted of serious crimes. It appears, however, that the criminality of his conduct was not intentional but, rather, the result of his following what appeared to be an accepted, but incorrect, practice. As demonstrated by his having been granted both a disability pension and social security disability benefits, there apparently was no reason for the applicant to engage in intentional fraud. He has been a real estate salesperson since 2016, and his team leader and clients speak very highly of him. As a real estate salesperson he will continue to be subject to regular supervision by a licensed real estate broker (19 NYCRR 175.21), which will help to assure his good conduct.

Having heard and observed his testimony, which was in no way refuted and which I found to be credible, and after having given due consideration to the factors set forth in Correction Law §753 and to the requirements of RPL Article 12-A, 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 he is sufficiently trustworthy to be licensed as a real estate salesperson.

**DETERMINATION**

**WHEREFORE, IT IS HEREBY DETERMINED THAT**, pursuant to Real Property Law §§441(1) (b) and 441-e, the application of Marc A. Criado-Mastros for renewal of his license as a real estate salesperson, UID# 10401294128 is granted.

/s/

Roger Schneier  
Administrative Law Judge

Dated: December 4, 2018