Business Integrity Commission

DECISION OF THE BUSINESS INTEGRITY COMMISSION DENYING THE REGISTRATION RENEWAL APPLICATION OF MC&O CONSTRUCTION INC. TO OPERATE AS A TRADE WASTE BUSINESS

Introduction

MC&O Construction, Inc. ("MC&O" or the "Applicant") has applied to the New York City Business Integrity Commission (the "Commission") for a renewal of the its exemption from licensing requirements and a registration to operate a trade waste business pursuant to New York City Administrative Code ("Admin. Code") § 16-505(a). Specifically, MC&O seeks an exemption from the licensing requirements and a registration enabling it to operate a trade waste business "solely engaged in the removal of waste materials resulting from building demolition, construction, alteration or excavation" – a type of waste commonly known as construction and demolition debris, or "C & D."

On May 31, 2013 the staff issued and served the Applicant with Notice of the Grounds to Recommend that the Application be Denied. The Applicant was granted ten business days to respond, until June 14, 2013. See 17 Rules of the City of New York §2-08(a). The Applicant submitted its response on June 14, 2013 ("Response"). Based on the record as to the Applicant, the Commission now denies the registration renewal application of MC&O because MC&O lacks good character, honesty and integrity for the following independently sufficient reasons:

A. The Applicant's Principals have been convicted of: 1) Violating Labor Law by failing to pay Prevailing Wages; 2) Violating Workers' Compensation Law; and 3) Failing to Pay IRS FICA Taxes.

B. The Applicant failed to provide truthful information in connection with the application, and the Commission may consider such failure in accordance with Admin. Code § 16-509(a)(1).

Background and Statutory Framework

Every commercial business establishment in New York City must contract with a private carting company to remove and dispose of the waste it generates. Historically, the private carting industry in the City was operated as a cartel controlled by organized crime. As evidenced by numerous criminal prosecutions, the industry was plagued by pervasive racketeering, anticompetitive practices and other corruption. *See e.g., United States v. International Brotherhood of Teamsters (Adelstein)*, 998 F.2d 120 (2d Cir. 1993); *People v. Ass'n of Trade Waste Removers of Greater New York Inc. et al.*, Indictment No. 5614/95 (Sup. Ct. N.Y. Cty.); *United States v. Mario Gigante et al.*, No. 96 Cr. 466 (S.D.N.Y.); *People v. GNYTW*, 701 N.Y.S.2d 12 (1st Dep't 1999). The construction and demolition debris removal sector of the City's carting industry has also been the subject of significant successful racketeering prosecutions. *See United States v. Paccione*, 949 F.2d 1183, 1186-88 (2d Cir. 1991), *cert.*

denied, 505 U.S. 1220 (1992); *United States v. Cafra, et al.*, No. 94 Cr. 380 (S.D.N.Y.); *United States v. Barbieri, et al.*, No. 94 Cr. 518 (S.D.N.Y.); *United States v. Caccio, et al.*, Nos. 94 Cr. 357,358, 359, 367.

The Commission is charged with, *inter alia*, combating the pervasive influence of organized crime and preventing its return to the City's private carting industry, including the construction and demolition debris removal industry. Instrumental to this core mission is the licensing scheme set forth in Local Law 42 of 1996, which created the Commission and granted it the power and duty to license and regulate the trade waste removal industry in New York City. Admin. Code § 16-505(a). It is this licensing scheme that continues to be the primary means of ensuring that an industry historically plagued with corruption remains free from organized crime and other criminality, and that commercial businesses that use private carters can be ensured of a fair, competitive market. However, the licensing scheme is not limited to a mere decision as to whether an applicant has ties to organized crime, since Local Law 42 of 1996 grants the Commission broader discretion to make a determination as to the "good character, honesty and integrity" of applicants. *See Canal Carting, Inc. v. City of New York Business Integrity Commission*, 66 A.D.3d 609, 888 N.Y.S.2d 30 (1st Dep't 2009). Thus, the licensing scheme enables the Commission to fulfill its mission by authorizing it to refuse licensure or registration to an applicant that, *inter alia*, lacks such good character, honesty and integrity. Admin. Code § 16-509(a).

