

BEFORE THE BOARD OF PRIVATE SECURITY
STATE OF MONTANA

IN THE MATTER OF DOCKET NO. CC-09-0368-PSP REGARDING:

THE APPLICATION FOR LICENSURE)	Case No. 2211-2009
OF FRANK DONALD CHAPPEL,)	
Process Server License Pending.)	
)	
)	

**PROPOSED FINDINGS OF FACT;
CONCLUSIONS OF LAW; AND RECOMMENDED ORDER**

I. INTRODUCTION

Frank Chappel appeals from the Montana Board of Private Security's denial of his request to be licensed as a process server in Montana. Hearing Examiner Gregory L. Hanchett convened a contested case hearing in this matter on October 20, 2009. Joseph Nevin, agency legal counsel, represented the Department of Labor and Industry Business Standards Division (BSD). Chappel represented himself. The parties stipulated to the admission of BSD's Exhibits Bates Stamped Numbers 1 through 9. The parties also stipulated that Chappel was convicted of three felony counts. Based on the evidence and argument adduced at hearing, the hearing examiner makes the following findings of fact, conclusions of law, and recommended order.

II. FINDINGS OF FACT

1. In 1979, Chappel was convicted in Montana District Court of two felony counts of robbery and one felony count of sexual intercourse without consent. He served his prison term on those felonies and was released. Exhibit Bates Stamp Numbers 8 and 9.

2. On April 16, 2009, Chappel applied to the Board of Private Security to become a licensed process server. Bates Stamp Numbers 1 through 4. The Board, finding that Chappel had been convicted of a felony, and cognizant of the requirements of both Mont. Code Ann. § 37-60-301(1)(b) and Mont. Code Ann.

§ 25-1-1101, denied the application because Chappel could not be registered as a process server due to his felony convictions.

III. CONCLUSIONS OF LAW¹

1. The applicant seeks to have the denial of his application for licensure overturned. As such, he bears the burden of proof to demonstrate that the Board's denial of his license was erroneous either in fact or law. *See generally*, 2 Am. Jur. 2d *Administrative Law* § 251.

2. A professional licensing board may grant or deny a license. Mont. Code Ann. § 39-1-307(1)(e). Mont. Code Ann. § 39-2-202 provides that it is the intent of the legislature and the declared policy of the state that occupational licensure be granted or revoked as a police power of the state in its protection of the public health, safety and welfare.

3. In the absence of a more specific statute, Mont. Code Ann. § 39-2-202 does not permit the mere fact of a criminal conviction to be an automatic bar to being licensed. In addition, no licensing authority can refuse to grant a license solely on the basis of a previous criminal conviction unless the crime for which the applicant has been convicted relates to the public health, welfare and safety as it applies to the occupation for which the license is being sought. Mont. Code Ann. § 39-2-203.

4. The purpose of the chapter regulating licensing of private process servers is "to increase levels of integrity, competency, and performance of . . . process servers to safeguard the public health, safety, and welfare against illegal, improper, or incompetent actions committed by . . . process servers." Mont. Code Ann. § 37-60-103.

5. Except as provided in Montana Code Annotated § 25-1-1101(2), it is unlawful in Montana for any person to act as a process server for more than 10 services of process in a calendar year without being issued a certificate of registration by the Board. Mont. Code Ann. § 37-60-301(1)(b). Under Montana Code Annotated § 25-1-1101(1), a person who makes more than 10 services of process in a calendar year must be registered under Title 37, Chapter 60. The contents of a

¹Statements of fact in the conclusions of law are incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

process server's registration certificate must include a statement that the process server has not been convicted of a felony. Mont. Code Ann. § 25-1-1102.

6. In construing different provisions of statutes which relate to the same subject matter, a court must read the statutes in such a manner as to give effect to all provisions related to the subject matter. Mont. Code Ann. § 1-2-101. In addition, specific statute governs over general statute. Mont. Code Ann. § 1-2-102.

7. Chappel appears to argue that denying his license on the basis of his felony convictions is unconstitutional and constitutes discrimination under Title 49 of the Montana Code Annotated. He further posits that the requirements of Mont. Code Ann. § 25-1-1101 and 1102 are in conflict with and must give way to the principals contained in Title 37, Chapter 1, Part 2. The hearing examiner finds these arguments unpersuasive.

