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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 License Denial Appeal – Delane Henley

Delane Henley has applied for an Operator 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

Mr. Henley does not meet the statutory eligibility criteria for the license sought. Some of the offenses that contribute to his ineligibility are subject to consideration of rehabilitation. However, the offenses not subject to consideration of rehabilitation would continue to leave him ineligible based upon his conviction record and the presence of an unpardoned felony conviction.

The license applied for may not be lawfully granted and must be denied.

§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. 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, 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 typically 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." 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.

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.

Competent Evidence of Sufficient Rehabilitation

For denials *based upon §111.335(3)(a)*[2]*,* 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 forms of evidence 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

[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.

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

date.[3]

§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.[4]

Where 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, or 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.

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[3] 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.

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

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

Applicability to Delane Henley

According to Lt. Goodin's memorandum to the Safety and Licensing Committee and Common Council, Mr. Henley has several prior convictions for law violations which are relevant for licensing consideration. They are:

- Outagamie County case 06CF1112 – Conviction for Manufacture/Deliver Cocaine (<=1g), contrary to §961.41(1)(cm)1g, a felony offense. He was convicted of this offense on June 19, 2007. He has not been pardoned for this offense. This conviction is not subject to consideration of rehabilitation based upon §111.335(4)(h), as noted above.
- Outagamie County case 07CF696 – Convictions for Battery contrary to §940.19(1), and Disorderly Conduct, both with "Habitual Criminality / Repeater" enhancers. Court records reflect that the battery charge for which he was convicted was amended from "Substantial Battery," a felony. He was convicted on April 28, 2008. Battery is an "exempt" offense and not subject to consideration of rehabilitation.
- Menasha and Neenah City Municipal Court citation file R902065 - Convicted of OWI 1st offense contrary to §346.63(1)(a). This is a non-criminal traffic forfeiture offense. The date of the conviction is not readily accessible. However, such a conviction is a prerequisite to the 2nd and 3rd offense OWI matters noted below.
- Winnebago County case 12CT701 – Convicted of OWI 2nd offense contrary to §346.63(1)(a). This is a criminal misdemeanor offense. He as convicted on August 7, 2012.
- Outagamie County case 23CT516 – Convicted of OWI 3rd offense contrary to §346.63(1)(a). This is a criminal misdemeanor offense. He as convicted on May 20, 2023.

The above is not an exhaustive list of Mr. Henley's record of law violations. It does contain those which the law and available facts indicate are substantially related to the licensed activity of distributing intoxicating beverages. These offenses involve the use, possession and / or distribution of intoxicating substances, they implicate the ability to promote public safety and order inherent to the distribution of alcohol beverages, or they are of a nature that the statutes elevate as being of enhanced relevance for a licensing decision such as this. Each noted offense involves one or more of these substantial ties to the licensed activity in question.

From the outset, Mr. Henley is statutorily ineligible for the sought license based upon his conviction record, his unpardoned felony conviction, and because he has been a habitual law offender. Mr. Henley can only be granted the sought license if failure to do so constitutes prohibited employment discrimination. It does not.

The ability to show rehabilitation does not change the eligibility determination in this case. Even assuming that Mr. Henley can sufficiently demonstrate rehabilitation as permitted by the statutes, and do so for each of the offenses subject to that provision, the convictions for Manufacture/Deliver Cocaine and for Battery would remain under consideration. This would continue to leave him ineligible at least based upon his unpardoned felony conviction, and his conviction record. He would likely continue to be considered a habitual law offender as well,

though the answer to that question need not be decided.

Mr. Henley's ineligibility for an Operator License does not prevent him from working in a capacity where he is selling alcohol beverages. He would simply need to do so under proper supervision as required by Wisconsin Statutes.

Conclusion

Mr. Henley does not meet the statutory eligibility criteria for the license sought. Some of the offenses that contribute to his ineligibility are subject to consideration of rehabilitation. However, the offenses not subject to consideration of rehabilitation would continue to leave him ineligible based upon his conviction record and the presence of an unpardoned felony conviction.

The license applied for may not be lawfully granted and must be denied.