Pursuant to Local Law 42, a company "solely engaged in the removal of waste materials resulting from building demolition, construction, alteration or excavation," commonly known as construction and demolition debris, or "C & D" removal, must apply to the Commission for an exemption from the licensing requirement. Admin. Code § 16-505(a). If, upon review and investigation of an exemption application, the Commission grants the applicant an exemption from the licensing requirement, it issues the applicant a Class 2 registration. *Id*; *see also* Title 17 RCNY § 2-03(d). Before issuing such registration, the Commission must evaluate the "good character, honesty and integrity of the applicant." Admin. Code § 16-508(b); *see also Matter of Attonito v. Maldonado*, 3 A.D.3d 415, 771 N.Y.S.2d 97 (1st Dep't 2004) (establishing the Commission's authority to review, investigate and determine applications seeking a Class 2 registration to engage in the removal of "C & D"). The New York City Administrative Code provides an illustrative list of relevant factors for the Commission to consider in making a licensing or registration decision:

> 1. failure by such applicant to provide truthful information in connection with the application;
>
> 2. a pending indictment or criminal action against such applicant for a crime which under this subdivision would provide a basis for the refusal of such license, or a pending civil or administrative action to which such applicant is a party and which directly relates to the fitness to conduct the business or perform the work for which the license is sought, in which cases the commission may defer consideration of an application until a

decision has been reached by the court or administrative tribunal before which such action is pending;

3. conviction of such applicant for a crime which, considering the factors set forth in section seven hundred fifty-three of the correction law, would provide a basis under such law for the refusal of such license;

4. a finding of liability in a civil or administrative action that bears a direct relationship to the fitness of the applicant to conduct the business for which the license is sought;

5. commission of a racketeering activity or knowing association with a person who has been convicted of a racketeering activity, including but not limited to the offenses listed in subdivision one of section nineteen hundred sixty-one of the Racketeer Influenced and Corrupt Organizations statute (18 U.S.C. §1961 *et seq.*) or of an offense listed in subdivision one of section 460.10 of the penal law, as such statutes may be amended from time to time, or the equivalent offense under the laws of any other jurisdiction;

6. association with any member or associate of an organized crime group as identified by a federal, state or city law enforcement or investigative agency when the applicant knew or should have known of the organized crime associations of such person;

7. having been a principal in a predecessor trade waste business as such term is defined in subdivision a of section 16-508 of this chapter where the commission would be authorized to deny a license to such predecessor business pursuant to this subdivision;

8. current membership in a trade association where such membership would be prohibited to a licensee pursuant to subdivision j of section 16-520 of this chapter unless the commission has determined, pursuant to such subdivision, that such association does not operate in a manner inconsistent with the purposes of this chapter;

9. the holding of a position in a trade association where membership or the holding of such position would be prohibited to a licensee pursuant to subdivision j of section 16-520 of this chapter;

10. failure to pay any tax, fine, penalty, or fee related to the applicant's business for which liability has been admitted by the

> person liable therefor, or for which judgment has been entered by a court or administrative tribunal of competent jurisdiction.

Admin. Code § 16-509(a)(i)-(x).

Additionally, the Commission may refuse to issue a license or registration to any applicant who has "knowingly failed to provide information or documentation required by the Commission . . . or who has otherwise failed to demonstrate eligibility for a license . . . ." *Id.* at § 16- 509(b). The Commission may refuse to issue a license or registration to an applicant when such applicant was previously issued a license which was revoked or not renewed, or where the applicant "has been determined to have committed any of the acts which would be a basis for the suspension or revocation of a license." *Id.* at § 16-509(c). Finally, the Commission may refuse to issue a license or registration to any applicant where the applicant or its principals have previously had their license or registration revoked. Id. at § 16-509(d).

An applicant for a private carting license (including construction and demolition) has no entitlement to and no property interest in a license or registration and the Commission is vested with broad discretion to grant or deny a license or registration application. *Sanitation & Recycling Industry, Inc.*, 107 F.3d 985, 995 (2d Cir. 1997); *see also Daxor Corp. v. New York Dep't of Health*, 90 N.Y.2d 89, 98-100, 681 N.E.2d 356, 659 N.Y.S.2d 189 (1997); Admin. Code § 16-504(a); New York City Charter § 2101(b)(1).

