



License To Work Initiative:

How To Represent A Person With A Criminal Record In A Security Guard Licensing Hearing

MFY LEGAL SERVICES, INC.
Workplace Justice Project
299 Broadway, 4th Floor
New York, NY 10007
212.417.3838

LICENSE TO WORK INITIATIVE

The Workplace Justice Project (WPJ) at MFY Legal Services, Inc. recognizes the need to increase its assistance to ex-offenders whose efforts to rebuild their lives are often stymied when they are denied licenses because of their criminal records.

The goal of the "License to Work Initiative" is to enable formerly incarcerated people to get security guard licenses and other licenses that will allow them to secure full-time employment. Studies have shown that employment is absolutely essential for successful re-entry into society¹ and helping formerly incarcerated people overcome the barriers to securing a license is a practical and effective way of enabling their re-entry into the workforce.

Through the weekly WPJ hotline (212-417-3838) and bi-monthly Employment Law Clinics, the WPJ provides direct legal services in the form of advice, counsel and representation at administrative hearings to formerly incarcerated people seeking security guard and other licenses in New York State.

This training manual is designed to assist pro bono attorneys in representing ex-offenders at their administrative hearing before the New York State Department of State and is limited to security guard license application denials.

The information in this manual is not legal advice. Please consult an attorney for legal advice, which is dependent on the specific circumstances of each situation.

If you have any questions, please contact:

Bernadette Jentsch
Workplace Justice Project
MFY Legal Services, Inc.
299 Broadway, 4th Floor
New York, NY 10007
212-417-3700

Funding for this manual was provided by the Taconic Foundation.
A special thanks to those who assisted in preparing and reviewing this manual:
Kate Rubin, Judy Whiting, Chaumtoli Huq, Jason Hoge, Amy Carroll,
James Wong and Andrew Goldberg.

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¹ See "Reentry & Reintegration: The Road to Public Safety" Report and Recommendations of the Special Committee on Collateral Consequences of Criminal Proceedings of the New York State Bar Association, and Report and Recommendations of the Independent Committee on Reentry & Employments to New York State on Enhancing Employment Opportunities for Formerly Incarcerated People.

TABLE OF CONTENTS

Overview	1
I. Statutory Background	
General Business Law Article 7-A	2
Correction Law Article 23-A	5
Eight Factors	6
II. Procedural Background	
Denial Notice and Requesting a Hearing	7
Hearing Notice, Rules, and Procedures	8
III. The Hearing	
Burden of Proof	10
Evidence of Rehabilitation	11
Hearing Decisions	13
IV. Case Preparation	
Client Intake	15
Criminal Record Review	15
Gather Evidence(s) of Rehabilitation	16
Client Preparation	17
V. Post-Hearing	
Appeal	17

Appendix

Security Guard License Application Packet	Tab A
Denial Notice	Tab B
Sample Letter Requesting Hearing	Tab C
Notice of Hearing	Tab D
Notice of Appearance	Tab E
Guide to Statutes and Rules Relating to Hearings	Tab F
Administrative Hearing Decisions	Tab G
Intake Questionnaire	Tab H
Sample Letters of Rehabilitation	Tab I
Abbreviated Listing of Penal Law Sections of Some Offenses	Tab J

OVERVIEW

The security guard industry generally requires its employees to be licensed for continued employment and for career advancement. The application for a security guard license takes several weeks to process since applicants are required to provide fingerprints for DCJS (Division of Criminal Justice Service for New York State) and the FBI (Federal Bureau of Investigations) so that the Department of State (DOS) can review their criminal record. After the applicant receives the decision, which is usually a couple of months after they file their application package, they have 35 days to appeal the proposed denial of their application and are given instructions on how to request a formal administrative hearing before an administrative law judge (ALJ) to review the proposed denial. A hearing is scheduled at the DOS Office of Administrative Hearings a couple of months after the applicant submits the written request. The ALJ issues a decision within a week after the hearing.

While a number of people who seek this license have conviction records, having a conviction record should not bar them from becoming licensed in New York State especially if they have an advocate¹ who can put the conviction in context and show – with good and solid proof – evidence that the applicant has changed his/her life since the conviction. Having an advocate at the administrative hearing can make a difference between getting a license (and having a stable livelihood) or a denial. At the hearing, the applicant has the burden of proving that they are qualified under the law for registration as a security guard.² By submitting evidence of rehabilitation and showing evidence that the direct relationship that exists between the criminal conviction and the duties of a registered security guard have been sufficiently attenuated, applicants can be successful in obtaining a security guard license.

