



DEPARTMENT OF
**LEGAL AND
ADMINISTRATIVE
SERVICES**

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TO: Safety and Licensing Committee, Common Council

From: ACA Zak Buruin

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RE: Appeal of Denial of Operator License Application of Tammy Taylor

Tammy Taylor has applied for an operator's license and is appealing the denial of that application. Below is a summary of the relevant Chapter 125 eligibility requirements and an analysis of their application in this case.

Summary

The applicant, Tammy Taylor, has previously been convicted of 4th Degree Sexual Assault. This offense substantially relates to the activity of the commercial distribution of intoxicating beverages. As it is an "exempt" offense, the provision statutory provisions which would otherwise permit her to demonstrate rehabilitation do not apply. Ms. Taylor is therefore statutorily ineligible for the license sought, and her application cannot lawfully be granted.

§125.04(5) Licensing Requirements

According to §125.04(5)(a)1, in order to be granted a license or permit under Wisconsin Statutes Chapter 125, the applicant may not have an arrest or conviction record. This prohibition is subject to the requirements of various statutes prohibiting certain types of employment discrimination, which will be discussed below. These statutes are §111.321, §111.322, §111.335 and §125.12 (1) (b).

§125.04(5)(b) states that "No license or permit related to alcohol beverages may, subject to §111.321, 111.322 and 111.335, be issued under this chapter to any person who has habitually been a law offender or has been convicted of a felony unless the person has been duly pardoned."

In summary, §125.04(5) prohibits the issuance of alcohol related licenses under chapter 125 to anybody with an arrest or conviction record, anybody with an unpardoned felony conviction, or anybody "who has habitually been a law offender," regardless of whether any arrests or

convictions exist (see State ex rel. Smith v. City of Oak Creek, 139 Wis. 2d 788, 407 N.W.2d 901 (1987)), unless failing to grant that license would constitute prohibited discrimination.

Prohibited Discrimination

§111.321 – Prohibited Bases of Discrimination

Arrest or conviction (among other bases not relevant to consideration here) are not permitted to be used as a basis for employment discrimination by a licensing agency.

§111.322 – Discriminatory Actions Prohibited

§111.322(1) specifies that refusal to license any individual on any of the bases listed in §111.321, which includes arrest and conviction history, is generally prohibited. This is subject to exceptions set forth in §111.33 to §111.365.

§111.335 – Arrest or Conviction Record; Exceptions and Special Cases

§111.335(3)(a)1 states that it is not employment discrimination because of a conviction record to refuse to license an individual where that person has been convicted of “any felony, misdemeanor, or other offense the circumstances of which substantially related to the circumstances of the particular job or licensed activity.” In evaluating the existence of a substantial relationship, it is the circumstances that provide the opportunity for criminal behavior, the reaction to responsibility, or the character traits of the applicant that are the proper considerations. It is not relevant whether the applicant has the ability to perform the work to an employer’s standards. (See Milwaukee Cnty. v. Lab. & Indus. Rev. Comm’n, 139 Wis. 2d 805, 407 N.W.2d 908 (1987)).

Each offense must be evaluated under the above criteria for determination of whether or not it is substantially related to the activity for which a license is sought. Any arrest, conviction, or other offense which is substantially related to the licensed activity is to be considered in the licensing decision.

Exempt Offenses

“Exempt Offenses” are defined by §111.335(1m)(b). Exempt offenses are those specified in Chapter 940 or §948.02, 948.025, 948.03, 948.05, 948.051, 948.055, 948.06, 948.07, 948.075, 948.08, 948.085, or 948.095, or a violation of the law of another jurisdiction that would be a violation of one of the listed statutes if committed in Wisconsin.

§111.335(4)(c)2 indicates that the considerations of rehabilitation and the requirement to state the reasons for denial based upon §111.335(3)(a)1, including the substantial relationship, do not

apply to an “exempt offense.”¹ The allowance for demonstration of rehabilitation is only provided for by §111.335(4)(c)1.b, which does not apply to “exempt offenses.” Where a particular offense is considered “exempt,” its consideration stops at the existence of a “substantial relationship,” and does not progress to rehabilitation.

Chapter 940 offenses are crimes against life and bodily security. Homicide offenses, sexual offenses, various forms of battery and other more general violent offenses are contained within Chapter 940. Any offense in Chapter 940 is considered “exempt.” Chapter 948 addresses crimes against children. While only specified offenses within this chapter are considered “exempt,” the specified offenses are sexual offenses committed against children. While it is true that a licensing agency is statutorily much more restricted in how it may consider “exempt offenses,” those restrictions are reserved for a limited class of criminal offenses.

Applicability to Tammy Taylor

According to the investigation of Lt. Ben Goodin of the Appleton Police Department, Ms. Taylor was convicted of 4th Degree Sexual Assault, a misdemeanor offense, in Outagamie County Case 1998CF169. This is a violation of Wisconsin Statutes §940.225(3m), a statute which has not been altered since 1995. This and all forms of sexual assault within Wisconsin Statutes involve sexual activity with a person who either has not consented or cannot lawfully consent to such activity. As a Chapter 940 offense, this offense is considered “exempt,” meaning that an allowance for the demonstration rehabilitation is not provided for.

Individuals engaged in the commercial service of intoxicating beverages will often find themselves in the presence of individuals under the influence of intoxicants. They will be at least partially responsible for the supervision of a premises occupied by intoxicated individuals. They will be called upon to make decisions about continued service to individuals who may or may not be intoxicated.

Intoxicated individuals may be less able or unable to give valid consent to engage in such activity, and less able to protect themselves from unwanted and unlawful advances, clearly fostering the potential for criminal activity of the type for which the applicant was convicted by providing the opportunity for similar criminal behavior. As noted above, it is not a relevant consideration whether or not the applicant is able to perform the activity in question up to the standards of the employer.

As such, the above offense appears to substantially relate to the activity for which license is sought. The applicant is therefore not eligible for the license applied for.

¹ It is the advice of Legal Services that a substantial relationship must still exist between the circumstances of the offense and licensed activity, even though the licensing agency is statutorily relieved from documenting its nature in writing.

Denial of the license sought does not bar the applicant from performing duties related to the sale and service of alcohol beverages. Someone of at least 18 years of age may sell and serve alcohol beverages without an operator's license provided they are working under the immediate supervision of a licensed operator, or the holder of the alcohol beverage license for the premises, along with any other legal requirements which might apply.

Conclusion

The applicant, Tammy Taylor, has previously been convicted of 4th Degree Sexual Assault. This offense substantially relates to the activity of the commercial distribution of intoxicating beverages. As it is an "exempt" offense, the provision statutory provisions which would otherwise permit her to demonstrate rehabilitation do not apply. Ms. Taylor is therefore statutorily ineligible for the license sought, and her application cannot lawfully be granted.