Statement of Facts

Pending before the Commission is the renewal application for a registration, submitted by the Applicant on February 16, 2012. See, MC&O Renewal Application for a License as a Trade Waste Business ("Renewal Application"). In the Renewal Application, MC&O disclosed its two principals, Owen O'Reilly ("O'Reilly") and Eamonn McDonnell ("McDonnell"). As part of the Applicant's application, both O'Reilly and McDonnell signed certifications attesting that the answers provided in the application were "full, complete and truthful." Id. at 12 and 13.[1] The Applicant described the nature of its business as "construction". See, Initial Registration Application at 4. The Applicant described the type of waste that it planned to remove as "building and construction debris (bricks, blocks, concrete)." See, Id at 4.

A. **Criminal Convictions of Principals O'Reilly and McDonnell**

(1) Criminal Conviction of Owen O'Reilly for Failure to Pay Prevailing Wage (First District Court, District of Suffolk, State of New York)

The Commission's investigation of the Renewal Application revealed that on December 16, 2011, in First District Court, Suffolk County, O'Reilly, as the Vice President of MC&O,

[1] It has previously been disclosed to the Commission that McDonnell has been the President of the company since November 2001 and O'Reilly has been the Vice President of the company since 2001. In the Renewal Application submitted February 16, 2012, Owen O'Reilly is listed as being Vice President of MC&O since 2011. This appears to be an error – a review of the two previously submitted applications lists 2001 as the start date.

pleaded guilty to a violation of Labor Law §220.03, Failure to Pay Prevailing Wage, and was sentenced to a conditional discharge. O'Reilly admitted on the record that MC&O entered into a Public Works contract with the Coram New York Fire Department which required that MC&O pay prevailing wage to the workers performing construction work at the site. O'Reilly further admitted that, between October 1, 2008 and October 26, 2011, MC&O employed construction workers at the Coram Fire Department work site at 243 Mount Sinai Road, Coram, New York and MC&O did not pay these employees prevailing wage. See Transcript of Proceedings held in State of New York v. O'Reilly, Docket No. 2011SU049937, December 16, 2011, at 4.

(2) Criminal Conviction of O'Reilly for Offering a False Instrument for Filing and Violation of Workers Compensation Law

The Commission's investigation of the Renewal Application revealed that on February 1, 2012, in New York State Supreme Court, New York County Criminal Term, Owen O'Reilly, as Vice Presidentof MC&O, pleaded guilty to Penal Law §175.35, Offering a False Instrument for Filing and Workers' Compensation Law §96. Both charges are E felonies.

During his allocution, O'Reilly stated:

> "From March 2006 and December 2007 I owned and operated a company called MC&O Masonry, a construction company with job sites in Manhattan and elsewhere. During that time, MC&O had a workers' compensation insurance policy with the state, New York State Insurance Fund. On or about November the 13th, 2007 in order to secure a lower policy premium for MC&O, I caused my insurance broker to provide the Fund with false New York City withholding tax codes in that they failed to contain the true number of MC&O employees or the true amount of MC&O payroll.
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> "Similarly on or about October 25, 2007, I caused MC&O to file with the New York State New York City withholding tax return which I signed for the quarter ending September 20, 2007. Again, I knew that return underreported both the number of MC&O employees and amount of MC&O payroll."

See Transcript of Proceedings held in State of New York v. O'Reilly, Indictment No. 336/2012, February 1, 2012, at 8-9.

(3) Criminal Conviction of O'Reilly and McDonnell for Failure to Collect, Account For and Pay Employment Taxes

The Commission's investigation of the Renewal Application revealed that on March 15, 2012, in United States District Court, Eastern District of New York, both O'Reilly and McDonnell pleaded guilty to a violation of Title 26, United States Code, §7202 and Title 18, United States Code, §§ 2 and 3551.

According to the Information filed[2] both defendants, as principals of MC&O, had employees completing jobs at construction sites in the New York metropolitan area, including Nassau and Suffolk Counties. Pursuant to Title 26 of the United States Code, employers, including MC&O, have a duty to collect, truthfully account for and pay over to the Internal Revenue Service ("IRS") Federal Insurance Contributions Act ("FICA") taxes and to file an Employer's Quarterly Federal Tax Return, IRS Form 941. FICA requires the payment of taxes by employees and employers to fund various federal benefit programs, including Social Security and Medicare. As the owners and operators of MC&O, O'Reilly and McDonnell were required to collect, truthfully account for and pay over to the IRS FICA taxes that were due and owing. MC&O cashed checks, made payable to MC&O, and used the cash to pay wages to its employees. MC&O filed Form 941 for the third and fourth quarters of 2004 in which both O'Reilly and McDonnell knowingly and falsely omitted the cash wages from the gross wages and FICA taxes reported to the IRS in order to avoid paying the full amount of FICA taxes that MC&O owed. See Information filed in U.S. v. McDonnell et al.