This training manual is a guide on how to represent and prepare a client for an administrative hearing before the Department of State for a denial of a security guard license and may also be useful for other licensing hearings.

Practice Tip

- *If you have never done an administrative hearing, observing a Department of State administrative hearing is recommended. Administrative hearings are open to the public and are held at 123 William Street starting at 10:00 a.m. until about 12:00 on Tuesdays, Wednesdays, and Thursdays.*
- *Call the Office of Administrative Hearings at (212) 417-5776 in advance to find out if hearings have been scheduled.*

¹ Advocates do not need to be attorneys to represent clients at administrative hearings before the Department of State.

² Please note that the terms “registration as a security guard” and “obtaining a license as a security guard” are synonymous and used interchangeably throughout this manual.

I. STATUTORY BACKGROUND

This section will briefly discuss two statutes. First, General Business Law (GBL), Article 7-A (or the Security Guard Act), which regulates the security guard industry, will give you a background on the process of obtaining a security guard license (or registration card). Second, Correction Law, Article 23-A, which seeks to eliminate the bias against ex-offenders from obtaining employment, will give you a background on how a person's criminal conviction record affects the security guard license application process.

General Business Law (GBL) Article 7-A: Security Guard Act of 1992³

In 1992, the New York State Legislature declared that "because of the large number of unregulated and unlicensed security guards who may lack sufficient training and their nexus to the general public, the state should establish uniform standards for the employment, registration, enforcement and liability insurance coverage of security guards and the security guard industry within the state."⁴

The Secretary of State through the Department of State (DOS) makes the determination whether an applicant for a registration card to perform security guard functions meets the requirements pursuant to General Business Law (GBL) § 89-h. The DOS also makes the determination whether an issued registration card may be suspended, revoked and reissued pursuant to GBL § 89-l.

Security Guard Definition

"Security guard" is defined as "a person, other than a police officer, employed by a security guard company to principally perform one or more of the following functions within the state:

- (a) protection of individuals and/or property from harm, theft or other unlawful activity;
- (b) deterrence, observation, detection and/or reporting of incidents in order to prevent any unlawful or unauthorized activity including but not limited to unlawful or unauthorized intrusion or entry, larceny, vandalism, abuse, arson or trespass on property;
- (c) street patrol service;
- (d) response to, but not installation or service of, a security system alarm installed and/or used to prevent or detect unauthorized intrusion, robbery, burglary, theft, pilferage and other losses and/or to maintain security of a protected premises."⁵

³ N.Y. General Business Law § 89-e.

⁴ N.Y. General Business Law Article 7-A Note.

⁵ N.Y. General Business Law § 89-f(6).

Qualifications for Security Guard

In general, under GBL § 89-h, to qualify for a registration card to perform the security guard functions enumerated above, applicants must be 18 years of age, have completed an 8-hour pre-assignment training course, and have not been convicted of a "serious offense,"⁶ or of a misdemeanor, which, in the discretion of the secretary, "bears such a relationship to the performance of the duties of a security guard, as to constitute a bar to employment."⁷ Applicants are also required to "be of good moral character and fitness."⁸

⁶ N.Y. General Business Law § 89-f(13) defines "serious offense" as: any felony involving the offenses enumerated in the closing paragraph of this subdivision; a criminal solicitation of or a conspiracy to commit or an attempt to commit or a criminal facilitation of a felony involving the offenses enumerated in the closing paragraph of this subdivision, which criminal solicitation, conspiracy, attempt or criminal facilitation itself constitutes a felony or any offense in any other jurisdiction which if committed in this state would constitute a felony; any offense in any other jurisdiction which if committed in this state would constitute a felony provided that for the purposes of this article, none of the following shall be considered criminal convictions or reported as such: (i) a conviction for which an executive pardon has been issued pursuant to the executive law; (ii) a conviction which has been vacated and replaced by a youthful offender finding pursuant to article seven hundred twenty of the criminal procedure law, or the applicable provisions of law of any other jurisdiction; or (iii) a conviction the records of which have been sealed pursuant to the applicable provisions of the laws of this state or of any other jurisdiction; and (iv) a conviction for which other evidence of successful rehabilitation to remove the disability has been issued.

