GUIDE TO STATUTES AND RULES RELATING TO HEARINGS

New York State Department of State

Introduction

The Office of Administrative Hearings conducts administrative hearings, in which the Office of General Counsel represents the department's Division of Licensing Services, to determine where discipline of licensees regulated by the department is warranted. This *Guide to Statutes and Rules Relating to Hearings* provides information to those who are respondents in a hearing and their attorneys. Included in the Guide are excerpts from the State Administrative Procedure Act and the Rules of the Department of State (19 NYCRR), and a summary of those rules.

Additional information may be obtained by writing to:

Department of State
Office of General Counsel
41 State Street
Albany, NY 12231-0001

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Summary of Hearing Rules of Procedure

The Department of State's Rules of Procedure for Adjudicatory Proceedings are set forth in Part 400 of 19 NYCRR. The following is a summary of such rules:

1. All hearings will be conducted in accordance with the State Administrative Procedure Act. Pertinent provisions are as follows:
    a. All hearings will be commenced on reasonable notice (generally 10 days under our statutes). The notice will apprise the respondent of matters asserted and of any statutes or rules involved. Parties may present written and/or oral argument on any issue.
    b. The department will make a record of all hearing proceedings including a transcript of the hearing and shall furnish a copy of the record or any part thereof to the respondent at cost. All parties have the usual rights of parties in civil proceedings, i.e., to examine and cross-examine witnesses, make objections, etc.
    c. The administrative law judge will preside over the hearing in a fair and impartial manner. Generally, an administrative law judge has the authority of any judge in a civil matter and may order discovery and depositions. The judge rules on the admissibility of evidence and is not bound by strict rules of evidence.
    d. The administrative law judge or other person assigned to render a decision does so by including findings of fact and conclusions of law or reasons for his/her decision. The judge will not consult with any party about his/her decision except upon notice to all parties.
2. The rules require a decision to be made in the format of findings of fact and conclusions of law. Parties may propose findings of fact and the decision will contain a ruling on such findings.
3. Subpoenas compelling attendance of witnesses or documents may be issued by the administrative law judge or any attorney duly admitted to practice in the State of New York.
4. Motions may be made to dismiss the complaint upon failure of proof.
5. Every person is entitled to representation and someone who is not a lawyer may represent a respondent. Every representative must file a notice in accordance with Section 166 of the Executive Law on forms to be provided by the department.
6. A maximum of two adjournments of a hearing may be granted and requests must be made by affidavit addressed to the administrative law judge and must be received no later than three working days prior to the date of the hearing.
7. All adjudicatory proceedings must be finally disposed of within 150 days of the date of the hearing unless the hearing is adjourned by mutual consent or by request of the respondent; or the time is extended by mutual consent or the Secretary of State or administrative law judge makes a written declaration of necessity to extend citing his/her reasons therefor.

STATE ADMINISTRATIVE PROCEDURE ACT
§ 102. Definitions

3. "Adjudicatory proceeding" means any activity which is not a rule making proceeding or an employee disciplinary action before an agency, except an administrative tribunal created by statute to hear or determine allegations of traffic infractions which may also be heard in a court of appropriate jurisdiction, in which a determination of the legal rights, duties or privileges of named parties thereto is required by law to be made only on a record and after an opportunity for a hearing.

4. "License" includes the whole or part of any agency permit, certificate, approval, registration, charter, or similar form of permission required by law.

5. "Licensing" includes any agency activity respecting the grant, denial, renewal, revocation, suspension, annulment, withdrawal, recall, cancellation or amendment of a license.

6. "Person" means any individual, partnership, corporation, association, or public or private organization of any character other than an agency engaged in the particular rule making, declaratory ruling, or adjudication.

7. "Party" means any person or agency named or admitted as a party or properly seeking and entitled as of right to be admitted as a party; but nothing herein shall be construed to prevent an agency from admitting any person or agency as a party for limited purposes.

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§ 301. Hearings

1. In an adjudicatory proceeding, all parties shall be afforded an opportunity for hearing within reasonable time.
2. All parties shall be given reasonable notice of such hearing, which notice shall include (a) a statement of the time, place, and nature of the hearing; (b) a statement of the legal authority and jurisdiction under which the hearing is to be held; (c) a reference to the particular sections of the statutes and rules involved, where possible; (d) a short and plain statement of matters asserted; and (e) a statement that interpreter services shall be made available to deaf persons, at no

charge, pursuant to this section. Upon application of any party, a more definite and detailed statement shall be furnished whenever the agency finds that the statement is not sufficiently definite or not sufficiently detailed. The finding of the agency as to the sufficiency of definiteness or detail of the statement or its failure or refusal to furnish a more definite or detailed statement shall not be subject to judicial review. Any statement furnished shall be deemed, in all respects, to be a part of the notice of hearing.

3. Agencies shall adopt rules governing the procedures on adjudicatory proceedings and appeals, in accordance with provisions of article two of this chapter, and shall prepare a summary of such procedures in plain language. Agencies shall make such summaries available to the public upon request, and a copy of such summary shall be provided to any party cited by the agency for violation of the laws, rules or orders enforced by the agency.
4. All parties shall be afforded an opportunity to present written argument on issues of law and an opportunity to present evidence and such argument on issues of fact, provided however that nothing contained herein shall be construed to prohibit an agency from allowing parties to present oral argument within a reasonable time. In fixing the time and place for hearings and oral argument, due regard shall be had for the convenience of the parties.
5. Unless precluded by statute, disposition may be made of any adjudicatory proceeding by stipulation, agreed settlement, consent order, default, or other informal method.
6. Whenever any deaf person is a party to an adjudicatory proceeding before an agency, or a witness therein, such agency in all instances shall appoint a qualified interpreter who is certified by a recognized national or New York state credentialing authority to interpret the proceedings to, and the testimony of, such deaf person. The agency conducting the adjudicatory proceeding shall determine a reasonable fee for all such interpreting services which shall be a charge upon the agency.

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§ 302. Record

1. The record in an adjudicatory proceeding shall include: (a) all notices, pleadings, motions, intermediate rulings; (b) evidence presented; (c) a statement of matters officially noticed except matters so obvious that a statement of them would serve no useful purpose; (d) questions and offers of proof, objections thereto, and rulings thereon; (e) proposed findings and exceptions, if any; (f) any findings of fact, conclusions of law or other recommendations made by a presiding officer; and (g) any decision, determination, opinion, order or report rendered.
2. The agency shall make a complete record of all adjudicatory proceedings conducted before it. For this purpose, unless otherwise required by statute, the agency may use whatever means it deems appropriate, including but not limited to the use of stenographic transcriptions or electronic recording devices. Upon request made by any party upon the agency within a reasonable time, but prior to the time for commencement of judicial review, of its giving notice of its decision,

determination, opinion or order, the agency shall prepare the record together with any transcript of proceedings within a reasonable time and shall furnish a copy of the record and transcript or any part thereof to any party as he may request. Except when any statute provides otherwise, the agency is authorized to charge not more than its cost for the preparation and furnishing of such record or transcript or any part thereof, or the rate specified in the contract between the agency and a contractor if prepared by a private contractor.

