

Northern Territory Licensing Commission

Reasons for Decision

Respondent:	Mr Bashir Hussain Shah 410 Gunn Point Road Howard Springs, NT 0835
Licence Number:	7798
Proceedings:	Application for Crowd Controller Licence
Heard Before (on papers):	Mr Philip Timney (Presiding Member) Mr John Brears Ms Cindy Bravos
Date of Hearing:	8 November 2011

Background

- 1) On 7 July 2011 Mr Bashir Shah lodged an application for a Crowd Controller Licence to upgrade his existing Security Officer Licence to a dual Licence. Previously, on 12 May 2009, Mr Shah lodged an application for a dual Security Officer and Crowd Controller Licence. Mr Shah's Police Report, dated 23 April 2009 recorded eight convictions comprising six traffic offences, one firearm offence and one drug offence.
- 2) Critical to the application currently before the Commission, on 27 March 1997 Mr Shah was convicted of an offence of "Cultivate Cannabis/ Possess Cannabis". He was sentenced to two years imprisonment (suspended on a Good Behaviour Bond) and was required to forfeit the items used in the cultivation. As a result, he was convicted of a disqualifying offence which, despite the passage of fourteen years, remains unspent due to the custodial sentence ordered by the Court.¹
- 3) Due to the unspent conviction, the Director of Licensing referred Mr Shah's 2009 application to the Licensing Commission (the Commission) for consideration as to whether Mr Shah was an appropriate person to hold a Crowd Controller licence, despite the disqualifying offence. The Commission determined that further information was required to properly consider the matter and determined to conduct further Inquiries by way of a Hearing.
- 4) The Hearing was held on 28 May 2009. In the course of the Hearing Mr Shah withdrew his application for a Crowd Controller Licence and consideration of the application for a Security Officer licence only proceeded.
- 5) At the Hearing, Mr Shah provided the Commission with sufficient information to satisfy them that, despite his serious criminal conviction, he was now a person of good character. The Commission approved the grant of a Security Officer's Licence for a twelve month probationary period. The Commission's letter of approval advised that if, at the end of the probationary period, the Director had any concerns about reissuing the Security Officer Licence, then the renewal application was to be brought before the Commission for consideration. That letter advised further that if the Director had no concerns, then the licence could be renewed under the Director's delegated authority.

¹ Refer to Section 6 of the *Criminal Records (Spent Convictions) Act*

- 6) Mr Shah's Security Officer Licence was subsequently issued on 28 May 2009, and expired on 28 May 2010 as Mr Shah did not apply for its renewal.
- 7) On 7 March 2011, Mr Shah lodged another application for a Security Officer Licence accompanied by the prescribed fee and supporting documentation. At the time he did not apply for a Crowd Controller Licence. On 16 March 2011, the Deputy Director Licensing approved the grant of the Security Officer licence, in keeping with the Licensing Commission's decision of 28 May 2009. Mr Shah's current Security Officer Licence will expire on 17 March 2012.

Current Situation

- 8) As noted above, on 7 July 2011 Mr Shah lodged an application for a Crowd Controller Licence. The National Police Certificate accompanying the application, dated 6 January 2011, is identical to the one dated 23 April 2009 and includes the 1997 conviction for the offence of "Cultivate Cannabis/ Possess Cannabis".
- 9) On 12 September 2011, Mr Shah advised in writing that the dual licence was required for the purpose of his employment, claiming that he needs both a Security Officer and a Crowd Controller Licence as there have been weekend jobs that he has been unable to apply for due to not holding a dual licence. Mr Shah's application was subsequently referred to the Commission and is the subject of this decision.
- 10) The Commission determined to conduct an Investigation into Mr Shah's application, pursuant to Section 16(2) of the *Private Security Act* ("the Act") to assist in deciding whether he is an appropriate person to hold a Crowd Controller licence, despite the disqualifying offence for which he was convicted some fourteen years ago. The Commission determined to conduct the Inquiry on the papers without the requirement for Mr Shah to attend.
- 11) It should be noted that Mr Shah's application is supported by the Acting Director of Licensing on the basis that:
 - He has not been convicted of any offence since 1999, illustrating that he now has regard for the law;
 - He is sufficiently qualified, experienced and competent to carry out security activities under a dual licence;
 - He has held a Security Officer Licence without issues or concerns coming to the attention of the office of the Director and has not been the subject of a licence review; and
 - There are no grounds to believe that he is now likely to be a person of bad character.

Consideration of the Issues

- 12) The Act defines disqualifying offence as follows:

disqualifying offence, for a category of licence, means:

- (a) an offence prescribed by regulation to be a disqualifying offence in relation to that category of licence; or
- (b) an offence against a law, or a repealed law, of the Territory or another jurisdiction (including a jurisdiction outside Australia) that substantially corresponds to an offence mentioned in paragraph (a).