Felonies involving: assault, aggravated assault and reckless endangerment pursuant to article one hundred twenty; vehicular manslaughter, manslaughter and murder pursuant to article one hundred twenty-five; sex offenses pursuant to article one hundred thirty; unlawful imprisonment, kidnapping or coercion pursuant to article one hundred thirty-five; criminal trespass and burglary pursuant to article one hundred forty; criminal mischief, criminal tampering and tampering with a consumer product pursuant to article one hundred forty-five; arson pursuant to article one hundred fifty; larceny and offenses involving theft pursuant to article one hundred fifty-five; offenses involving computers pursuant to article one hundred fifty-six; robbery pursuant to article one hundred sixty; criminal possession of stolen property pursuant to article one hundred sixty-five; forgery and related offenses pursuant to article one hundred seventy; involving false written statements pursuant to article one hundred seventy-five; commercial bribing and commercial bribe receiving pursuant to article one hundred eighty; criminal impersonation and scheme to defraud pursuant to article one hundred ninety; bribery involving public servants and related offenses pursuant to article two hundred; perjury and related offenses pursuant to article two hundred ten; tampering with a witness, intimidating a victim or witness and tampering with physical evidence pursuant to article two hundred fifteen; criminal possession of a controlled substance pursuant to sections 220.06, 220.09, 220.16, 220.18 and 220.21; criminal sale of a controlled substance pursuant to sections 220.31, 220.34, 220.39, 220.41, 220.43 and 220.44; criminal sale of marijuana pursuant to sections 221.45, 221.50 and 221.55; riot in the first degree, aggravated harassment in the first degree, criminal nuisance in the first degree and falsely reporting an incident in the second or first degree pursuant to article two hundred forty; and crimes against public safety pursuant to article two hundred sixty-five of the penal law.

⁷ N.Y. General Business Law § 89-h(5).

⁸ N.Y. General Business Law § 89-h(6).

Security Guard Application Requirements

Security guard applicants are required to submit the following:

- The completed, signed application
- Original certificate showing completion of an 8-hour pre-assignment course
- Signed DMV Informed Consent
- NYS fingerprint card
- FBI fingerprint card
- \$135 non-refundable fee which includes the security guard application fee (\$36), New York State Fingerprint Fee (\$75), FBI Fingerprint Fee (\$24)
- Any additional documentation requested in response to specific questions on the application form.⁹

<i>See Tab A: Security Guard Application Packet</i>
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Under GBL § 89-k, DOS shall issue a registration card unless it determines that an applicant does not meet the requirements of GBL § 89-h or is unable to perform security guard functions.

The applicant and the security guard company that employs such applicant are given notice by regular mail upon issuance of the registration card or denial of the application by DOS. The notice of denial indicates the reason(s) for denial and can be based on one or more of the following:

- Conviction of a "serious offense" pursuant to Article 7-A of the General Business Law.
- Conviction of a felony or misdemeanor and
 - There is a direct relationship between one or more of the previous criminal offenses and the specific license or employment sought, or
 - The issuance of the license or the granting of the employment would involve an unreasonable risk to property or to the safety or the welfare of specific individuals or to the general public.
- Denied authorization to perform security guard functions in another jurisdiction or authorization was suspended or revoked.
- Application contained a material false statement or omission.¹⁰
- Other

<i>See Tab B: Denial Notice</i>
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⁹ If employment will commence with filing of the application, the Notice of Employment section must be completed by the employer. If applying for armed security guard registration, a course completion certificate for 47 hours of firearms training, or a copy of the waiver issued by the Division of Criminal Justice Services. See <http://www.dos.state.ny.us/lcns/guardfaq.html>.

¹⁰ These are considered in determining the nature of the character and the fitness of an applicant. Pursuant to GBL § 89-h(6), an applicant for a registration card must be of "good moral character and fitness."

As listed above, the Secretary of State may deny registration as a security guard to any person who has been convicted of a felony or misdemeanor, which either bears a direct relationship to the performance of the duties of a security guard or poses an unreasonable risk to persons or property. However, the provisions of Correction Law Article 23-A imposes an obligation on licensing agencies like DOS, to “deal equitably with ex-offenders while also protecting society’s interest in assuring performance by reliable and trustworthy persons.”¹¹ This obligation requires DOS to consider the eight factors under Correction Law § 753, which will be discussed below.