3. Findings of fact shall be based exclusively on the evidence and on matters officially noticed.

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§ 303. Presiding officers

Except as otherwise provided by statute, the agency, one or more members of the agency, or one or more hearing officers designated and empowered by the agency to conduct hearings shall be presiding officers. Hearings shall be conducted in an impartial manner. Upon the filing in good faith by a party of a timely and sufficient affidavit of personal bias or disqualification of a presiding officer, the agency shall determine the matter as part of the record in the case, and its determination shall be a matter subject to judicial review at the conclusion of the adjudicatory proceeding. Whenever a presiding officer is disqualified or it becomes impractical for him to continue the hearing, another presiding officer may be assigned to continue with the case unless it is shown that substantial prejudice to the party will result therefrom.

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§ 304. Powers of presiding officers

Except as otherwise provided by statute, presiding officers are authorized to:

1. Administer oaths and affirmations.
2. Sign and issue subpoenas in the name of the agency, at the request of any party, requiring attendance and giving of testimony by witnesses and the production of books, papers, documents and other evidence and said subpoenas shall be regulated by the civil practice law and rules. Nothing herein contained shall affect the authority of an attorney for a party to issue such subpoenas under the provisions of the civil practice law and rules.
3. Provide for the taking of testimony by deposition.
4. Regulate the course of the hearings, set the time and place for continued hearings, and fix the time for filing of briefs and other documents.
5. Direct the parties to appear and confer to consider the simplification of the issues by consent to the parties.
6. Recommend to the agency that a stay be granted in accordance with section three hundred four, three hundred six or three hundred seven of the military law.

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§ 305. Disclosure

Each agency having power to conduct adjudicatory proceedings may adopt rules providing for discovery and depositions to the extent and in the manner appropriate to its proceedings.

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§ 306. Evidence

1. Irrelevant or unduly repetitious evidence or cross-examination may be excluded. Except as otherwise provided by statute, the burden of proof shall be on the party who initiated the proceeding. No decision, determination or order shall be made except upon consideration of the record as a whole or such portion thereof as may be cited by any party to the proceeding and as supported by and in accordance with substantial evidence. Unless otherwise provided by any statute, agencies need not observe the rules of evidence observed by courts, but shall give effect to the rules of privilege recognized by law. Objections to evidentiary offers may be made and shall be noted in the record. Subject to these requirements, an agency may, for the purpose of expediting hearings, and when the interests of parties will not be substantially prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.
2. All evidence, including records and documents in the possession of the agency of which it desires to avail itself, shall be offered and made a part of the record, and all such documentary evidence may be received in the form of copies or excerpts, or by incorporation by reference. In case of incorporation by reference, the materials so incorporated shall be available for examination by the parties before being received in evidence.
3. A party shall have the right of cross-examination.
4. Official notice may be taken of all facts of which judicial notice could be taken and of other facts within the specialized knowledge of the agency. When official notice is taken of a material fact not appearing in the evidence in the record and of which judicial notice could not be taken, every party shall be given notice thereof and shall on timely request be afforded an opportunity prior to decision to dispute the fact or its materiality.

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§ 307. Decisions, determinations and orders

1. A final decision, determination or order adverse to a party in an adjudicatory proceeding shall be in writing or stated in the record and shall include findings of fact and conclusions of law or reasons for the decision, determination or order. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings. If, in accordance with agency rules, a party submitted proposed findings of fact, the decision, determination or order shall include a ruling upon each proposed finding. A copy of the decision, determination or order shall be delivered or mailed forthwith to each party and to his attorney of record.

2. Unless required for the disposition of ex parte matters authorized by law, members or employees of an agency assigned to render a decision or to make findings of fact and conclusions of law in an adjudicatory proceeding shall not communicate, directly or indirectly, in connection with any issue of fact, with any person or party, nor, in connection with any issue of law, with any party or his representative, except upon notice an opportunity for all parties to participate. Any such agency member (a) may communicate with other members of the agency, and (b) may have the aid and advice of agency staff other than staff which has been or is engaged in the investigative or prosecuting functions in connection with the case under consideration or factually related case.

   This subdivision does not apply (a) in determining applications for initial licenses for public utilities or carriers; or (b) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers.

3. (a) Each agency shall maintain an index by name and subject of all written final decisions, determinations and orders rendered by the agency in adjudicatory proceedings. Such index and the text of any such written final decision, determination or order shall be available for public inspection and copying. Each decision, determination and order shall be indexed within sixty days after having been rendered.

   (b) An agency may delete from any such index, decision, determination or order any information that, if disclosed, would constitute an unwarranted invasion of personal privacy under the provisions of subdivision two of section eighty-nine of the public officers law and may also delete at the request of any person all references to trade secrets that, if disclosed, would cause substantial injury to the competitive position of such person. Information which would reveal confidential material protected by federal or state statute, shall be deleted from any such index, decision, determination or order.

Article 4--Licenses

§ 401. Licenses

1. When licensing is required by law to be preceded by notice and opportunity for hearing, the provisions of this chapter concerning adjudicatory proceedings apply. For purposes of this act, statutes providing an opportunity for hearing shall be deemed to include statutes providing an opportunity to be heard.
2. When a licensee has made timely and sufficient application for the renewal of a license or a new license with reference to any activity of a continuing nature, the existing license does not expire until the application has been finally determined by the agency, and, in case the application is denied or the terms of the new license limited, until the last day for seeking review of the agency order or a later date fixed by order of the reviewing court, provided that this subdivision shall not affect any valid agency action then in effect summarily suspending such license.

3. If the agency finds that public health, safety, or welfare imperatively requires emergency action, and incorporates a finding to that effect in its order, summary suspension of a license may be ordered, effective on the date specified in such order or upon service of a certified copy of such order on the licensee, whichever shall be later, pending proceedings for revocation or other action. These proceedings shall be promptly instituted and determined.
4. When the hearing seeks the revocation of a license or permit previously granted by the agency, either party shall, upon demand and at least seven days prior to the hearing, disclose the evidence that the party intends to introduce at the hearing, including documentary evidence and identification of witnesses, provided, however, the provisions of this subdivision shall not be deemed to require the disclosure of information or material otherwise protected by law from disclosure, including information and material protected because of privilege or confidentiality. If, after such disclosure, a party determines to rely upon other witnesses or information, the party shall, as soon as practicable, supplement its disclosure by providing the names of such witnesses or the additional documents.