As to any argument that the applicable statutes might be unconstitutional, the hearing examiner has no power to make such a finding. Under the Montana Constitution, such questions must be decided by a judicial body, not an administrative officer. Art. III, Section 1, Montana Constitution; *Jarussi v. Board of Trustees* (1983), 204 Mont. 131, 664 P.2d 316.

Chappel's argument that the act of denying him a license amounts to discrimination under the Montana Human Rights Act is also misplaced. This tribunal has no ability in this case to determine issues related to the Montana Human Rights Act. Moreover, Chappel is not part of a protected class nor does he stand in a cognizable relationship with the Board that would bring him within the ambit of the protections of the Montana Human Rights Act. *See generally*, Mont. Code Ann. § 49-1-102.

This leaves Chappel's third argument, that there is a conflict between Title 37, Chapter 1, Part 2 and Title 25-1-1102 which requires the hearing examiner to ignore the requisites of Title 25. This argument ignores the law's directives that statutes relating to the same subject matter must be read together and that specific provisions relating to a subject prevail over the general provisions related to that subject matter. Mont. Code Ann. § 1-2-102. While it is true that Title 37, Chapter 1, Part 2 might otherwise require more than mere conviction to deny issuance of the license on the basis of the conviction, the specific requirements of process server licensure under Title 37, Chapter 60 and Mont. Code Ann. § 25-1-1102 require denial on the sole basis that a felony conviction exists. One cannot be licensed under Title 37, Chapter 60 unless he can meet the requisites of Mont. Code Ann. § 25-1-1101

which include an ability to obtain a certificate of registration which indicates that the process server has not been convicted of a felony.

Moreover, there is no cross reference in Title 37, Chapter 60 or Mont. Code Ann. § 25-1-1101 which would demonstrate that the legislature intended that the provisions of Title 37, Chapter 1, Part 2 should apply to override the specific statutory requirements of Title 37, Chapter 60 and 25-1-1101. *Compare Erickson v. Board of Medical Examiners* (1997), 282 Mont. 367, 938 P.2d 625 (holding that the absence of such a cross reference and the fact that license revocation due to unprofessional conduct which included the mere fact of conviction permitted revocation on the sole basis of conviction even in the face of Title 37, Chapter 1, Part 2) and *Ulrich v. Board of Funeral Service*, 1998 MT 196, ¶24, 289 Mont. 407, 961 P.2d 126 (which distinguished *Erickson* and found that mere conviction could not serve as a basis for revocation because the statutes applicable to revocation for morticians contained a specific requirement that revocation on the basis of conviction must be tied to a finding that the conviction affected the public health, safety and welfare).

In light of the above, the hearing examiner is compelled to conclude that the Board's denial on the sole basis of the felony conviction was in conformity with the legislative intent as expressed in the applicable statutes and was an appropriate basis to deny Chappel the license he sought.

IV. CONCLUSIONS OF LAW

1. The Board has jurisdiction of this matter.
2. Chappel had the burden of proof to demonstrate that the Board's proposed denial of his license was erroneous either in fact or law.
3. Chappel's felony convictions, in light of the specific statutes relating to licensure of process servers, are sufficient in themselves to deny his application for licensure as a process server because in order to be so licensed a person cannot have been convicted of a felony under 25-1-1102 and § 37-60-301(1)(b).
4. This tribunal has no ability to consider violations of Title 49 in this proceeding and, in any event, Chappel is not within a protected class that would entitle him to protection under Title 49. In addition, Chappel's constitutional arguments can only be decided by a judicial court and this tribunal has no jurisdiction to consider such questions.

5. The Board did not err either in fact or law in proposing to deny Chappel's application for licensure.

V. RECOMMENDED ORDER

Based upon the foregoing, the hearing examiner recommends that the Board of Private Security affirm the denial of Chappel's application for licensure as a process server.

DATED this 19th day of November, 2009.

DEPARTMENT OF LABOR & INDUSTRY
HEARINGS BUREAU

By: /s/ GREGORY L. HANCHETT
GREGORY L. HANCHETT
Hearing Examiner

NOTICE

Mont. Code Ann. § 2-4-621 provides that the proposed order in this matter, being adverse to the licensee, may not be made final by the regulatory board until this proposed order is served upon each of the parties and the party adversely affected by the proposed order is given an opportunity to file exceptions and present briefs and oral argument to the regulatory board.