Correction Law Article 23-A: Licensure and Employment of Persons Previously Convicted of One or More Criminal Offenses

Legislative Purpose

Correction Law Article 23-A was enacted in an attempt to eliminate bias against ex-offenders which prevented them from obtaining employment, and sought to remove this obstacle to employment by imposing obligation on employers and public agencies to deal equitably with ex-offenders while also protecting society’s interest in assuring performance by reliable and trustworthy persons. Bonacorsa v. Van Lindt, 71 NY2d 605 (1988).

General Rule

In balancing the ex-offender’s and society’s interests, Correction Law prohibits unfair discrimination against a person previously convicted of one or more criminal offenses yet recognizes two exceptions to this general rule. It states in pertinent part:

“No application for any license or employment shall be denied by reason of the applicant’s having been previously convicted of one or more criminal offenses, or by reason of a finding of lack of ‘good moral character’ when such finding is based upon the fact that the applicant has previously been convicted of one or more criminal offenses, unless:

(1) there is a direct relationship between one or more of the previous criminal offenses and the specific license or employment sought; or

(2) the issuance of the license or the granting of the employment would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public.” Correction Law § 752.

¹¹ Matter of Bonacorsa, 71 N.Y.2d 605 (1988).

Direct Relationship Exception

"Direct relationship" is defined under the statute as the "nature of the criminal conduct for which the person 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 license or employment sought." Correction Law § 750(3).

Unreasonable Risk Exception

There is no statutory definition of unreasonable risk. It "depends upon a subjective analysis of a variety of considerations relating to the nature of the license . . . and the prior misconduct." Bonacorsa at 612.

Correction Law § 753: Eight Factors

In making a determination under Correction Law § 752, the public licensing agency, in exercising its discretion, must consider the following eight factors pursuant to Correction Law § 753:

- (a) The state's public policy to "encourage the licensure and employment of persons previously convicted of one or more criminal offenses";
- (b) "The specific duties and responsibilities necessarily related to the license or employment sought";
- (c) The bearing of the criminal offense(s) on the person's "fitness or ability to perform one or more such duties or responsibilities";
- (d) "The time ... elapsed since the occurrence of the criminal offense[s]";
- (e) "The age of the person at the time of occurrence of the criminal offense[s]";
- (f) "The seriousness of the offense[s]";
- (g) "Any information regard[ing] ... rehabilitation and good conduct"; and
- (h) "The legitimate interest of the public agency or private employer in protecting property, and the safety and welfare of specific individuals or the general public."

The weighing of the eight factors is not a mechanical function and there is no bright-line rule regarding when a license should be granted. Instead, the decision is left to the exercise of discretion to determine whether the direct relationship between the "convictions and the license has been attenuated sufficiently." Bonacorsa at 612.

Direct-relationship and unreasonable-risk issues are treated as 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.”¹²

The denial notice itself does not distinguish between the “direct relationship” and “unreasonable risk” exceptions nor does it provide an explanation of the eight factors under Correction Law § 753. In reality, only after the application has been initially denied does the weighing of the eight factors actually take place – i.e., during the administrative hearing process.

II. PROCEDURAL BACKGROUND

Denial Notice

Under Corrections Law § 754, upon request of an applicant who has been denied a license, the public agency shall provide, within thirty (30) days of a request, a written statement setting forth the reasons for such denial.

Besides the Department of State, other New York State agencies that issue licenses include the Department of Education, Department of Agriculture and Markets, State Liquor Authority, State Insurance Department, Department of Health, Department of Motor Vehicles, Department of Buildings, State Banking Department, and the Waterfront Commission, among others.¹³

Requesting a Hearing

To request an administrative hearing, the applicant must submit a written request within 35 days after receipt of the denial notice to:

Application Audit Unit, Department of State
Division of Licensing Services
P.O. Box 22001
Albany, NY 12201-2001
Fax: 518-474-7739

<i>See Tab C: Sample letter requesting a hearing</i>

The applicant may also submit additional documentation to support the Security Guard application and request an informal conference prior to the hearing depending on the reason for the denial of the application.

¹² In the Matter of Anthony Diaz, 682 DOS 05.

¹³ See also New York State Occupational Licensing Survey prepared by the Legal Action Center (2006) at www.lac.org.

Hearing Notice, Rules, and Procedures

The Department of State's Office of Administrative Hearings (OAH) is responsible for conducting administrative hearings. Below are excerpts from the State Administrative Procedure Act and the Rules of the Department of State (19 NYCRR Part 400).