Article 5--Representation

§ 501. Representation

Any person compelled to appear in person or who voluntarily appears before any agency or representative thereof shall be accorded the right to be accompanied, represented and advised by counsel. In a proceeding before an agency, every party or person shall be accorded the right to appear in person or by or with counsel. Nothing herein shall be construed either to grant or to deny to any person who is not a lawyer the right to appear for or represent others before any agency.

19 NYCRR PART 400
Hearing Rules of Procedure

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§ 400.1 Intent and purpose.

The Secretary of State has authority under Article 3 of the State Administrative Procedure Act to provide for adjudicatory proceedings and appeals pertaining to matters within the Secretary's statutory jurisdiction. It is the intent and purpose of these regulations to afford all those appearing in any hearing subject to this part due process of law and an opportunity to be heard, while at the same time ensuring protection of the public health, safety and general welfare.

§ 400.2 Office of Administrative Hearings.

(a) There is hereby established within the Department of State an office of administrative hearings which shall conduct all adjudicatory proceedings which devolve upon the Secretary of State by requirement of statute. All adjudicatory proceedings shall be conducted by the office of administrative hearings through the service of administrative law judges who will have all the power and authority of presiding officers or hearing officers as defined by the State Administrative Procedure Act (SAPA), and other pertinent statutes, and these regulations.

(b) All administrative law judges shall be licensed to practice law and shall not serve in any other capacity within the Department of State.

(c) For administrative and personnel purposes the administrative law judges shall report directly to the Secretary of State or the Secretary of State's designee.

(d) The fact that an administrative law judge's rulings, decisions or other actions favor or disfavor the Department of State or any other party shall not be considered in establishing the administrative law judge's salary, promotion, benefits, working conditions, case assignments or opportunities for employment or promotion, and shall not be the cause of any disciplinary proceedings, removal, reassignment, reclassification, or relocation. There shall not be established any quotas or similar expectations for any administrative law judge that relate in any way to whether the administrative law judge's rulings, decisions or other actions favor or disfavor the Department of State. The work of the administrative law judge shall be evaluated only on the following general areas of performance: competence, objectivity, fairness, productivity, diligence and temperament.

(e) In any pending adjudicatory proceeding, the administrative law judge may not be ordered or otherwise directed to make any finding of fact, to reach any conclusion of law, or to make or recommend any specific disposition of a charge, allegation, question or issue.

(f) Unless otherwise authorized by law, an administrative law judge shall not communicate in connection with any issue that relates in any way to the merits of an adjudicatory proceeding pending before the administrative law judge with any person except upon notice and opportunity for all parties to participate, except that an administrative law judge may consult on questions of law and ministerial matters with other administrative law judges and support staff of the office, provided that such other administrative law judges or support staff have not been engaged in investigative or prosecutorial functions in connection with the adjudicatory proceeding under consideration or a factually related adjudicatory proceeding or would not be disqualified pursuant to (g), below.

(g) An administrative law judge shall not participate in any proceeding to which he or she is a party; in which he or she has been attorney, counsel or representative; in which he or she is interested; or if he or she is related by consanguinity or affinity to any party to the controversy. An administrative law judge shall recuse him or herself from any case in which he or she believes that there is, or there may be perceived to be, a conflict of interest.

(h) Matters shall be referred by other divisions of the Department of State to the office of administrative hearings for hearing.

(i) The administrative law judge assigned shall set the location and time at which a hearing, and any adjournments or continuations thereof, will be held. The office of administrative hearings shall prepare the notice of hearing and transmit it to the person assigned to litigate the matter for proper service. Notices of adjournment or continuation shall be transmitted directly to the parties by the office of administrative hearings.

(j) After the hearing the administrative law judge shall issue a decision based on findings of fact and conclusions of law. Such decision shall be final and binding when issued unless an appeal is taken pursuant to (k), below.

(k) Any of the parties may appeal the decision or the grant or denial of an interim order of suspension to the Secretary of State within thirty calendar days of receipt. Such an appeal shall be made by filing with the Secretary of State, and serving on the other party or parties, a written memorandum stating the appellant's arguments and setting forth specifically the questions of procedure, fact, law or policy to which exceptions are taken, identifying that part of the administrative law judge's decision and order to which objection is made, specifically designating the portions of the record relied upon, and stating the grounds for exceptions. A party upon whom an adverse party has served an appeal may file and serve a memorandum in opposition and cross-appeal within thirty calendar days after such service. A response to a cross-appeal may be filed and served within fifteen calendar days after service of the cross-appeal. The failure of any party to respond shall not be deemed a waiver or admission. The record on appeal shall consist of the evidentiary exhibits from and transcript of the hearing, and the memorandums of appeal, opposition, and cross-appeal. The Secretary of State or his or her designee may, in his or her discretion, stay the effective date of the decision, and shall, based solely on

the record on appeal unless he or she directs in his or her sole discretion that there be oral argument, either confirm the decision in writing, make a written, superseding decision including a statement as to why he or she has not confirmed the administrative law judge's decision, or remand the matter to the administrative judge for additional proceedings.

(l) Following the administrative law judge's decision, and pending the filing of an appeal therefrom, any party may immediately apply to the Secretary or the Secretary's designee for a stay pending determination of the appeal. The application for a stay shall be in writing and based upon evidence contained in the record and shall be served on opposing parties who shall have the opportunity to rebut the application in writing within two business days of receipt. The Secretary or the Secretary's designee shall forthwith rule on the application, and may grant the stay and reserve decision on the appeal; or may deny the stay and either reach a decision on the merits of the appeal or reserve such decision.

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§ 400.3 Conduct of adjudicatory proceedings.

All adjudicatory proceedings will be conducted under the rules enunciated by articles 3, 4 and 5 of the State Administrative Procedure Act, the definitions of the State Administrative Procedure Act pertaining thereto, any other licensing statute under the jurisdiction of the Secretary of State, the Civil Practice Law and Rules as the same may be reasonably be applied and the Constitution of the State of New York as these statutes and Constitution are now stated or may be amended in the future. In all instances, due process of law will be observed. An administrative law judge shall have all the authority which the Secretary of State may grant pursuant to the State Administrative Procedure Act or any other pertinent statute, including, but without limitation, the authority to direct disclosure under section 305 of the State Administrative Procedure Act.

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§ 400.4 Commencement of disciplinary proceedings.

(a) Every adjudicatory proceeding which may result in a determination to revoke or suspend a license or to fine or reprimand a licensee will be commenced by the service of a notice of hearing together with a statement of charges (also known as a complaint), which shall consist of plain and concise statement which shall sufficiently give the administrative law judge and the respondent notice of the alleged misconduct of incompetence. Notice of hearing and statement of charges (or complaint) shall be communicated in any manner permitted by the applicable regulatory statute or the Civil Practice Law and Rules. Respondent may, at his option, serve an answer denying such charges and interposing affirmative defenses, if any. Absent an answer, all charges are deemed denied and all rights are reserved.