13) Section 15(7) of the Act provides:

*15(7).A person is not an appropriate person to hold a licence if the person, **within 10 years of applying for a licence, has been convicted of:***

*(a) **a disqualifying offence in relation to such a licence;** or*

(b) an offence that would be a disqualifying offence in relation to such a licence if committed in the Territory. (emphasis added).

14) Cultivation and Possession of Cannabis are offences against Sections 7 and 9(1) of the *Misuse of Drugs Act* respectively; and are prescribed as disqualifying offences by regulation 2(e) of the *Private Security (Security Officers) Regulations* and regulation 3(e) of the *Private Security (Crowd Controllers) Regulations*. Relevant to this decision, the *Criminal Records (Spent Convictions) Act* (“the CR Act”) defines a “spent conviction” as meaning a “*criminal record which is spent in accordance with Part 2*”.

15) Section 6 of that CR Act sets out the circumstances where a conviction may become a spent conviction.

6 Convictions may be spent

*(1) In this Section criminal record **does not include** a record of a conviction of **an offence in respect of which a sentence of imprisonment for more than 6 months was imposed**, whether or not the sentence was suspended. (emphasis added).*

(2) Subject to this Part, a criminal record is a spent conviction on the expiration of a period, immediately after the date of conviction of the offence, of:

(a) where the offender was convicted in the Youth Justice Court within the meaning of the Youth Justice Act – 5 years; and

(b) in any other case – 10 years,

during which period the offender has not:

(c) been convicted of an offence punishable by imprisonment; or

(d) served all or any part of a sentence of imprisonment.

16) As noted, whilst Mr Shah committed the drug offence some 14 years ago it is not spent conviction due to the term of imprisonment imposed, albeit the custodial sentence was suspended immediately. Had the drug offence become spent conviction after a usual period of 10 years the Commission would be precluded from taking it into account in determining whether or not Mr Shah is an appropriate person to be granted a licence. However, as the conviction for the drug offence is not a spent conviction (and never will be) this is a matter that the Commission is entitled, if not obliged, to take into account in considering whether or not Mr Shah is an appropriate person to hold a Crowd Controller Licence.

17) In this case, the Commission, having considered Mr Shah’s current application and the supporting materials and taking account of the Commission’s previous deliberations in respect of Mr Shah’s criminal history, is inclined to grant a Crowd Controller licence to Mr Shah, despite the unspent disqualifying offence.

18) The Commission, subject to finding that Mr Shah is otherwise an appropriate person, is not precluded from granting him a Crowd Controller licence on the basis he has not been convicted of a disqualifying offence **within 10 years of applying for a licence.**²

19) Section 15(8) of the Act provides:

(8) The licensing authority may, in its absolute discretion, refuse to grant a licence to an applicant if the licensing authority has grounds for believing that the applicant is likely to be of bad character, having regard to the public interest in ensuring that persons of bad character are not employed as security providers, and the licensing authority shall give reasons for its decision.

20) Clearly, if the Commission finds that no grounds exist on which to determine that Mr Shah is likely to be of bad character then it may, in its absolute discretion, grant the licence for which he has applied. However, the Commission, having concluded that Mr Shah is an appropriate person to hold a Crowd Controller Licence, notes the provisions of Section 57 of the Act:

57 Person not to hire crowd controller with disqualifying offence

*A person (the **employer**) shall not engage another person to carry out the functions of a crowd controller if the employer knows, or ought reasonably be expected to know, that the person **has been convicted of a disqualifying offence**, unless the Local Court has, knowing of the offence, granted a licence to the person.*

Penalty: In the case of a natural person – 100 penalty units.

In the case of a body corporate – 500 penalty units.

21) The Commission notes that Section 57 does not contain the same qualifying words as Section 15(7) in respect of the currency of a disqualifying conviction i.e. it does not limit the operative effect of a disqualifying offence to a period of 10 years. On a literal reading of Section 57, a person (the employer) is not to engage another person who has been convicted of a disqualifying offence to carry out the functions of a Crowd Controller unless the Local Court, knowing of the disqualifying offence, has granted a licence to the person³.

22) In this instance, at no stage has the Local Court issued any form of Security Provider Licence (Crowd Controller or Security Officer Licence) to Mr Shah. In fact he previously applied to the Commission for, and was granted, a Security Officer licence without the requirement to make application to the Local Court as, by the time he made the initial application, the date of the conviction was outside the 10 year disqualification period. Similarly, the current application for a Crowd Controller Licence was made to the Commission and not the Local Court.

