STATE OF NEW YORK DEPARTMENT OF LABOR

In the Matter of the Suspension, Revocation, Refusal to Renew or the Denial of a Renewal Application for an Own and Posses Explosive License and Blaster Certificate for:

JOHN J. SCRIMA

Pursuant to Section 459 of the Labor Law of the State of New York and Part 61 (formerly Part 39) of Title 12 of the Official Compilation of Codes, Rules and Regulations of the State of New York.

REPORT & RECOMMENDATION

GA-09-0094

To: Honorable Colleen C. Gardner
Commissioner of Labor
State of New York

Pursuant to a Notice of Hearing, and in accordance with Labor Law Article 16, a hearing was held in this matter on June 9, 2010 at Albany, New York. The purpose of the hearing was to inquire into and report findings of fact, conclusions of law and recommendations to the Commissioner of Labor regarding the denial, by the Division of Safety and Health ("Division") of the New York State Department of Labor ("Department"), of a renewal application submitted by John J. Scrima ("Applicant") for an explosives license.

APPEARANCES

The Division was represented by Department Counsel, Maria Colavito (Benjamin Shaw, Senior Attorney, of Counsel). The Applicant was represented by Paul M. Callahan, Esq.

FINDINGS OF FACT

On or about June 9, 2008, the Applicant submitted to the Division an application

for a license to own or possess explosives ("Explosives License") (Dept. Ex. A). The Applicant had previously held an Explosives License, which had lapsed in 2006 (T. 15). In response to that application, the Division, in accordance with routine procedure, obtained a criminal history report, which disclosed additional arrests since the Applicant's license had lapsed (T. 11, 13; Dept. Ex. H). As a consequence, the Division sent the Applicant a letter dated August 1, 2008, requesting further information concerning arrests occurring on July 17, 2008 and August 29, 2007 (Dept. Ex. C).

In response, Mr. Scrima's attorney, Paul M. Callahan, Esq., wrote to the Division on September 30, 2008 and advised that the matter arising from the July 17, 2008 Driving While Intoxicated (DWI) arrest was still pending in village court and that the Department of Motor Vehicles administrative matter arising from the August 29, 2007 chemical test refusal resulted in a decision dismissing and closing the case, a copy of which was enclosed, which disclosed that the decision was based on the failure of a police officer to appear to substantiate the refusal report (Dept. Ex. D). By letter dated April 23, 2009, Mr. Callahan advised the Division that he had reached a plea agreement with the District Attorney whereby Mr. Scrima would enter a plea to the traffic infraction Driving While Ability Impaired (DWAI) in resolution of the pending DWI charge (Dept. Ex. E).

By letter dated May 15, 2009, the Division denied the application on the basis of the Applicant's "history of seven convictions, the majority having occurred in the past four years, which include the following:

- Your current plea of guilty to Driving While Ability Impaired By the Consumption of Alcohol, following the August 29, 2008[sic] arrest;
- Driving While Ability Impaired By the Consumption of Alcohol, infraction, December 19, 2005;
- Criminal Possession of Stolen Property, Class E felony, January 12, 2005;
- Attempted Grand Larceny – 4th Degree, Class A Misdemeanor, February 7, 2005;
- Driving While Ability Impaired By the Consumption of Alcohol, infraction, July 31, 1995;

- Disorderly Conduct, Violation, March 9, 1990; and
- Disorderly Conduct: Fight/Violent Behavior, Violation, September 14, 1988."

As a result of that denial, the Respondent requested a hearing (T. 10; Dept. Ex. G).

In the Department's Notice of Hearing, the Department also referenced a July 17, 2008 arrest and subsequent conviction of Driving While Ability Impaired by Alcohol (Dept. Ex. K). The Division subsequently learned that the disposition of the July 17, 2008 DWI arrest was an Adjournment in Contemplation of Dismissal (ACOD), which will result in a dismissal of the charge if the Applicant remains on good behavior through November 2010 (T. 17). The first reference conviction in the Department's May 15, 2009 denial letter of a DWAI resulting from an August 29, 2008 DWI arrest is incorrect; the charge resulted in a plea to the traffic infraction of failure to keep right (T. 17). Consequently, the two most recent arrests did not result in criminal convictions.

