"...meeting community needs...enhancing quality of life."

LEGAL SERVICES DEPARTMENT

Office of the City Attorney
100 North Appleton Street
Appleton, WI 54911
Phone: 920/832-6423
Fax: 920/832-5962

TO: Safety and Licensing Committee, Common Council

From: ACA Zak Buruin

Date: April 22, 2024

RE: Alcohol Licensing Statutes Analyzed

Below is a summary of the statutory sections relevant for considering the history of unlawful behavior of an applicant for chapter 125 licenses.

§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 times 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." The discrimination statutes mentioned here are three of the four statute sections referenced above in §125.04(5)(a)1.

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. This is subject to exceptions set forth in §111.33 to §111.365, neither of which apply to the instant circumstances.

§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 between the circumstances of the offense and the licensed activity, 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.

Consideration of Rehabilitation

§111.335(4)(c)1 requires that if a license is denied *based upon §111.335(3)(a)1* (as discussed in the preceding section), the licensing agency has two further obligations. It must state the reasons for denial in writing, including a statement of how the circumstances of the offense(s) relate to the licensed activity. It must also allow the person to show evidence of rehabilitation. According to §111.335(4)(c)1.b, if the individual " shows competent evidence of sufficient rehabilitation and fitness to perform the licensed activity under par. (d), the licensing agency may not refuse to license the individual or bar or terminate the individual from licensing based *on that conviction*." (Emphasis added).

The statute specifically notes documentation that can demonstrate rehabilitation "on that conviction."[1] As such, rehabilitation is to be considered with respect to each offense individually, rather than the applicant in totality. Where denial is based upon §111.335(3)(a)1, and competent evidence of sufficient rehabilitation shown, that offense may not be considered as part of a denial decision.

[1] There is language in some of the following statutes that I had initially believed introduced some ambiguity in this language and limited the safe use of discretion, particularly when viewed in isolation. Viewed again in full context of the surrounding statutes and the language concluding §111.335(4)(c)1.b, any ambiguity is more rationally resolved in the manner described herein. This also affords the Committee and Council more discretion than My original advice had indicated.

Exempt Offenses

"Exempt Offenses" are defined by §111.335(1m)(b). Exempt offenses are 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."[2] 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 limited in how it may consider "exempt offenses," those limitations are reserved for a limited class of criminal offenses.

Competent Evidence of Sufficient Rehabilitation

For denials *based upon §111.335(3)(a)*[3]*,* competent evidence of sufficient rehabilitation may be shown. As indicated above in §111.335(4)(c)1.b, where such evidence is shown, the related conviction may not be the basis for a denial of a license.

§111.335(4)(d)1 provides two ways in which are statutorily required to be considered "competent evidence of sufficient rehabilitation," and therefore must be accepted by the licensing agency as such. §111.335(4)(d)1.a. allows one to provide certified documentation of honorable discharge from the US armed forces following the otherwise disqualifying conviction. This documentation is no longer sufficient if there is a criminal conviction following the discharge date.[4]

§111.335(4)(d)1.b, allows the applicant to provide documentation of their release from custody and either completion of probation or release from custody and compliance with all terms and conditions of release, be it extended supervision, probation, or parole.[5]

---

[2] 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.

[3] Denials under other provisions may be subject to other requirements.

[4] From a practical standpoint, honorable discharge from the armed forces is not related to any particular offense. This section, in conjunction with §111.335(4)(c)1.b. could be interpreted as effectively removing any criminal offenses prior to honorable discharge from licensing consideration. This would be more akin to evaluating the rehabilitation of the person rather than specific offenses, which is not what the other related statutes call for. This arguable inconsistency what my prior, more rigid analysis was based upon.

[5] Periods of supervision are attributable to specific offenses, allowing for consideration of individual offenses as §111.335(4)(c)1.b contemplates.

For offenses which neither of the above exists, §111.335(4)(d)2 provides additional documentary evidence that may be provided that the licensing agency is bound to consider, but that it is not required to accept conclusively as sufficient evidence of rehabilitation. Evidence which the agency is required to consider include:

a. evidence of the seriousness of any offense of which he / she was convicted.
b. evidence of all circumstances relative to the offense including mitigating circumstances or social conditions surrounding the offense.
c. The age of the individual at the time the offense was committed.
d. The length of time that has elapsed since the offense was committed.
e. Letters of reference by persons who have been in contact with the individual since the applicant's release from any local, state, or federal correctional institution.
f. All other relevant evidence of rehabilitation and fitness presented.