- All hearings will be commenced on reasonable notice. The notice includes the date, time, and place of the hearing as well as matters asserted and the governing statutory provisions involved. Parties may present written and/or oral argument, as well as witnesses and evidence relevant to the issues.¹⁴
- The department will make a record of all hearing proceedings including a transcript of the hearing. All parties have the usual rights of parties in civil proceedings (i.e., to examine and cross-examine witnesses, make objections, etc.).¹⁵
- The ALJ will preside over the hearing in a fair and impartial manner. Generally the ALJ has the authority of any judge in a civil matter and may order discovery and depositions. The ALJ rules on the admissibility of evidence and is not bound by strict rules of evidence.¹⁶
- After the hearing, the ALJ 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.¹⁷

Subpoenas

- An attorney appearing may issue and serve subpoenas compelling attendance or witnesses or documents pursuant to 19 NYCRR § 400.5.¹⁸
- A party appearing without counsel may make an application to the ALJ for the issuance of subpoenas.¹⁹

¹⁴ See State Administrative Procedure Act (SAPA), § 301 et seq.

¹⁵ Id.

¹⁶ Id.

¹⁷ Id.

¹⁸ 19 NYCRR § 400.5 states "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."

¹⁹ See SAPA, § 304(2).

Representation / Notice of Appearance

Every person is entitled to representation and someone who is not a lawyer may represent a respondent without compensation. Pursuant to Executive Law § 166, an attorney representing a party before this tribunal is required to execute and file the notice of appearance form provided by the Department of State, Office of Administrative Hearings (OAH), with a copy sent to the assigned litigator.

See Tab E: Notice of Appearance

Practice Tip

- *If you have agreed to represent your client at his/her hearing, call the assigned litigator as soon as possible or at least one week prior to the scheduled hearing date to discuss the case and request a copy of the case file or make arrangements for review prior to the hearing.*
- *Fax a copy of the notice of appearance to the OAH ahead of time since the ALJ prefers to know that someone will be represented before the scheduled hearing date.*

Adjournments

No party shall be granted more than two (2) adjournments.²⁰ A request for adjournment will not be granted during the three days immediately preceding the date of the hearing and will not be granted unless good and sufficient grounds are shown and the following requirements are met:

- The request must be in writing;
- Grounds must be set forth in detail to the ALJ;
- Firm alternative dates for any rescheduled hearing must be given;
- A good faith effort must be made by the requesting party, to determine the position and alternative dates of all other parties, and such information shall be set forth in the request;
- Copies must be simultaneously served on all other parties to the hearing, and that fact must be noted on the request.

Practice Tip

- *If an adjournment is granted, usually the next hearing date is scheduled two (or more) months later.*

Exhibits

All exhibits offered in evidence at the hearing shall be in duplicate. Copies should be supplied to the ALJ and other parties at the time the exhibits are offered in evidence. If sufficient copies of any exhibit are not available at the time an exhibit

²⁰ 19 NYCRR § 400.11.

is received in evidence, it is the responsibility of the party offering such exhibit to submit the necessary copies before the close of the hearing.

Interpreter

Interpreter services will be made available to deaf and non-English speaking persons without charge on reasonable notice to the assigned litigator.

Settlement/Consent Order

The assigned litigator is authorized to receive and to act upon proposed settlements even after the commencement of the hearing. The ALJ may suggest discussions between parties or, on request, will afford reasonable opportunity during the hearing for such discussions. The Notice of Hearing also states that "The issuance of the notice of formal hearing ... does not necessar[il]y mean that this matter cannot be resolved by consent order."

See Tab D: Notice of Hearing
See Tab F: Guide to Statutes and Rules Relating to Hearings

III. THE HEARING

In general, the issue before the ALJ is whether the applicant should be denied registration as a security guard because of a prior criminal conviction. The provisions of GBL Article 7-A and the eight factors under Correction Law § 753 are considered to determine whether registration should issue.

At the hearing, the Assigned Litigator from the Department of State presents its case first by submitting documentary evidence starting with the proof of notice of the hearing then a copy of security guard application including the criminal record. The ALJ then gives the applicant an opportunity to rebut and submit documentary and/or testimonial evidence that he/she is otherwise qualified for a security guard license.