At the Hearing, Martha Waldman, the safety and health program manager responsible for the license and certificate unit of the Department's Division of Safety and Health, testified that the Respondent's application was denied because the cumulative, ongoing history of arrests and convictions evidence a lack of reliability and judgment necessary to own, use and transport explosives (T. 22-23). On two prior license renewal applications the Department had to inquire further about criminal convictions occurring since the prior renewal. In these instances the Department granted the renewal despite the convictions (T. 22). In Ms. Walman's opinion, the third time was enough (T. 22, 92). The Department's file contains no negative information, such as complaints or accident reports, concerning the Respondent's actual possession or use of explosives (T. 34).

The Respondent concedes that he has made mistakes in his personal life, but explains that the motorcycle accident that caused him to be hospitalized him as a result of the July 2008 incident served as an epiphany that he had to change his personal behavior, which he has committed to do (T. 55-57, 63, 71, 84-85). Moreover, Respondent maintains that none of the mistakes made in his personal life has ever adversely effected his possession and use of explosives during the approximately 20 years he has been engaged as a blaster (T. 40, 55-56, 84-85, 101-102).

CONCLUSIONS OF LAW

Pursuant to New York State Labor Law § 459 (1) an Explosives License or its renewal may be denied where the Commissioner has probable reason to believe, based on knowledge or reliable information, or finds, after due investigation, that the applicant is not sufficiently reliable and experienced to own, possess, transport or use explosives. Such a denial may be appealed to the Commissioner, who is then required to hold a hearing and issue a written decision thereon. NY Labor Law § 459 (1), (3).

Pursuant to the State Administrative Procedures Act (SAPA), a party initiating a proceeding bears the burden proof. SAPA § 306 (1). Since the Respondent is the party initiating the instant proceeding, he bears the burden of proof to establish his fitness for an explosives license. The standard of proof articulated by SAPA § 306 is that no decision, determination or order shall be made except upon consideration of the record as a whole and as supported by and in accordance with substantial evidence. SAPA § 306 (1) (third sentence). "[S]ubstantial evidence is less than a preponderance of the evidence[citation omitted] and, as a burden of proof, it demands only that a given inference is reasonable and plausible, not necessarily the most probable [citations omitted]." *Matter of Miller v. DeBuono*, 90 NY2d 783, 793 (1997). Where, however, a decision adversely impacts on future employment opportunities, "any … proof *by less* than a preponderance of the evidence is constitutionally inadequate... ." *Id.* at 794. This report assumes, without actually determining, that a liberty interest such as that identified in *Matter of Miller* attaches to the Respondent's license renewal, and that the higher standard proof articulated by the Court of Appeals in that case is therefore applicable. It is the function of the administrative agency, not the courts, to weigh the evidence and assess the credibility of witnesses. *Matter Oglesby v. New York City Housing Authority*, 66 AD3d 905 (2d Dept. 2009).

The issue thus presented is whether the Department's decision to deny Respondent renewal of his Explosives License is substantiated by a fair preponderance of the evidence. *See, Matter of Miller v. DeBuono*, 90 NY2d 783,794. The Respondent bears the burden of establishing that it does not.

The Respondent's history of legal troubles clearly evidences a lack of judgment

and responsibility. On two previous occasions the Department gave the Respondent the benefit of the doubt and renewed his Explosives License. The ongoing record of convictions and charges amply justify the Department's conclusion that Respondent lacks the judgment and reliability necessary to own, possess and use explosives.

RECOMMENDATIONS

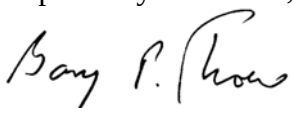
I RECOMMEND that the Commissioner of Labor adopt the Findings of Fact and Conclusions of Law as the Commissioner's determination of the issues raised in this case, and based on those Findings and Conclusions, the Commissioner should:

DETERMINE that the Division had sufficient grounds to deny the Applicant's application for an Explosives License; and

ORDER that the Applicant be denied an Explosives License.

Dated: October 13, 2010
Albany, New York

Respectfully submitted,



Gary P. Troue, Hearing Officer