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SERVICES

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TO: Safety and Licensing Committee, Common Council

From: ACA Zak Buruin

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RE: Operator Licensing Renewal Application of Kelly Arndt

Kelly Arndt has applied for an Operator License and is appealing the initial denial of that application. Below is a summary of the relevant Chapter 125 eligibility requirements and an analysis of their application.

Summary

Insufficient grounds currently exist to conclude that the applicant is statutorily ineligible for the license renewal being sought. Renewal should therefore be granted at this time.

As the applicant's pending criminal matters conclude, it remains possible that the situation will change. If or when sufficient evidence becomes available to demonstrate that the applicant is no longer eligible for the license she currently seeks or then holds, revocation proceedings would be available and appropriate.

§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 in relevant part 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.

§125.04(3)(j) – False Application Information

It is a violation of the law to provide false information on an application for any type of alcohol beverage license. §125.04(3)(j) provides that the penalty for any person who knowingly provides materially false information on an application for a license or permit under Chapter 125 may be required to forfeit not more than $1,000.

A review of the general licensing requirements as well as the bases for revocations, suspensions, and refusals to issue or renew licenses reveals what may be an unexpected fact. The provision of false, misleading, or incomplete information on an alcohol license application does not, in and of itself, provide an independent justification to deny, revoke, or suspend an alcohol beverage license under Chapter 125.

Whether this is intentional or an oversight by the legislature is not known. It is undoubtedly a proper consideration in a retail licensing application decision in situations where the licensing authority has more discretion. However, operator licenses are required by statute to be granted if the applicant is eligible for the license applied for. Absent an undiscovered statutory exclusion that might apply to someone who knowingly provides false information on their operator license application, doing so does not make someone statutorily ineligible for an operator license by itself.

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.

§111.335 – 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 relate 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)).

Regarding pending charges, it is considered employment discrimination for a licensing agency to refuse to license an individual or suspend an individual from licensing "solely because the individual is subject to a pending criminal charge." The exception to this general rule is when the circumstances of the charge substantially relate to the circumstances of the licensed activity in question, *and* the offense is either an exempt offense or a violent crime against a child. (See §111.335(2)(b) and (4)(a)). However, even though the fact of a pending charge may not be the sole basis for denial, this does not appear to prohibit the underlying conduct from being considered, to the extent it can be proved with sufficient evidence.

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 (subject to the above), conviction, or other offense which is substantially related to the licensed activity is to be considered in the licensing decision.

Applicability to Kelly Arndt

Ms. Arndt currently has criminal court matters pending in Calumet County and in Outagamie County. As of this writing, both matters are pending. Neither matter alleges an offense that would be considered exempt. Therefore, the fact that either of these matters are pending is not something which can be properly considered as a sole basis for denial.

The facts leading to an arrest remain a proper consideration when determining if an applicant is someone "who has habitually been a law offender." To be considered a "habitual law offender," one need not be convicted of or even arrested for a crime. Findings of guilt by a court are the typical way in which this is demonstrated, but they are not the only way in which law violations can be shown. The full scope of the evidence in the pending criminal matters is not generally available at this point in Ms. Arndt's proceedings. Whether this impacts the ability to determine someone's status as a "habitual law offender" must be determined on a case-by-case basis.

In at least one of Ms. Arndt's pending matters, a recent change in the procedural posture of the case indicates that there is at least the possibility of additional relevant factual developments before it is concluded. The posture of the cases at the time of Lt. Goodin's memorandum recommending the denial of the application was premised upon the (then) well-founded belief that the applicant was statutorily ineligible in fact, and that this fact could be sufficiently demonstrated to the Committee and Council. The change in the posture of the criminal matters is something that occurred after the original memorandum submitted by Lt. Goodin. It is not something he could have predicted based on the status of the cases at that time. Predictable or not, the change does appear to now preclude a fair and full consideration of the facts *at this time*.

There is sufficient evidence by which it might be shown that the applicant violated the law by providing materially false information on her renewal application. This does not, by itself, allow for the conclusion that the applicant is a "habitual law offender," or render her statutorily

ineligible for the license applied for. It remains a consideration with respect to future license renewals, new applications, and other eligibility determinations under Chapter 125.

Based on the above, it is premature to conclude whether or not Ms. Arndt is a "habitual law offender" and therefore ineligible for the license applied for. In the absence of a determination that she is a "habitual law offender," Ms. Arndt remains eligible for licensure, at least with respect to that specific qualification.

Conclusion

The defendant's application should be granted, as it cannot be shown that she is ineligible at this time.

The outcome of Ms. Arndt's pending criminal matters remains to be seen both legally and factually. Both could potentially have impacts upon whether Ms. Arndt remains statutorily eligible for an operator's license. The situation can and will be monitored. Changes to eligibility would be addressed in accordance with Wisconsin Statutes §125.12, which governs revocations, suspensions, and refusals to issue or renew alcohol beverage licenses under Chapter 125.