(b) The Department of State shall, before making a final determination to deny an application for a license, notify the applicant in writing of the reasons for such proposed denial and shall afford the applicant an opportunity to be heard in person or by counsel

prior to denial of the application. Such notification shall be served personally or by certified mail or in any manner authorized by the Civil Practice Law and Rules. If the applicant is a real estate salesman or has applied to become a salesman, the department shall also notify the broker with whom such salesman is associated, or with whom such salesman or applicant is about to become associated, of such proposed denial. If a hearing is requested, such hearing shall be held at such time and place as the department shall prescribe. If the applicant fails to make a written request for a hearing within 35 days after receipt of such notification, then the notification of denial shall become the final determination of the department. Upon receipt of such demand, and adjudicatory proceeding will be commenced in the manner set forth in subdivision (a) of this section, except that the reasons for denial will be set forth in the stead of charges.

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§ 400.5 Subpoenas.

Subpoenas may be issued by the administrative law judge or any attorney for a party who has been duly admitted to the practice of law in the State of New York. Subpoenas shall be served in any manner permitted by the Civil Practice Law and Rules unless otherwise provided by applicable statutes administered by this department.

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§ 400.6 Motions.

(a) A motion to dismiss the complaint or statement of charges for failure of proof may be made at the conclusion of the direct case presented by the complaining division of the Department of State. The administrative law judge may make a determination:

(1) granting the motion;

(2) denying the motion and continuing the hearing; or

(3) reserving decision on the motion and continuing the hearing.

(b) A denial of a motion made under this section is not a final disposition and a right to appeal to the Secretary of State or to commence a proceeding under article 78 of the Civil Practice Law and Rules shall not accrue until a final decision on the merits is rendered.

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§ 400.7 Affidavits.

When a verified statement is required or deemed desirable by any party, it shall be sufficient for the deponent to subscribe a statement at the end thereof that the "foregoing statement is affirmed under penalties of perjury." A statement verified before a notary public will be equally acceptable.

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§ 400.8 Evidence and proof.

The strict rules of evidence do not apply with respect to administrative adjudicatory proceedings.

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§ 400.9 Service of rules.

Every notice of hearing served shall be served with a copy of these rules, a copy of articles 3, 4 and 5 of the State Administrative Procedure Act and relevant definitions under section 102 of the State Administrative Procedure Act. A summary of these rules will be prepared and made available to the public on request and served with a notice of hearing on any respondent.

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§ 400.10 Representation.

Any person compelled to appear in person or who voluntarily appears before the agency shall be accorded the right to be accompanied, represented and advised by counsel. In a proceeding before the agency, every party or person shall be accorded the right to appear in person or by or with counsel. Nothing in this section shall be construed either to grant or deny to any person who is not a lawyer the right to appear for or represent others before the agency. In accordance with section 166 of the Executive Law, any such representative will file a notice of appearance with the administrative law judge on forms provided by the Department of State and state whether a fee is being paid therefore.

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§ 400.11 Adjournments.

(a) Adjournments of adjudicatory hearings will be granted only for good cause, and no party shall be granted more than two adjournments.

(b) Requests for adjournment must be made by written affidavit addressed to the presiding officer, and must be received at the office of the Department of State in which the presiding officer maintains his regular office no later than three business days prior to the scheduled date of hearing. The affidavit must contain sufficient details to explain the reason for the request so as to enable the presiding officer to rule thereon.

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§ 400.12 Proposed findings of fact.

Any party may submit proposed findings of fact within time limitations set by the administrative law judge. Such findings of fact shall be captioned, entitled as such, shall be consecutively numbered and shall be typed legibly on plain, white bond, standard weight paper, 8½ x 11 inches in size. Such proposed findings of fact shall recite basic facts and not evidentiary facts and shall not be conclusions of law. A basic fact would be "John Jones visited Syracuse," and not "John Jones testified that he visited Syracuse," which is an evidentiary fact. A conclusion of law would be "John Jones has demonstrated

untrustworthiness within the meaning of section 441-c of the Real Property Law." In general, it is expected that the complaint will allege the basic facts which would otherwise be contained in a statement of proposed findings of fact. In accordance with section 301(1) of the State Administrative Procedure Act, the person assigned to render a decision will rule on each finding of fact. Such decision maker will do so by marking the instrument setting forth the proposed findings of fact a part of the decision and noting in the margin thereof the ruling, i.e., "Found," "Not Found," "Irrelevant," "Evidentiary," "Conclusion of Law," which rulings may be abbreviated meaningfully. The body of the decision will contain such findings of fact as the decision maker deems relevant, but need not be expressed in the same language as presented in the proposed findings.

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§ 400.13 Time periods.

(a) Except by consent of the parties or otherwise determined under subdivision (c) of this section, every adjudicatory proceeding under the jurisdiction of the Secretary of State shall be brought to completion within 150 days of the date of the hearing specified in the service of the notice of hearing. An adjournment or continuance granted at the request of respondent or by mutual consent of the parties will extend the period of 150 days in which the Secretary of State must act by the length of time the adjournment or continuance is granted.

(b) With respect to applications for a license or a commission, the Secretary of State shall grant or deny such application within 150 days of the date of the submission of a completed application. If the application is denied, the Secretary of State shall state the reasons for denial in writing by letter to the applicant and offer the applicant an opportunity for a hearing by demanding the same in writing within 30 days of the date of the letter of denial. If a hearing is demanded, a decision shall be issued within 150 days of the receipt of the demand.

(c) The Secretary of State or an administrative law judge may, prior to the expiration period, extend the time periods established by subdivision (a) of this section by making a determination in writing that the adjudicatory proceeding cannot be completed within 150 days and stating sufficient reasons therefor. Such an extension shall be for no longer than an additional 120 days. Such determination shall be promptly mailed to all parties.

(d) A failure of the Secretary of State to observe the time limitations established by this section, or the failure of an administrative law judge to make the determination required by subdivision (c) of this section shall be reviewable under article 78 of the Civil Practice Law and Rules in a proceeding in the nature of mandamus.

Tab G

1054 DOS 04

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

DELIA A. VASQUEZ DECISION

For Registration as a Security Guard

----------X

The above noted matter came on for hearing before the undersigned, Roger Schneier, on December 16, 2004 at the office of the Department of State located at 123 William Street, New York, New York.

The applicant was represented by Chaumtoli Huq, Esq., MFY Legal Services, 299 Broadway, 4th floor, New York, New York 10007.

