DEPARTMENT OF STATE
OFFICE OF THE SECRETARY OF STATE
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In the Matter of the Complaint of

DEPARTMENT OF STATE
DIVISION OF LICENSING SERVICES,

Appellant,

DECISION AND ORDER
2 DOS APP. OO

-against-

JOSEPH MARSALA, Real Estate Salesperson

Respondent

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Division of Licensing Services ("Appellant") appeals to the Secretary of State from a decision of the Office of Administrative Hearings that overruled the decision of the Appellant denying Joseph Marsala ("Respondent") a real estate salesperson license.

Appellant submitted a Memorandum of Appeal objecting to the determination below.

Respondent submitted a Memorandum in Opposition.

ISSUE

This appeal considers whether the Office of Administrative Hearings committed error in determining that Respondent should be granted a real estate salesperson license.

SUMMARY OF THE EVIDENCE

In deciding this appeal, the following documents were considered:

A) Pleadings, consisting of a notice of hearing, a notice of appearance, Appellant's Memorandum of Appeal, and the Respondents's Memorandum in Opposition and Cross Appeal.

B) The Respondent's application for a real estate salesperson license, and the Appellant's letter of denial.

C) Copy of the hearing transcripts, with the exhibits appended.

FINDINGS OF FACT

The findings of fact in the decision of the Office of Administrative Hearings are adopted in part for purposes of this appeal. Paragraphs 1, 2, 3, 4, 5, 6, 8, and 9 are adopted in total. Paragraph 7 regarding Respondent's contentions are adopted as follows:

Respondent contends that he is not and has never been a member of the Gambino crime family and that he continued in the gambling enterprise because he "could not voluntarily stop being a bookmaker after being approached by the crime family." He admits full culpability for the unlawful act. There is no evidence of any other convictions against the Respondent.

OPINION

The Respondent, a former police officer, was convicted of attempted enterprise corruption[1] and was sentenced to six months house arrest and 5 years probation. After serving approximately two and one half years of probation, Mr. Marsala was granted an early discharge from probation. He subsequently applied for a real estate salesperson license on February 19, 1999 which was denied by the Appellant. The Office of Administrative Appeals reversed Appellant's decision, and Appellant appeals.

When determining whether an individual with a criminal conviction may be denied a license to practice a profession regulated by the state, N.Y. Correction Law §§ 751-753 must be applied. The State

[1]The record is not clear whether any criminal activity was ongoing while Respondent was a police officer. Respondents testimony suggests that his criminal activity began after he retired from the force. Both parties imply that the criminal activity began some time after Mr. Marsala left the police force; however, in his opinion Administrative Law Judge Neals states, as fact, that the criminal activity began while Mr. Marsala was still a police officer. This statement of fact was not disputed by either party.

may not deny a license based solely on a criminal conviction unless there is a "direct relationship" between the prior criminal act and the licensure, or if licensure would result in an "unreasonable risk to property or to the safety or welfare of specific individuals or the general public."[2] Either factor standing alone is adequate grounds for the Department of State to deny a license.

Additionally, N.Y. Correction Law § 753 contains eight factors which must be considered when reviewing section 752.[3] In order to properly review section 752, section 753 must first be examined.

1) As stated in the Correction Law, it is the public policy of this state to encourage licensure of those previously convicted of a crime. However, given the facts as established by this record, public policy does not require the issuance of a license to a former police officer who became involved in organized crime.

2) The duties of a real estate salesperson are those that require a significant level of trustworthiness. Access to the real and personal property of home sellers and access to financial information regarding buyers and sellers requires a high degree of trust. Moreover, participants in a real estate transaction need to believe that their agent is of the highest integrity.

3) A criminal offense should be looked at in light of the surrounding circumstances. In this matter, the respondent, a former police officer, became involved in illegal gambling activity because "the money was good." As a former police officer the respondent was certainly aware that his activities were criminal in nature[4] and more importantly, he would be more sensitive to the issues that would (and did) arise

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[2]N.Y. Correction Law § 752.

[3]N.Y. Correction Law § 753.