Burden of Proof

The burden is on the applicant to prove, by substantial evidence, that he/she is entitled to be registered as a security guard.²¹ Substantial evidence is that which a reasonable mind could accept as supporting a conclusion or ultimate fact.²²

²¹ SAPA, § 306(1).

²² Gray v. Adduci, 73 NY2d 741 (1988).

Evidence of Rehabilitation

To be able to prevail at the hearing, one of the most important factors for an applicant is to show that he/she has been rehabilitated. The section below discusses how various evidence of rehabilitation is considered during the administrative hearing.

- Certificates of Relief from Disabilities²³ and/or Good Conduct²⁴

These certificates are important because they may help remove bars to employment, which are automatically imposed by law by reason of a person's conviction of a crime or offenses.

The difference between the two certificates is the eligibility requirements. A person who has been convicted of no more than one felony and any number of misdemeanors is eligible for the Certificate of Relief from Disabilities, and must apply for and get a separate certificate for each conviction. A person with two or more felonies and any number of misdemeanors is eligible for a Certificate of Good Conduct, and need only apply for one certificate which will cover all convictions. However, there is a mandatory waiting period for a certificate of good conduct.

Practice Tip

- *We recommend applying for these certificates if the applicant is eligible.*
- *For more information on how to apply for these certificates. Go to the Legal Action Center website: <http://www.lac.org>*

While the certificates do not operate as a pardon and will not erase the record of conviction, the public licensing agency must give consideration to an applicant's certificate of relief from disabilities or certificate of good conduct, which creates a presumption of rehabilitation in regard to the offense or offenses specified.²⁵ The presumption, however, is only one factor to be considered out of the eight factors set forth in Correction Law § 753(1) in determining whether there is an unreasonable risk, or, where there is a direct relationship, in the exercise by the agency of its discretion.²⁶

An agency need not produce independent evidence to rebut the presumption of rehabilitation before denying a license where they have considered all eight factors. Although consideration of the other seven factors can warrant denial of the license without new evidence specifically addressed at overcoming the presumption of rehabilitation, on some occasions, an agency's failure to rebut the

²³ Correction Law, Article 23, §§ 701-703.

²⁴ Correction Law, Article 23, § 703-a and § 703-b.

²⁵ Correction Law § 753(2).

²⁶ Bonacorsa at 614.

presumption with evidence that there has been no rehabilitation will result in an arbitrary and capricious determination.²⁷

- Client Testimony

- a. Circumstances of Crimes

The other factors of Correction Law § 753 are most often elicited through the testimony of the client. At the licensing hearing, applicants must testify as to the nature of the crime and are asked about the details of why they committed the crime.²⁸

Applicants that do not take responsibility for their crimes are not viewed as showing enough remorse and are thus not viewed as being rehabilitated.²⁹

If there were circumstances in an applicant's life that led to applicants committing their crimes (or if there is a nexus between the crime and their addiction), if applicants' circumstances have since changed, that is viewed favorably.³⁰

The more time that has passed since the commission of the crime, the easier it is to judge the applicant's character and proof of rehabilitation. The age of the applicant at the commission of the crime also goes toward how much weight should be given to the commission of the crime. So long as they are over 18, they are presumed to have been aware of the consequences of their unlawful behavior.

The seriousness of the crime is generally judged by whether it was a felony or misdemeanor and the maximum term of imprisonment or penalty. *See also footnote 4, GBL § 89-f(13): "serious offense" definition.*

- b. Employment and Other Activities After Conviction

An applicant's employment history and ability to maintain jobs subsequent to the conviction is very important towards showing rehabilitation and the applicant's character. Any job training or positive school record for 6 months also helps.

Letters from the client's former employer(s) addressing the employee's trustworthiness, reliability and character, as well as letters from the client's community (i.e., pastor/minister, social services organizations the client is affiliated with, persons of influence, school administrator, job training program

²⁷ Bonacorsa at 614.

²⁸ See In the Matter of Delia Vasquez, 1054 DOS 04; In the Matter of Petra Gibbs, 84 DOS 05.

²⁹ See In the Matter of John Carota, 378 DOS 05.

³⁰ See In the Matter of Elaine Fonseca, 85 DOS 05; In the Matter of Delia Vasquez, 1054 DOS 04.

supervisor, etc.) can be important towards showing the applicant's good character and reputation.

Hearing Decisions

Below are some hearing decisions regarding security guard licenses that illustrate how the ALJ considers the eight factors under Correction Law § 753.