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

The matter had previously come on for hearing on December 11, 2003, at which time the applicant had failed to appear. A default decision denying the application was issued on December 15, 2003 (1144 DOS 03) but Ms. Huq subsequently requested that the matter be re-opened because neither she nor the applicant, who had moved after submitting her application, had received notice of the hearing and, in the interest of justice, that request was granted.

ISSUE

The issue before the tribunal is whether the applicant should be denied registration as a security guard because of prior criminal convictions and because her application contained a material false statement or omission.

FINDINGS OF FACT

1) By application dated April 22, 2003 the applicant applied for registration as a security guard, answering "no" to question #2: "Have you ever been convicted in this state or elsewhere of any criminal offense which is a misdemeanor or a felony?" (State's Ex. 2).

2) The applicant has the following record of criminal convictions (State's Ex. 3):

> 3/26/91-Intentionally/Fraudulently Obtaining Transportation Without Paying, Penal Law §165.15, a class A misdemeanor;
>
> 7/5/91, 1/3/92 and 4/4/96-Petit Larceny, Penal Law §155.25, a class A misdemeanor; and
>
> 4/7/98-Grand Larceny in the 4th degree, Penal Law §155.30, a class E felony, for which she was granted a Certificate of Relief From Disabilities on August 16, 2001.

3) At the time of the commission of the most recent crime the applicant was approximately thirty one years old.

4) Since the most recent conviction the applicant has been employed maintaining records and preparing invoices for a company in Westbury, New York, as an assembler in a factory, as a grounds keeper in a cemetery, and cleaning a law office at night, in which capacity she was entrusted with a key to the office and proved to be honest and reliable. In 2001 and 2002 she attended BOCES courses in Auto Mechanics I and II (State's Ex. 1).

5) The fare beating conviction arose out of the applicant's arrest after she jumped a turnstile which had not given her credit for the token which he had deposited in it. The Petit Larceny convictions arose out of her shoplifting with friends with whom she no longer associates. The Grand Larceny conviction arose out of the following circumstances: The applicant had accompanied a friend in the friend's car. The friend

parked the car and entered a restaurant while the applicant waited. The friend returned with a purse which he had stolen. He threw the purse to her and left in the car, while the applicant was apprehended by a crowd of people.

6) By letter dated May 27, 2003 DLS advised the applicant that it was denying her application because of the convictions and because it contained a material false statement or omission and that she could request a hearing, which Ms. Huq did by letter received on July 8, 2003. Accordingly, the matter having been referred to this tribunal on September 10, 2003, notice of hearing was served by registered mail addressed to the applicant at the address on her application and posted on October 20, 2003 (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 entitled to be registered as a security guard. 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- Pursuant to General Business Law (GBL) §89-h[6], the Secretary of State may deny registration as a security guard to any person who has been convicted of a crime which, in the discretion of the Secretary of State, bears such a relationship to the performance of the duties of a security guard as to constitute a bar to employment.

In considering whether the registration should be granted, it is necessary to consider, together with the provisions of General Business Law Article 7-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 (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 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.

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]. *Matter of Jose Luis 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, and registration as a security guard, it is first necessary to consult the definition of "security guard" in GBL §89-f[6]. A security guard is a person who: protects individuals and/or property from harm, theft or other unlawful activity; deters, observes, detects and/or reports incidents in order to prevent unlawful or unauthorized activity; patrols on the street; and responds to security alarms. There is a direct relationship between the crimes of which the applicant was convicted under the Penal Law and registration as a security guard.

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 security

guard (§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 her fitness to perform those duties and to meet those responsibilities (§753[1][c]).

Seven years have passed since the commission of the most recent crime (§753[1][d]), which occurred when the applicant was approximately thirty one years old (§753[1][e]).

The seriousness of one of the crimes (§753[1][f]) is established by the fact that it was a felony, while that of the others is mitigated by their status as misdemeanors.

In the applicant's favor is the public policy of encouraging licensure of ex-offenders (§753[1][a]), her employment and education subsequent to the most recent conviction (§753[1][g]), and the issuance to her of a Certificate of Relief From Disabilities (§752[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 has been convicted of several crimes, all of which essentially arose out of her associating with the wrong kid of people. She testified that at the time she was living on her own, having been forced to move out of her family home and, as an immigrant from Peru, having no one else to rely on. She has since ceased her association with those people, and is making what appear to be sincere attempts to support herself in an honest manner.

III- Pursuant to GBL §89-l[2][b], the fact that an application contained a material false statement or

omission is grounds for revocation of a registration. Clearly, then, the fact of such a false statement or omission may be considered in determining, pursuant to GBL §89-h[6], the nature of the character and the fitness of an applicant for registration or for renewal of an existing registration.

A material false statement or omission in an application is an incorrect statement, or an omission of fact which, in whole or in part, is an essential factor in determining the fitness of the applicant for licensure. *Division of Licensing Services v Gise,* 48 DOS 88, conf'd. *sub nom Gise v Shaffer,* 153 AD2d 688, 544 NYS2d 677 (1989). In an application for registration as a security guard it is any statement which, had it been true, either would have prevented the issuance of the registration or would have allowed DLS to exercise its discretion to propose to deny the registration. *Matter of the Application of Mahoney,* 195 DOS 96.

The applicant answered the conviction question on her application falsely, and is, therefore, guilty of making a material false statement. However, I credit her testimony that she did so because when she was granted the Certificate of Relief From Disabilities the judge told her that it would enable to get a job anywhere, and that she believed that it cleared her record. I also accept her statement that she was not trying to hid anything, as she knew that her fingerprints would be used to determine what her record was.

CONCLUSIONS OF LAW

1) After having given due consideration to the factors set forth in Correction Law §753 and to the requirements of GBL §89-h[5], 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 her criminal convictions would not cause the issuance to her of a registration as a security guard to involve such an unreasonable risk to the safety and welfare of the general public as to warrant denial of her application. GBL §89-k.

2) The applicant's application contained a material

false statement which under the circumstances does not indicate that she is not trustworthy.

DETERMINATION

WHEREFORE, IT IS HEREBY DETERMINED THAT, pursuant to General Business Law §89-k, the application of Delia A. Vasquez, UID #10009186316, for registration as a security guard is granted.

Roger Schneier
Administrative Law Judge

Dated: December 16, 2004

STATE OF NEW YORK

DEPARTMENT OF STATE

OFFICE OF ADMINISTRATIVE HEARINGS

309 DOS 05

Supercedes 79 DOS 05

----------X

ANTOINETTE E. JONES,

Applicant for Registration as a Security Guard,

-against- **DECISION**

DIVISION OF LICENSING SERVICES,

Objector.

----------X

ADMINISTRATIVE LAW TRIBUNAL

123 William Street, New York, NY 10038

Held: January 20 and March 10, 2005

Felix Neals, Supervising Administrative Law Judge

Applicant, Ms. Antoinette E. Jones, was represented by Chaumtoli Huq, Esq.