[4]During cross-examination, the respondent testified: "I knew I was committing a crime. I'm not saying that I was ignorant of it. I knew what I was doing. The money was good." Record at 20-21.

regarding this type of criminal activity, i.e. affiliation with organized crime.[5] His voluntary participation in these activities all but invited members of organized crime to contact him. In fact, during cross-examination, the respondent admitted that if he desired to continue his illegal activity, he would have to get involved with organized crime figures.[6] There is no demonstrated merit to Mr. Marsala's claim that he was coerced and ordered to become affiliated with the Gambino crime family.[7]

4) The criminal activity did not cease until his indictment in 1994. The record indicates that Mr. Marsala would have continued this illegal activity had he not been arrested. Therefore, although at least five years have passed since any known criminal activity, it appears that had Mr. Marsala not been arrested, he would still be involved in illegal activity.

5) The record is unclear as to when the applicant became involved in the stated criminal activity[8]; however, the applicant was likely in his forties or early fifties when the illicit activity began. There is no argument to be made that Mr. Marsala was too young to understand the nature of his actions or that the crimes were just youthful indiscretions. In fact, Mr. Marsala admitted that he knew he was committing a crime.

6) Mr. Marsala's criminal activity and involvement with organized crime was serious.

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[5]See Record at 20-21, Marsala v. Division of Licensing Services, 67 DOS 00.

[6]Under cross-examination, the respondent testified as follows:

Q. When you became associated with [organized crime], you knew that these were organized crime figures?

A. Yeah.

Q. So you willingly - -

A. If I wanted to stay in the business, yeah.

Record at 19.

[7]Brief for Respondent at 2, Marsala v. Division of Licensing Services, 67 DOS 00.

[8]See infra note 1 at 1.

7) Mr. Marsala did provide the Office of Administrative Hearings with a written character reference and a certificate of relief from civil disabilities. The character reference was provided by Reverend Augustus C. Sandman of the Our Lady of Good Counsel Parish. There is little in the record that qualifies Rev. Sandman as a relevant character witness; therefore, little weight should be given to the character reference that he provided. A clergyman's standard of forgiveness is far different from a judicial determination of fitness to hold a license issued by the state. Although the opinion of Reverend Sandman is respected, his determination is based on faith. The decision rendered here must be based on the law as applied to the facts at issue.

Section 753 (2) of the Correction Law grants the presumption of rehabilitation to Mr. Marsala based upon the issuance of a certificate of relief from civil disabilities; however, Mr. Marsala's testimony during cross-examination satisfactorily acted to rebut the aforementioned presumption. Under cross-examination, Mr. Marsala admitted that he knew he was committing a crime, that he was involved in the criminal activity because of the money involved, that he continued in the criminal enterprise knowing there was organized crime involvement, and alluded to the fact that he would still be involved in criminal activity if he had not been arrested. Given the right opportunity Mr. Marsala could well again become involved in criminal activity.

8) When state law mandates a licensing scheme for any profession, it does so partially to protect those within the state and/or their property from any harm or wrongdoing on the part of those acting within that profession. The Department of State has such a mandate in relation to the licensure of real estate professionals. It is well within the Department's interests to deny a license to individuals the Department deems not fit to act in the public good.

Having examined the eight factors listed in section 753 it is now necessary to review those factors in light of section 752. A direct relationship exists if "the nature of the criminal conduct for which [Mr. Marsala] was convicted has a direct bearing on his fitness or ability to perform one or more of the duties or responsibilities necessarily related to the [real estate license]."[9]

A fiduciary relationship exists between a real estate salesperson and client that mandates a standard of care that requires honesty, trustworthiness, and reasonableness. By his guilty plea, Mr. Marsala admittedly attempted to conduct or participate in a pattern of criminal activity. This activity was undertaken voluntarily with the full knowledge that a crime was being committed. This showing of untrustworthiness is a direct contradiction to the traits required by the holder of a real estate license.

It is therefore found that a direct relationship exists between the prior criminal activity and the type of conduct and character required to hold the real estate salesperson license. Furthermore, pursuant to section 753, it is found, as discussed above, that the factors listed in Section 753 do not diminish or outweigh the direct relationship between the crime and the real estate license requirements. Having so found, it is not necessary to determine whether the licensure of Mr. Marsala would create an unreasonable risk.

CONCLUSIONS OF LAW

Consistent with New York law, having determined that a direct relationship exists between the requirements of conduct and character of the license sought and the prior criminal conduct, and that such conduct was not diminished by any statutorily enumerated factors, it is found that the Department of State is not required to issue a Real Estate Salesperson License to the Respondent.

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[9] N.Y. Correction Law § 750.

DETERMINATION

The determination of the Administrative Law Judge is reversed. The Division of Licensing Services should take all necessary and appropriate steps to effectuate this Decision and Order.

So ordered on:

Alexander F. Treadwell
Secretary of State