23) It is noted that there is nothing in the legislation that specifically prohibits the Commission from granting a Crowd Controller licence to Mr Shah if it were to determine that he is an appropriate person to hold such a licence despite the 14 year old disqualifying offence. However, following the grant of the licence it would, on the basis of Section 57 of the Act, be an offence for another party (i.e. an employer) to “engage” Mr Shah to carry out the functions of a Crowd Controller. It is also noted that Section 57 of the Act uses the term “engage” and not “employ”. That usage indicates that it would be just as unlawful for a person to engage an independent contractor with a disqualifying offence as it would be to employ that person in the usual type of employer / employee arrangement.

² Refer to Section 15(7) of the *Private Security Act* which prohibits the Commission from granting a licence to a person convicted of a disqualifying offence within 10 years of the date of the application.

³ Whilst the Commission is precluded from granting a licence to a person who has been convicted of a disqualifying offence within 10 years of the date of the application, the Local Court is not bound by the same restriction and may (and often does) grant a licences to otherwise disqualified persons.

- 24) In this instance it is expected that Mr Shah would utilise the Crowd Controller Licence, if granted, in the capacity of an employee of a licensed security firm. If that were to occur, a strict reading of Section 57 would, at least arguably, result in the employer being guilty of an offence in that they would be engaging Mr Shah as a Crowd Controller in circumstances where he has been convicted of a disqualifying offence and his Crowd Controller Licence has not been issued by the Local Court.
- 25) It appears to the Commission that a literal interpretation of the Sections of the Act under consideration in this application results in something of an absurdity. Namely, the Commission is entitled to grant a Crowd Controller Licence to a person who has been convicted of a disqualifying offence more than 10 years ago and yet a prospective employer who subsequently engages that person to carry out Crowd Controller duties is liable to be found guilty of an offence pursuant to Section 57 of the Act.
- 26) The Legislative intent in this instance appears to be readily identifiable. By introducing the concept of disqualifying offences it appears clear that the Legislature intended to preclude the Commission from granting a Crowd Controller licence to a person who was convicted of a disqualifying offence within ten years of applying for the licence. That authority or discretion is clearly reserved for the Local Court. Outside the 10 year period the Commission has the authority and discretion to grant a Crowd Controller licence to such a person, subject to first determining that the person is otherwise fit and proper to hold the licence for which they have applied.
- 27) It is also clear from any reading of Section 57 that the Legislature intended that employers could engage Crowd Controllers who had been convicted of disqualifying offences, either within or outside the 10 year period, so long as the person's licence was granted by the Local Court. The absurdity arises where a person, such as Mr Shah, is lawfully granted a licence by the Commission but is precluded from being engaged as a Crowd Controller by a prospective employer as that engagement would render the employer, and not the licensee, liable to prosecution for an offence against Section 57 of the Act.
- 28) That apparently absurd scenario cannot, at least arguably, have been the intention of the Legislature. It appears to the Commission as presently constituted, that Section 57 may be deficient in not including words to the effect that an employer is entitled to engage a Crowd Controller who has been convicted of a disqualifying offence more than ten years prior to the grant of a Crowd controller in circumstances where the licence was lawfully granted by the Commission.
- 29) However, the Commission is bound by the rules of statutory interpretation to interpret and apply the legislation as it stands and to not import words that would result in the outcome the Commission prefers. Unfortunately for Mr Shah, the Commission is not prepared to grant a Crowd Controller licence that would be of little utility unless a prospective employer was prepared to engage Mr Shah to carry out Crowd Controller functions in contravention of Section 57 and rendering the employer liable to prosecution for a breach of the Act. Put another way, the Commission is not prepared to grant a licence that has the potential to cause a prospective employer to commit a breach of the Act.

Decision

- 30) Given the clear wording of Section 57, the Commission has determined to refuse Mr Shah's current application for a Crowd Controller Licence on the basis such a grant would be futile in that, regardless of the grant of a licence by the Commission, any employer who engaged him to carry out Crowd Controller duties would be liable to prosecution for an offence under Section 57 of the Act.
- 31) A decision by the Commission to refuse the grant of a licence is appealable to the Local Court and the Commission requests that the Director of Licensing advise Mr Shah of his options in that regard. Should the Local Court grant a Crowd Controller licence to Mr Shah

the exemption contained within Section 57 would be triggered and prospective employers would be entitled to engage him as a Crowd Controller.

- 32) The down side for Mr Shah is that, unless Section 57 is amended, he will be required to go through the expense and inconvenience of an appeal to the Local Court to obtain a licence the Commission would be minded to grant were it not for the ramifications of Section 57. The Commission expresses its concern in respect of the process that Mr Shah will need to go through in order to be granted a licence the Commission is actually minded to grant and proposes to bring the apparent deficiency in the legislation to the attention of the Minister with a recommendation that the Act be amended.

Philip Timney
Presiding Member

29 December 2011