Objector, Division of Licensing Services, was represented by Ms. Nadine Kozer, Legal Assistant II.

Under provisions of General Business Law, §§79 and 89-k(2), applicant appeals the Division of Licensing Services' decision to deny his application for registration as a security guard. The State alleges that the applicant's conviction of a criminal offense indicates a lack of good character, fitness, and competence required for registration as a security guard.

At the hearing held January 20, 2005, Ms. Jones did not appear and was not represented, and a decision issued. At applicant's request, the case was reopened.

On June 4, 1996, Ms. Jones plead guilty to a class D felony, contraband to prisoners 1st degree, Penal Law, §205.25. She was sentenced to a five-year term of probation from which she was discharged on July 26, 1999.

On August 24, 1999, Ms. Jones obtained a certificate of relief from disabilities from the New York State Supreme Court, Bronx County. Because the sentencing court imposed a revocable sentence, the certificate, issued under Correction Law, §703, permits the registration application to be considered (General Business Law, §§89-f(13) and 89-h(5); *Wandoloki v Division of Licensing Services, 488 DOS 00[2000]*).

309 DOS 05 -2-

Supercedes 79 DOS 05

The conviction resulted from an incident that occurred on June 4, 1996: Ms. Jones took controlled substances to her imprisoned male friend. She expressed remorse for her unlawful action. She has been gainfully employed since the conviction and is pursuing education in the field of para-legal. There is not any evidence of any illegal activity by Ms. Jones subsequent to or other than the act included in the criminal action.

Having been convicted of a criminal offense, a determination of the applicant's fitness for registration as a security guard must be decided as statutorily directed by provisions both of General Business Law, Article 7-A, that regulate the registration and the employment of security guards (§§89-g and 89-h), and of Correction Law, Article 23-A, that expresses the public policy that forbids unfair discrimination against an applicant previously convicted of a criminal offense who seeks to be registered as a security guard (§752).

Essentially, the statutes provide that registration as a security guard may be denied to any person who has been convicted of a criminal offense either: (1) where an essential element of the criminal offense directly relates to the duties statutorily imposed on a registered security guard (implying that the applicant cannot be trusted to lawfully perform watch, guard, and patrol activities, and that if registered as a security guard, the applicant would pose an unreasonable risk to persons whom or to property that the licensing agency is mandated to protect); or (2) the registration

or employment of the applicant as a security guard involves an unreasonable risk to property, or the safety or welfare of specific individuals or of the general public (General Business Law, §§89-h[5] and 89-l[5][b]; Correction Law, §752).

Direct-relationship and unreasonable-risk issues are concomitant: An applicant's prior, criminal conviction that directly relates to the duties of a registered security guard creates a rebuttal presumption of risk, and the question becomes whether the applicant has furnished satisfactory evidence of "Character and fitness: be of

good moral character and fitness;" (General Business Law, §89-h[6]).

A registered security guard acts in a quasi-law, enforcement position in that he or she is hired to protect individuals and property from harm, theft or other unlawful activity and to deter criminal activity. Law obligates and trusts a registered security guard to lawfully perform watch, guard, and patrol activities. A registered security guard should not pose a risk of being a danger to the property that or to the persons whom the security guard is employed to protect.

309 DOS 05 -3-

Supercedes 79 DOS 05

Ms. Jones's unlawful act, a violation of the Penal Law, §205.25, a class D felony, directly relates to the fitness to perform the duties legally imposed on a registered security guard (General Business Law, §89-h[5]; Correction Law, §§752, 753[1][b], and 753[1][c]) she was 22 years of age when the criminal offense was committed and is presumed to have been aware of the consequences of her unlawful behavior (Correction Law, §753[1][e]; her conviction is classified as a serious, criminal offense (Correction Law, §753[1][f]; the nine-year duration of time that has elapsed since the applicant committed the criminal offense is sufficient to evaluate applicant's rehabilitation.

In support of her contention of good moral character, Ms. Jones offered both her testimony and testimonial letters from persons who live or work in communities in which he lives and works.

Character and reputation are not necessarily equivalent terms. Character is the morality of a person; reputation is what the community believes a person's character to be. A person's character is not presumed. To have character considered in making a determination, evidence of character must be produced. General character is proved by evidence of general reputation.

In criminal actions, the issue is a defendant's guilt or innocence of events committed in the past. Consequently, the introduction of reputation evidence of good character is usually for the purpose of raising an inference that the person charged would not be likely to have committed the offense alleged. And the general rules regarding proof of character are: (1) evidence of witnesses is limited to evidence concerning the reputation of the accused; (2) to satisfy the requirements of relevancy, the evidence must concern the particular trait involved in the offense charged; (3) reputation evidence from people in position to have knowledge of the defendant's reputation concerning the trait involved in the criminal offense charged is treated as fact; and (4) evidence of a reputation in time after the alleged criminal act is inadmissible.

Evidence of an applicant's reputation after a criminal conviction is admissible in a quasi-judicial, administrative hearing brought pursuant to General Business Law, §§79 and 89-k(2), to review a proposed decision of the Division of Licensing Services to deny the application based solely on the criminal conviction of the applicant who has both satisfied the penalty imposed in the criminal action and received a certificate of relief from disabilities (*Application of Zeher, 39 DOS 85[1985]*). Under those circumstances, to not consider evidence of an applicant's reputation after the criminal conviction would deny the possibility and the hope of reformation and would punish an individual for past activity without regard for the relevancy of a present situation to licensing law and regulation.

309 DOS 05 -4-

Supercedes 79 DOS 05

The reputation evidence offered by Ms. Jones from people in a position to have knowledge of her reputation after the criminal conviction is treated as fact.

Applicant offered evidence sufficient to attenuate the direct relationship that exists between her criminal conviction and the duties of a registered security guard (Correction Law, §753[1][g]; General Business Law, §§89-h[5] and 89-l[5][b]).

Ms. Antoinette E. Jones proved by substantial evidence that she possesses the requisite character, fitness, and competence required by the provisions of General Business Law, §89-h, to be registered as a security guard.

I ORDER that the application (UID #10009581813)of Ms. Antoinette E. Jones for registration as a security guard is granted.

SO ORDERED: March 10, 2005

Felix Neals

Supervising Administrative Law Judge

STATE OF NEW YORK

DEPARTMENT OF STATE

OFFICE OF ADMINISTRATIVE HEARINGS

85 DOS 05

----------X

ELAINE FONSECA,

Applicant for Registration as a Security Guard,

-against- **DECISION**

DIVISION OF LICENSING SERVICES,

Objector.

----------X

ADMINISTRATIVE LAW TRIBUNAL

123 Williams Street, New York, NY 10038

Held: January 20, 2005

Felix Neals, Supervising Administrative Law Judge

Applicant, Ms. Elaine Fonseca, represented herself.