Practice Tip

- *Administrative hearing decisions are searchable on the DOS website at <http://www.dos.state.ny.us/ooah/decisions.htm>. This database, however, is not complete.*
- *All administrative hearings (hard copy) are available at the DOS Office of Administrative Hearing located at 123 William Street (where the licensing hearings are held). The decisions are not indexed by topic but are arranged in chronological order. If you want to look at these decisions, call the Office of Administrative Hearing at (212) 417-5776 to set up an appointment ahead of time.*

- In the Matter of Delia Vasquez, 1054 DOS 04 [Application granted]
There were 2 issues in this case³¹: (1) whether the applicant should be denied registration as a security guard because of her prior criminal convictions; (2) whether the applicant should be denied registration because her application contained a material false statement or omission.

The applicant was 31 years old when she committed the most recent crime 7 years ago and was convicted of a Class E felony (Grand Larceny, 4th degree, Penal Law § 155.30), which she later received a Certificate of Relief from Disability. Prior to that, she had a number of Class A misdemeanors (Intentionally/Fraudulently Obtaining Transportation Without Paying, Penal Law § 165.15; Petit Larceny, Penal Law § 155.25). Since her most recent conviction, she had attended courses in Auto Mechanics and was employed at 3 different jobs. The applicant testified that several of the crimes arose out of her associating with the wrong kind of people, that 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, and that she has since ceased her association with those people and was making a sincere attempt to support herself in an honest manner.

With regard to the second issue, when the applicant applied for registration as a security guard, she answered "no" to the question "have you ever been convicted in this state or elsewhere of any criminal offense which is a misdemeanor or a

³¹ A default decision denying the application was issued on December 15, 2003 but a request to re-open was granted since neither the applicant nor counsel received notice of the hearing.

felony?" At the hearing, the applicant testified that when she was granted the Certificate of Relief from Disability, the judge told her that it would enable her to get a job anywhere, and that she believed it cleared her record. The ALJ believed that she was not trying to hide anything since she knew her fingerprints would be used to determine what her record was.

- In the Matter of Antoinette Jones, 309 DOS 05 [Application granted] Applicant was 22 years of age when the criminal offense was committed. She took a controlled substance to her imprisoned male friend and was convicted of a Class D felony (Penal Law § 205.25), classified as a serious offense, for which she later obtained a Certificate of Relief from Disabilities. Nine years had elapsed since the applicant committed the crime and was deemed sufficient to evaluate applicant's rehabilitation. Applicant offered her own testimony as well as testimonial letters from persons who lived in her community in support of her contention of good moral character.

Reputation evidence after a criminal conviction of an applicant from people who are in a position to have knowledge is admissible in this proceeding and is treated as fact.

- In the Matter of Elaine Fonseca, 85 DOS 05 [Application granted] Applicant was 38 years old at the time the crime occurred and was convicted of a serious criminal offense (Class D felony, criminal possession of a weapon in the 3rd degree, Penal Law § 265.02), for which she later obtained a Certificate of Relief from Disabilities. Fourteen years had elapsed since the applicant committed the criminal offense. She testified that while she was a drug abuser from 1989-1990, she has been drug free since 1990 and has been employed in various jobs.

- In the Matter of Petra Gibbs, 84 DOS 05 [Application granted] Applicant was 22 years old when the criminal offense was committed and was convicted of a serious criminal offense (Class D felony, criminal possession of a weapon in the 3rd degree, Penal Law § 265.09), which she later obtained a Certificate of Relief from Disabilities. 21 years had elapsed since the crime was committed. Applicant testified that she helped an injured person into a taxi and when the police investigated, found a weapon, and charged both the applicant and the taxi driver. Since 1979 she had been gainfully employed and managed a beauty salon until 2004 when the business was sold. Since then she was employed as a security guard.

- In the Matter of Anthony Diaz, 682 DOS 05 [Application granted] Applicant was 23 years old when the last criminal offense was committed. He had 2 Class B misdemeanors (attempted criminal contempt in the 2nd degree and criminal possession of marijuana in the 5th degree) and one serious criminal offense, Class C felony (attempted criminal sale of a controlled substance in the 3rd degree, Penal Law § 110/220.39), for which he obtained a Certificate of Relief

from Disabilities. He testified that he had been a drug abuser but had since attended a drug program and had stopped using drugs. He worked in a drug store in stock and as a cashier. Three years had elapsed since he committed the crime.