On March 15, 2012, both O'Reilly and McDonnell pleaded guilty to count one of the Information, the allegation involving Third Quarter 2004. O'Reilly was sentenced to eleven months in prison and McDonnell was sentenced to four months in prison. See, Criminal Cause for Sentencing, Owen O'Reilly and Criminal Cause for Sentencing, Eamonn McDonnell. Eamonn McDonnell has completed his prison sentence; Owen O'Reilly is currently incarcerated.

B. MC&O's Failure to Disclose Information Requested in the Registration Application

MC&O failed to disclose significant information requested in the Renewal Application, namely, the two criminal convictions of O'Reilly and the pending federal criminal charges against O'Reilly and McDonnell. Question 7 of the Renewal Application reads, "Has the applicant or any of the applicant's principals, employees or affiliates been arrested, convicted of or been the subject of *any* criminal charges in *any* jurisdiction?" (emphasis added)

MC&O answered this question negatively by checking the box labeled "no." However, it is clear that MC&O should have disclosed O'Reilly's two criminal convictions and the pending federal court case against both O'Reilly and McDonnell on the Renewal Application. The Second Renewal Application was filed on February 16, 2012. O'Reilly pleaded guilty two months earlier in December 2011 and a mere two weeks earlier on February 1, 2012. Regarding the federal case, both O'Reilly and McDonnell were arraigned in federal court on May 16, 2011, nine months before the Renewal Application was filed. See, Criminal Cause for Arraignment.

The facts demonstrate that O'Reilly and McDonnell had certain personal knowledge of these cases before February 16, 2012, that O'Reilly and McDonnell were under a duty to

[2] Both defendants waived their right to be indicted and consented to be prosecuted by Information.

disclose them to the Commission and that O'Reilly and McDonnell did not disclose them on the Renewal Application. See, Renewal Application at 3.

Basis for Denial

> **The Applicant's Principals have been convicted of: 1) Violating Labor Law by failing to pay Prevailing Wages; 2) Violating Workers' Compensation Law; and 3) Failing to Pay IRS FICA Taxes.**

As set forth above, in 2011 and twice in 2012, the Principals of MC&O were convicted of crimes for failure to pay the prevailing rate of wages to employees of MC&O on a public works project and underreporting income to defraud on taxes.

In making a determination regarding an applicant's good character, honesty and integrity in connection with an application for a license or registration, Admin. Code § 16-509(a)(iii) expressly permits the Commission to consider the conviction of an applicant for a crime which, considering the factors set forth in Correction Law § 753, would provide a basis under such law for the refusal of such license or registration. Upon consideration of the factors in such law, the balance falls in favor of the denial of the pending Renewal Application of MC&O. Despite the public policy of New York State to encourage the licensure of persons previously convicted of one or more criminal offenses, the Renewal Application should nonetheless be denied because there is a direct relationship between both O'Reilly's and McDonnell's criminal convictions and the specific registration sought. See Correction Law §§ 752(1) and 753(1)(a). O'Reilly and McDonnell are the sole principals of MC&O. As part of operating a trade waste business, O'Reilly and McDonnell would have the specific duty and responsibility of ensuring that wages are properly paid to employees and that necessary governmental forms are completed honestly and truthfully in accordance with applicable law. However, McDonnell has shown his failings in this regard, and O'Reilly, egregiously, has shown his failings in this regard, not once, not twice, but three times. Thus, the specific duties and responsibilities held by O'Reilly and McDonnell argue against approval of the Registration Application. See Correction Law § 753(1)(b).

Similarly, the convictions of O'Reilly and McDonnell bear heavily on their fitness and ability to properly perform payroll duties and responsibilities in accordance with the law. These convictions also lend themselves to a determination that both O'Reilly and McDonnell markedly lack good character, honesty and integrity when it comes to business dealings in general. See Correction Law § 753(1)(c). Moreover, the seriousness of the offense that O'Reilly and McDonnell were convicted of can be measured by the sentence imposed. The federal sentence required O'Reilly to serve eleven months in prison and for McDonnell to serve four months in prison. Nor can O'Reilly or McDonnell attribute these charges and subsequent convictions to youthful indiscretion as both of them were 36 years old in 2004, the earliest date of the multiple charges relating to failure to pay prevailing wage. See Correction Law § 753(1)(e).

