



DEPARTMENT OF
**LEGAL AND
ADMINISTRATIVE
SERVICES**

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TO: Safety and Licensing Committee, Common Council
From: ACA Zak Buruin
Date: September 12, 2024
RE: Operator (Bartender) License Renewal Denial Appeal of Cindy Reed

Cindy Reed has applied to renew an operator's (bartender) license and is appealing the denial of that renewal application. Per §125.17(1) of the Wisconsin statutes, the City is required to issue an operator's license any applicant that is qualified under §125.04(5). The Appleton Police Department has learned of information it contends leaves the applicant unable eligibility requirements, and that the application must be denied.

Summary

Ms. Reed was convicted of a 4th offense OWI in January of 2024. This felony offense, along with her prior OWI offenses leaves her ineligible for license renewal as both an unpardoned felon and a "habitual law offender."

This disqualification leaves her with the ability to provide evidence of rehabilitation. It does not appear that any documentation that the Committee and Council would be *required* to accept as sufficient evidence of rehabilitation and fitness exists.

Ms. Reed may provide evidence and documentation to show she has been rehabilitated from the disqualifying offenses. The Committee and Council must each consider all relevant evidence provided. The Committee and Council must utilize their judgment to determine if the evidence provided constitutes "competent evidence of sufficient rehabilitation and fitness to perform the licensed activity."

If the Committee and Council find that competent evidence of sufficient rehabilitation and fitness to perform the license activity has been presented, the license must be granted (renewed). If it is found that competent evidence of sufficient rehabilitation and fitness has not been provided, the license may not be granted (renewed).

Discussion: **§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, in relevant part.

§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.

§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 above, 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 typically 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.”

Competent Evidence of Sufficient Rehabilitation

§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 date.

§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.

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 includes:

- 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."

Applicability to the Application of Cindy Reed

Investigation by the Appleton Police Department has yielded information about 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, this is a sound assessment. The offense of Operating a Motor Vehicle While Intoxicated necessarily involves either the failure to recognize over-consumption of alcohol (i.e. intoxication), or the decision to disregard the fact that one has over-consumed alcohol. Those licensed to serve alcohol commercially are called upon with each transaction to determine whether the person they are about to serve is intoxicated. Wis. Stat. §125.07(2)(a). Their judgement potentially impacts the safety of that customer, as well as anybody that customer may subsequently encounter before any effects of the alcohol recede.

Lt. Goodin notes convictions for OWI in 2007, 2002, and 1995. These would be either misdemeanor or non-criminal convictions for OWI offenses prior to the approval of Ms. Reed's prior operator license application. However, Lt. Goodin takes note of a recent conviction occurring since Ms. Reed's prior application was approved.

On January 30, 2024, Ms. Reed was convicted of OWI 4th offense, a felony, in Winnebago County Case 2023CF277. According to Wisconsin Circuit Court Access records accessed on September 12, 2024, Ms. Reed was sentenced to a combination of jail (with work release), monetary penalties, and a combination of judicial and administrative penalties against her driving privileges.

Her sentence did not subject her to supervision through probation, extended supervision, or parole. Therefore, she would be unable to provide any documentation of rehabilitation and fitness that the Committee and Council would be *required* to accept as "competent evidence of sufficient rehabilitation," unless she has been honorably discharged from the United States armed forces since the date of the offense on March 23, 2023.

However, she is still able to provide additional information and evidence to show competent

evidence of sufficient rehabilitation such as that contained in the list above. The Committee and Council are bound to consider that evidence. Whether evidence presented is sufficient to show rehabilitation and fitness to perform the licensed activity is committed to the sound discretion of the Committee and Council. Should the Committee and Council find the evidence sufficient to demonstrate rehabilitation and fitness, state law requires that the license must be granted because failure to do so would constitute unlawful discrimination. Should the Committee and Council find the evidence to be insufficient to demonstrate rehabilitation and fitness, state law prohibits the license from being granted, as the applicant would not meet eligibility criteria.

Conclusion

Ms. Reed's most recent conviction for OWI 4th offense is a disqualifying offense. It is an unpardoned felony. It is also the latest in a series of convictions which qualify Ms. Reed as a Habitual Law Offender. This is also a disqualifying fact. All of the relevant offenses are substantially related to the licensed activity. Therefore, denial based upon these factors is not unlawful discrimination. The staff recommendation that the application to renew Ms. Reed's operator's license be denied is supported by the relevant law and available facts.

Ms. Reed is afforded the opportunity to demonstrate to the Committee and Council that she has been rehabilitated. Subject to one exception discussed above, the Committee and Council will be tasked with exercising its judgement and discretion in evaluating whether Ms. Reed has shown competent evidence of rehabilitation. As the statutes require granting an operator's license to eligible applicants, and prohibits granting a license to ineligible applicants, the decision of whether or not Ms. Reed's license is to be renewed will rest upon the Committee and Council's sound assessment of the evidence and documentation of rehabilitation Ms. Reed is able to provide, and the conclusions drawn therefrom.