- In the Matter of John Carota, 378 DOS 05 [Application denied]
Applicant was 33 years old when the last crime was committed. His convictions were not serious (2 unclassified misdemeanors, 2 Class A misdemeanors, 1 Class B misdemeanor) but only 1 year had elapsed and was deemed insufficient to properly evaluate his character and trustworthiness. Applicant failed to offer evidence sufficient to attenuate the direct relationship that existed between the criminal convictions and the duties of a registered security guard.

See Tab G: *Copy of full decision for the above cases*

IV. CASE PREPARATION

Client Intake

The initial intake interview with the potential client is crucial not only in assessing the strength and weaknesses of the case but also in preparing the client for a hearing later on. The intake questionnaire lists the essential information needed to represent the client at a licensing hearing successfully.

See Tab H: *Intake Questionnaire*

Criminal Record Review

It is important to have an understanding of the client's criminal conviction(s) and nature of the offense(s) to determine whether the client meets the requirements for a security guard license.

Practice Tip

- You can look up the convictions in the New York Penal Law Section. An abbreviated listing of penal law sections of some offenses has been reprinted and attached in the appendix for your convenience. **See Tab J.** This is part of a publication entitled *From Arrest to Appeal: A Guide to Criminal Cases in New York State Courts* by the Fund for Modern Courts, which is available at www.reentry.net.
- Other basic criminal information can be found at:
<http://www.courts.state.ny.us/litigants/crimjusticesyshandbk.shtml>,
<http://www.manhattanda.org/arrest/index2.html>,

Review the denial notice and the reason(s) for denying the application as well as the criminal record carefully.

- If there are errors in the client's criminal records (e.g., arrests without any disposition), we recommend correcting them as they might affect the outcome of the hearing.
- If the client pled guilty to a lesser offense than what s/he was originally charged with, find out why s/he did so. Was s/he represented and advised by counsel? Were there any other factors under consideration prior to pleading guilty?
- If there is more than one reason for the denial of the application, discuss the particular issue with the client, especially if the application contained a material false statement or omission, which is one of the reasons for denying registration. You will need to prepare your client to explain this at the hearing.

Gathering Evidence of Rehabilitation

As discussed earlier, one of the most important factors for an applicant to prevail at the hearing is to show that they have been rehabilitated. Evidence of rehabilitation is crucial in the licensing hearing since it is one of the eight factors under Correction Law § 753 that you can really develop to tip the scale towards your client's favor. Gathering evidence(s) of rehabilitation is an important part in preparing your case. Below is a checklist of possible sources to explore with your client:

- Certificates of Relief from Disability / Good Conduct
- Job Training for at least 6 months
- Schools attended for at least 6 months
- Employment
- Volunteer work in the community, church, etc.
- Treatment, counseling, or social services programs
- Letter from parole or probation officer
- Letter from clergy, minister, etc.
- Letter from people of influence (e.g., assembly man, state representatives, etc.)
- Special recognition awards or achievements
- Noteworthy news articles documenting how your client's life has changed since criminal convictions
- Other

Practice Tip

- *Request the letters as soon as possible.*
- *The person who is writing on behalf of the client should state in detail the nature of their relationship with the client, the basis for their character assessment, and address the client's trustworthiness, reliability, and character.*

See Tab I: Sample letters of rehabilitation

If the person is testifying for your client, make sure the witness is prepared to answer potential cross-examination or follow up questions.

Client Preparation

- If the client has never been to an administrative hearing, explain the hearing process, the people involved and their respective roles, and what he/she can expect to happen.
- Go over the direct questions as well as potential cross-examination questions with the client.
- Prepare and photocopy all the documents (3 copies each) you intend to submit.
- On the day of the hearing, plan to arrive at least 15-30 minutes earlier than the scheduled time on the hearing notice in case there are security check, transportation, or other unexpected delays.

V. POST HEARING

Appeal

Any of the parties may appeal the decision of the ALJ to the Secretary of State within 30 calendar days of receipt.³²

Administrative decisions are subject to further review by a proceeding brought under Article 78 of the Civil Practice Law and Rules (CPLR)³³.

Practice Tip

- *Please consult an attorney if you wish to commence an Article 78 proceeding as soon as possible.*
- *The statute of limitations is 4 months from the date of the administrative decision.*

³² 19 NYCRR § 400.2(k).

³³ N.Y. General Business Law § 89-h.