Finally, the Commission has a very legitimate interest in protecting the welfare of those whom the Applicant would employ, as well as the general public from dishonest and unscrupulous behavior and the denial of the Renewal Application herein directly furthers that interest. See Correction Law § 753(1)(h).

In its Response, Applicant does not deny that its principals were convicted of the above-detailed crimes. Rather, the Applicant attempts to minimize the seriousness of the actions of its principals by stating, "That [Federal charges] did not deal with employees being shortchanged in their wages. Rather, MC&O acquiesced to the employees' desires that they be paid in cash." See Response at 2. To claim that the crime pleaded to did not involve "shortchanging employees", but rather arose from shortchanging the IRS hardly demonstrates good character, honesty and integrity. Nor does Applicant's reliance on the restitution being paid by McDonnell and O'Reilly sufficiently demonstrate good character, honesty and integrity. The conviction itself is of great concern to the Commission, and the fact that McDonnell and O'Reilly are now allegedly complying with the terms of their punishment does not mitigate the fact that a serious crime related to the registration they seek was committed. Indeed, the fact that the Applicant is responsible for the payment of nearly $2 million in restitution demonstrates the extremely egregious nature of Principals' crimes.[3]

The Applicant failed to provide truthful information in connection with the application, and the Commission may consider such failure in accordance with Admin. Code § 16-509(a)(1).

MC&O filed the pending Renewal Application on February 16, 2012 and did not disclose O'Reilly's convictions of December 2011 and February 1, 2012. Specifically, MC&O failed to provide truthful information with respect to Question 7 on the Renewal Application. Additionally, the Applicant also did not disclose the pending federal criminal charges against both O'Reilly and McDonnell. It is not incumbent upon the Commission to prove motivation for such non-disclosure, but the facts certainly suggest that the Applicant's non-disclosure on the Second Renewal Application was motivated by intent to avoid Commission scrutiny in these key areas. Each of these convictions and charges are directly relevant to a determination of the Applicant's fitness for a Class 2 Registration Renewal in light of the fact that such investigations centered on the Applicant's failure to pay prevailing wages in three separate instances.

In its Response, the Applicant appears to argue that it did disclose the convictions when it submitted a letter to the Commission dated September 12, 2012. See Response at 1. The Applicant's belated disclosure, which was provided to the Commission only after Commission staff specifically inquired as to the details of the previously undisclosed convictions is too little,

[3] In its Response, the Applicant further cites to the fact that the Court permitted McDonnell and O'Reilly to "serve their sentences at separate times." In wholly conclusory manner, the Applicant makes the inferential leap that the timing of their surrender and incarceration somehow demonstrates their good character, honesty and integrity. The Commission is not persuaded by this assertion.

too late. Commission rules require a registered company, such as Applicant, to disclose arrests of its principals (and employees) within ten days. See, NYC Administrative Code §2-05(a)(1). Further, Commission rules require arrests and convictions to be disclosed on all renewal applications. See, NYC Administrative Code §2-03(c)(5) and §2-03(c)(6). The Applicant failed to comply with both of these requirements, leaving the Commission to learn of the significant arrests and convictions only through its investigation. It is unacceptable to the Commission that an applicant would be forthright with the Commission about criminal convictions for crimes directly related to MC&O Construction only after being specifically asked.

The blatant disregard for the Commission's rules regarding disclosure and the repeated non-disclosure of multiple criminal convictions shows a complete lack of honesty, integrity and good character.

Conclusion

The Commission is vested with broad discretion to issue a license or refuse to grant an exemption from the license requirement and issue a registration in lieu of a license, to any applicant who it determines to be lacking in good character, honesty and integrity. The record as detailed above demonstrates that the Applicant falls short of that standard. Accordingly, based on the above independently sufficient reasons, the Commission denies the Applicant's exemption renewal application.

Business Integrity Commission

This exemption/registration denial is effective immediately. MC&O Construction, Inc. may not operate as a trade waste business in the City of New York.

Dated: June 24, 2013

Shari C. Hyman
Commissioner and Chair

John Doherty, Commissioner
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