Objector, Division of Licensing Services, was represented by Ms. Nadine Kozer, Legal Assistant III.

Under provisions of General Business Law, §§79 and 89-k(2), applicant appeals the decision of the Division of Licensing Services that deny the application for registration as a security guard. The State alleges that the applicant lacks requisite character, fitness, and competence required by the provisions of General Business Law, §89-h, to be registered as a security guard, because the applicant has been convicted of a criminal offense that indicates a lack of good character, fitness, and competence required for registration as a security guard.

On April 11, 1989, Ms. Fonseca plead guilty to criminal possession of a weapon 3rd degree, class D felony, Penal Law, §265.02. She was sentenced to a five-year term of probation. On April 28, 2004, she obtained a certificate of relief from disabilities.

Ms. Fonseca testified as follows: In the duration of time 1989-1990, Ms. Fonseca was a drug abuser. She has been drug free since 1990. She has been employed in various jobs; finding employment was difficult because of the criminal conviction. The tribunal finds her testimony to be credible.

Having been convicted of a criminal offense, a determination of Ms. Fonseca's fitness for registration as a security guard must be decided as statutorily directed by provisions both of General Business Law, Article 7-A, that regulate the

registration and the employment of security guards (§§89-g and 89-h), and of Correction Law, Article 23-A, that expresses the public policy that forbids unfair discrimination against an applicant previously convicted of a criminal offense who seeks to be registered as a security guard (§752).

Essentially, the statutes provide that registration as a security guard may be denied to any person who has been convicted of a criminal offense either: (1) where an essential element of the criminal offense directly relates to the duties statutorily imposed on a registered security guard (implying that the applicant cannot be trusted to lawfully perform watch, guard, and patrol activities, and that if registered as a security guard, the applicant would pose an unreasonable risk to persons whom or to property that the licensing agency is mandated to protect); or (2) the registration or employment of the applicant as a security guard involves an unreasonable risk to property, or the safety or welfare of specific individuals or of the general public (General Business Law, §§89-h[5] and 89-l[5][b]; Correction Law, §752).

Direct-relationship and unreasonable-risk issues are concomitant. An applicant's prior, criminal conviction that directly relates to the duties of a registered security guard creates a rebuttal presumption of risk.

A registered security guard acts in a quasi-law, enforcement position in that he or she is hired to protect individuals and property from harm, theft or other unlawful activity and to deter criminal activity. Law obligates and trusts a registered security guard to lawfully perform watch, guard, and patrol activities. A registered security guard should not pose a risk of being a danger to the property that or to the persons whom the security guard is employed to protect.

Ms. Fonseca's unlawful act, a violation of Penal Law, §265.02, directly relates to the fitness to perform the duties legally imposed on a registered security guard (General Business Law, §89-h[5]; Correction Law, §§752, 753[1][b], and 753[1][c]); she was 38 years of age when the criminal offense was committed and is presumed to have been aware of the consequences of her unlawful behavior (Correction Law, §753[1][e]); the convictions is classified as a serious, criminal offense (Correction Law, §753[1][f]); the fourteen-year duration of time that has elapsed since the applicant committed the criminal offense is sufficient to evaluate applicant's character and trustworthiness.

The applicant offered evidence sufficient to attenuate the direct relationship that exists between the criminal conviction and the duties of a registered security guard (Correction Law, §753[1][g]; General Business Law, §§89-h[5] and 89-l[5][b]).

Ms. Elaine Fonseca proved by substantial evidence that she possesses the requisite character, fitness, and competence required by the provisions of General Business Law, §89-h, to be registered as a security guard.

I ORDER the application (UID #10009606421) of Ms. Elaine Fonseca for her registration as a security guard is granted.

SO ORDERED: January 20, 2005

Felix Neals

Supervising Administrative Law Judge

STATE OF NEW YORK

DEPARTMENT OF STATE

OFFICE OF ADMINISTRATIVE HEARINGS

84 DOS 05

----------X

PETRA F. GIBBS,

Applicant for Registration as a Security Guard,

-against- **DECISION**

DIVISION OF LICENSING SERVICES,

Objector.

----------X

ADMINISTRATIVE LAW TRIBUNAL

123 Williams Street, New York, NY 10038

Held: January 20, 2005

Felix Neals, Supervising Administrative Law Judge

Applicant, Ms. Petra F. Gibbs represented herself.

Objector, Division of Licensing Services, was represented by Ms. Nadine Kozer, Legal Assistant II.

Under provisions of General Business Law, §§79 and 89-k(2), applicant appeals the decision of the Division of Licensing Services that deny the application for of registration as a security guard. The State alleges that the applicant lacks requisite character, fitness, and competence required by the provisions of General Business Law, §89-h, to be registered as a security guard, because the applicant has been convicted of a criminal offense that indicates a lack of good character, fitness, and competence required for registration as a security guard.

On January 21, 1985, Ms. Gibbs plead guilty to criminal possession of a weapon 3rd degree, class D felony, Penal Law, §265.09. She was sentenced to a five-year term of probation. On March 16, 1990, she obtained a certificate of relief from disabilities.

Ms. Gibbs testified as follows: On July 6, 1984, she saw a taxi driver helping a bleeding man into a taxi. She recognized the injured man and helped the taxi driver get the injured person into the taxi and accompanied the injured man to a hospital. At the hospital, it was discovered that the man had been shot. The police investigated, found a weapon in the taxi, and charged both Ms. Gibbs and the taxi driver.

Ms. Gibbs has been gainfully employed since 1979 and licensed an appearance enhancement operator and business owner. She managed a beautiful salon until 2004 when the business was sold. Since 2004, she was employed as a security guard.

Having been convicted of a criminal offense, a determination of Ms. Gibbs's fitness for registration as a security guard must be decided as statutorily directed by provisions both of General Business Law, Article 7-A, that regulate the registration and the employment of security guards (§§89-g and 89-h), and of Correction Law, Article 23-A, that expresses the public policy that forbids unfair discrimination against an applicant previously convicted of a criminal offense who seeks to be registered as a security guard (§752).

Essentially, the statutes provide that registration as a security guard may be denied to any person who has been convicted of a criminal offense either: (1) where an essential element of the criminal offense directly relates to the duties statutorily imposed on a registered security guard (implying that the applicant cannot be trusted to lawfully perform watch, guard, and patrol activities, and that if registered as a security guard, the applicant would pose an unreasonable risk to persons whom or to property that the licensing agency is mandated to protect); or (2) the registration or employment of the applicant as a security guard involves an unreasonable risk to property, or the safety or welfare of specific individuals or of the general public (General Business Law, §§89-h[5] and 89-l[5][b]; Correction Law, §752).

