



DEPARTMENT OF
**LEGAL AND
ADMINISTRATIVE
SERVICES**

CITY ATTORNEY'S OFFICE
100 North Appleton Street
Appleton, WI 54911
p: 920.832.6423
f: 920.832.5962
www.appleton.org

TO: Safety and Licensing Committee, Common Council

From: ACA Zak Buruin

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RE: Operator's License Application of Katherine Neubert

Katherine Neubert has applied for an Operator's (Bartender) 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

The Appleton Police Department's recommendation that the applicant's application be denied based upon Lt. Goodin's conclusion that applicant is a habitual law offender is well-grounded in the relevant and facts and law currently available. She is ineligible for licensure unless she provides "competent evidence of sufficient rehabilitation."

§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.

Competent Evidence of Sufficient Rehabilitation

For denials *based upon §111.335(3)(a)¹*, 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 date.²

§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.³

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

¹ Denials under other provisions may be subject to other requirements.

² 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.

³ Periods of supervision are attributable to specific offenses, allowing for consideration of individual offenses as §111.335(4)(c)1.b contemplates.

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 Katherine Neubert

Operating While Intoxicated offenses are unquestionably substantially related to the activity for which Ms. Neubert seeks a license. Ms. Neubert’s history of repeated Operating While Intoxicated offenses makes her a habitual law offender. The criminal conviction for her most recent offense, a third offense, was on July 15, 2022. Sentence was withheld and she was placed on probation. Probation records could be particularly determinative evidence in this case, but they are not the only source of information which either must or should be considered. Should she provide “competent evidence of sufficient rehabilitation” as described above, the requested license must be granted. It is up to her to provide any such evidence.

Should she fail to provide “competent evidence of sufficient rehabilitation” as described above, Ms. Neubert would remain statutorily ineligible for the requested license, and it may not be granted.

Conclusion

The Appleton Police Department’s recommendation that the applicant’s application be denied based upon Lt. Goodin’s conclusion that applicant is a habitual law offender is well-grounded in the relevant facts and law currently available. She is ineligible for licensure unless she provides “competent evidence of sufficient rehabilitation.”