Based upon the above, where a denial of a licensed is based upon §111.335(3)(a)1, and there is no evidence presented that is statutorily defined as "competent evidence of sufficient rehabilitation" for a particular offense, it is up to the licensing agency to determine whether the other documentary evidence available constitutes "competent evidence of sufficient rehabilitation and fitness to perform the licensed activity."

Distribution of Controlled Substances

§111.335(3)(a)1 is not the only basis upon which licensure can be denied without constituting unlawful discrimination. §111.335(4)(h) provides a separate basis upon which denial of a license issued under Chapter 125 is lawful. Because it is not subject to the rehabilitation allowance discussed above, offenses running afoul of §111.335(4)(h) are disqualifying, and a license may not be issued. The offenses specified within this section relate to the manufacture, delivery, distribution, of controlled substances or analogs, possession with intent to manufacture, distribute, or deliver a controlled substance or analog, possession of specified materials with the intent to manufacture methamphetamine, or conviction of a federal offense or offense of another state substantially similar to those previously mentioned.

As indicated, this section is limited in applicability to Chapter 125 licenses, and to controlled substance delivery and manufacture offenses specified.

Applicability to the Application of Miguel Hulke

Investigation by the Appleton Police Department has yielded five offenses which Lt. Goodin advises are substantially related to the activity for which the instant license has been sought. By the nature of the offenses, it is difficult to disagree with that assessment.

The updated memorandum from Lt. Goodin takes note of the documentation provided by Mr. Hulke. It documents his completion of probation on the two most recent criminal cases (19CF451 and 13CF502). That along with documentation of release from custody would qualify as competent evidence of sufficient rehabilitation with respect to those two offenses.[6]

[6] In the strictest sense, Mr. Hulke has not provided a release document for either of these two cases and the Committee / Common Council is within its right to demand that before taking action. The circumstances and my prior knowledge of Mr. Hulke's circumstances suggest that this would be a mere formality, though an entirely

Nothing provided requires that the Committee / Council similarly disregard the first three OWI offenses. These remain valid arrests and convictions. A review of online records (CCAP) indicates that there is no supervision associated with any of the first three offenses, and therefore no documentation that could be provided that the Committee / Council would be bound to accept as competent evidence of sufficient rehabilitation.[7] The Committee / Council has the authority to evaluate the documentary evidence provided, any additional documentary evidence which it believes to be relevant (including those items which it is required to consider) and come to its own discretionary conclusion about the sufficiency of the rehabilitation demonstrated.

Should the Committee desire additional information upon which to base its decision, it would be free to ask for additional documentation from Mr. Hulke's supervising agent, treatment providers, or the treatment court in which he participated, and to draw appropriate conclusions from the documentary evidence or lack thereof.

Absent a finding by the Council that the evidence sufficiently demonstrates rehabilitation for the first three OWI offenses, Mr. Hulke would be disqualified from the sought license as a habitual law offender.

Conclusion

The circumstances of Mr. Hulke's application leave the Committee / Council with discretion to determine whether or not there is competent evidence of sufficient rehabilitation for at least the three oldest of the offenses that the Appleton Police Department has determined are substantially related to the licensed activity in question.

With respect to the two most recent OWI offenses noted, documentation of Mr. Hulke's completion of probation has been provided. It is likely, closing in on a certainty, that documentation of his release exists, though it has not been provided. Even if the Committee / Council find that the documentation provided is incomplete and does not meet the requirement of the statute requiring its treatment as competent evidence of sufficient rehabilitation for those offenses, the Committee / Council may still consider the information provided in utilizing its discretion.

reasonable one. Without this being provided, the Committee / Council could still conclude that there is competent evidence of sufficient rehabilitation for the felony offenses, though it would not be required to do so.

[7] I am aware of no information which suggests a relevant honorable discharge from the US armed forces exists.