Direct-relationship and unreasonable-risk issues are concomitant. An applicant's prior, criminal conviction that directly relates to the duties of a registered security guard creates a rebuttal presumption of risk.

A registered security guard acts in a quasi-law, enforcement position in that he or she is hired to protect individuals and property from harm, theft or other unlawful activity and to deter criminal activity. Law obligates and trusts a registered security guard to lawfully perform watch, guard, and patrol activities. A registered security guard should not pose a risk of being a danger to the property that or to

the persons whom the security guard is employed to protect.

Mr. Gibbs's unlawful act, a violation of Penal Law, §265.09, directly relate to the fitness to perform the duties legally imposed on a registered security guard (General Business Law, §89-h[5]; Correction Law, §§752, 753[1][b], and 753[1][c]); she was 22 years of age when the criminal offense to which she plead guilty was committed and is presumed to have been aware of the consequences of her behavior (Correction Law, §753[1][e]); her convictions is classified as a serious, criminal offense (Correction Law, §753[1][f]); the twenty-one-year duration of time that has elapsed since the applicant committed the criminal offense is sufficient to evaluate applicant's character and trustworthiness.

The applicant offered evidence sufficient to attenuate the direct relationship that exists between the criminal convictions and the duties of a registered security guard (Correction Law, §753[1][g]; General Business Law, §§89-h[5] and 89-l[5][b]).

Ms. Petra F. Gibbs proved by substantial evidence that she possesses the requisite character, fitness, and competence required by the provisions of General Business Law, §89-h, to be registered as a security guard.

I ORDER the application (UID #10009533545) of Ms. Petra F. Gibbs for of her registration as a security guard is granted.

SO ORDERED: January 20, 2005

Felix Neals

Supervising Administrative Law Judge

STATE OF NEW YORK

DEPARTMENT OF STATE

OFFICE OF ADMINISTRATIVE HEARINGS

682 DOS 05

----------X

ANTHONY DIAZ, JR.,

Applicant for Registration as a Security Guard,

-against- **DECISION**

DIVISION OF LICENSING SERVICES,

Objector.

----------X

ADMINISTRATIVE LAW TRIBUNAL

123 William Street, New York, NY 10038

Held: August 2, 2005

Felix Neals, Supervising Administrative Law Judge

Applicant, Mr. Anthony Diaz, Jr., represented herself.

Objector, Division of Licensing Services, was represented by supervising investigator, Mr. William F. Schmitz.

Under provisions of General Business Law, §§79 and 89-k(2), applicant appeals the Division of Licensing Services' decision to deny his application for registration as a security guard. The State alleges that the applicant's conviction of criminal offenses indicate a lack of good character, fitness, and competence required for registration as a security guard.

Mr. Diaz was convicted of the following, criminal offenses: February 5, 1997, attempted criminal sale of a controlled substance 3rd degree, class C felony, Penal Law, §§110/220.39, sentenced to five years probation, and issued a certificate of relief from disabilities on August 4, 2004; two class B misdemeanors, February 4, 2002, attempted criminal contempt 2nd degree, sentenced conditional discharge, and December 12, 2002, criminal possession of marijuana 5th degree, Penal Law, §221.10, sentenced conditional discharge.

Mr. Diaz testified as follows: He was a drug abuser of marijuana until September 2004. He has not used drugs since. He attended a drug program that assists in helping a person to stop using marijuana. He works in a drug store in stock and as a cashier.

Having been convicted of a criminal offense, a determination of Mr. Diaz's fitness for registration as a security guard must be decided as statutorily directed by provisions both of General Business Law, Article 7-A, that regulate the registration and the employment of security guards (§§89-g and 89-h), and of Correction Law, Article 23-A, that expresses the public policy that forbids unfair discrimination against an applicant previously convicted of a criminal offense who seeks to be registered as a security guard (§752).

Essentially, the statutes provide that registration as a security guard may be denied to any person who has been convicted of a criminal offense either: (1) where an essential element of the criminal offense directly relates to the duties statutorily imposed on a registered security guard (implying that the applicant cannot be trusted to lawfully perform watch, guard, and patrol activities, and that if registered as a security guard, the applicant would pose an unreasonable risk to persons whom or to property that the licensing agency is mandated to protect); or (2) the registration

or employment of the applicant as a security guard involves an unreasonable risk to property, or the safety or welfare of specific individuals or of the general public (General Business Law, §§89-h[5] and 89-l[5][b]; Correction Law, §752).

Direct-relationship and unreasonable-risk issues are concomitant: An applicant's prior, criminal conviction that directly relates to the duties of a registered security guard creates a rebuttal presumption of risk, and the question becomes whether the applicant has furnished satisfactory evidence of "Character and fitness: be of good moral character and fitness;" (General Business Law, §89-h[6]).

A registered security guard acts in a quasi-law, enforcement position in that he or she is hired to protect individuals and property from harm, theft or other unlawful activity and to deter criminal activity. Law obligates and trusts a registered security guard to lawfully perform watch, guard, and patrol activities. A registered security guard should not pose a risk of being a danger to the property that or to the persons whom the security guard is employed to protect.

Mr. Diaz's unlawful acts, violations of Penal Law, §§110/220.39, 110/215.50, and 221.10, directly relate to the fitness to perform the duties legally imposed on a registered security guard (General Business Law, §89-h[5]; Correction Law, §§752, 753[1][b], and 753[1][c]); he was 23 years of age when the last criminal offense was committed and is presumed to have been aware of the consequences

of his unlawful behavior (Correction Law, §753[1][e]; one of his convictions is classified as a serious, criminal offense (Correction Law, §753[1][f]; the three-year duration of time that has elapsed since the applicant committed the criminal offense is sufficient to evaluate applicant's rehabilitation.

Mr. Diaz offered evidence sufficient to attenuate the direct relationship that exists between his criminal convictions and the duties of a registered security guard (Correction Law, §753[1][g]; General Business Law, §§89-h[5] and 89-l[5][b]).

Mr. Anthony Diaz, Jr. proved by substantial evidence that he possesses the requisite character, fitness, and competence required by the provisions of General Business Law, §89-h, to be registered as a security guard.

I ORDER that the application (UID #1000976629) of Mr. Anthony Diaz, Jr. for his registration as a security guard is granted.

SO ORDERED: August 2, 2005

Felix Neals

Supervising Administrative Law Judge

STATE OF NEW YORK

DEPARTMENT OF STATE

OFFICE OF ADMINISTRATIVE HEARINGS

378 DOS 05

----------X

JOHN J. CAROTA,

Applicant for Registration as a Security Guard,

-against- **DECISION**

DIVISION OF LICENSING SERVICES,

Objector.

----------X

ADMINISTRATIVE LAW TRIBUNAL

41 State Street, Albany, NY 12231

Held: March 24, 2005