

ID# 14258  
# 85



33 East Main Street  
Suite 500  
Madison WI 53703-3095

Mailing Address:  
P.O. Box 2038  
Madison WI 53701-2038

Phone:  
608 257 7181

Fax:  
608 257 2508

www.murphydesmond.com

Ronald M. Trachtenberg  
Direct Line 608.268.5575  
Facsimile 608.257.2508  
rtrachtenberg@murphydesmond.com

21 July 2009

Mayor and Common Council  
City of Madison  
210 Martin Luther King, Jr. Blvd.  
Madison, WI 53703

Re: Roy A. Schmitz  
Agenda Item 85  
Operators License Application  
ID # 14258

Dear Mayor and Common Council:

We represent Roy A. Schmitz on a pro-bono basis for the reasons stated below regarding his operator's license application, agenda item 85, ID # 14258.

Mr. Schmitz is age 50 and has lived in Madison since 1991. He is living with his ex-wife and he and his ex-wife are doing their best to raise their three children, the younger of whom (twins) will be starting La Follette High School this school year and the oldest of whom is attending the University of Wisconsin - Milwaukee. Mr. Schmitz, who is employed at the Edgewater Hotel, is seeking his operator's license to earn more money to help raise his family. Please see the attached letter of support from the Edgewater Hotel.

Mr. Schmitz was born in Chicago, Illinois and attended the University of Illinois-Champaign Urbana and graduated with a degree in psychology. While in Illinois, he was employed as a book store cashier, a hospital orderly and at various restaurants as a server, bartender and assistant manager. He moved for a short time to San Diego, California, to assist his father and was employed as an automobile detailer and property manager.

In 1986, Mr. Schmitz married and in 1990 his first child was born. The family moved to Madison in 1991 and his twins were born in 1994. From 1991 to 1999, Mr. Schmitz continued to commute to and from Chicago on weekends to work as a bartender at a popular Chicago establishment and was "Mr. Mom" during the week. Since 1999, Mr. Schmitz has worked as a server or bartender at several Madison establishments, including the Holiday Inn, Orpheum, George's Chop Shop, Cloud Nine, and now at Oliva and the Edgewater Hotel.

In 2002, Mr. Schmitz was charged and subsequently pled no contest to two criminal misdemeanor charges: retail theft and disorderly conduct. Mr. Schmitz had attempted to

steal winter jackets for his children from a local discount store and during the police chase (on foot) had tossed the jackets.

In 2004, Mr. Schmitz was charged with and subsequently pled no contest to a single criminal felony charge: manufacturing of THC (marijuana) in violation of Section 961.41 (1) (h) 4, Wisconsin Statutes. Mr. Schmitz's then wife (now-ex-wife) was a heavy marijuana user at the time and was literally breaking the family budget by her use. Mr. Schmitz grew marijuana to supply her. He also used some himself and gave some to friends. There was no sale of product. (Mr. and Ms. Schmitz divorced after the arrest, but resumed living together as a family unit to raise the children.)

None of Mr. Schmitz's criminal offenses were committed as part of any employment. There has been no theft, disorderly conduct, nor anything to do with drugs during the course of his substantial employment history.

As a result of Mr. Schmitz's conviction, he spent some jail time and some home monitoring time before being placed on probation which included drug testing. Mr. Schmitz successfully completed his probation and received early discharge on February 10, 2009. Please see the attached memorandum from the Wisconsin Department of Corrections. Please also note that Mr. Schmitz suffers from a form of Asperger syndrome, which is a form of autism, and is on medication to moderate that condition.

There are two issues before the Common Council this evening. The first issue is whether the City of Madison has the authority to grant Mr. Schmitz an operator's permit under Chapter 125, Wisconsin Statutes, as read in conjunction with Chapter 111, Wisconsin Statutes. The second question, assuming the affirmative for the first question, is whether in the exercise of that authority, the Common Council should grant an operator's permit to Mr. Schmitz?

The ALRC first considered Mr. Schmitz's permit application on April 15, 2009. Mr. Schmitz represented himself at that hearing. That first ALRC hearing was a complete due process failure, an exercise in reverse sexism, and resulted in a recommendation against the granting of the operator's permit, although for no specified purpose (a reason for denial is required by law). It was at this point that we began my representation of Mr. Schmitz, to protect his due process rights. Because of the problems with the first hearing, the Common Council remanded the application back to the ALRC for re-hearing.

The ALRC held the remand public hearing on June 17, 2009. The hearing itself was held in a much better format, but was still problematic. First, the chair recommended that if the permit application was to be denied, no reason should be given in order that Mr. Schmitz could not sue the City (the chair who is an attorney is simply wrong on the law and his statements show his lack of appreciation and understanding of due process). Second, a motion was finely made to deny the permit application on the basis that the City lacked the

authority to grant the permit, but that vote failed on a three to three tie and the chair failed to allow any subsequent motions or votes (showing the chair's basic lack of understanding of Robert's Rules of Order). Finally, after the end of the hearing and vote, but before the next item, Commissioner Tom Farley, who had voted not to grant the permit, gratuitously stated that the Edgewater Hotel position was a plum position and people with conviction records should not get such positions when people without a conviction record were looking for such work. (Mr. Farley needs to read the State's and the City's anti-discrimination laws )

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In summary, Mr. Schmitz's permit application is before the Common Council without ALRC recommendation.

The first issue before the Common Council as stated above is whether the City of Madison has the authority to grant Mr. Schmitz an operator's permit under Chapter 125, Wisconsin Statutes, as read in conjunction with Chapter 111, Wisconsin Statutes.

Section 125.04 (5) (bn), Wisconsin Statutes, provides, in part, "no license or permit related to alcohol beverages may, subject to ss. 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" (emphasis added)

Section 111.321, Wisconsin Statutes, provides, in part, "Subject to ss. 111.33 to 111.36, no . . . licensing agency . . . may engage in any act of employment discrimination as specified in s. 111.322 against any individual on the basis of . . . conviction record." (emphasis added)

Section 111.322, Wisconsin Statutes, provides that "Subject to ss. 111.33 to 111.36, it is an act of employment discrimination to do any of the following (1) To refuse to . . . license any individual . . . because of any basis enumerated in s. 111.321, Wis Stats." (emphasis added)

The key statutory provision is Section 111.335, Wisconsin Statutes, which pertains specifically to arrest or conviction records. Subsection 1(c) provides: "Notwithstanding s. 111.322, it is not employment discrimination because of conviction record to refuse to employ or license or to bar or terminate from employment or licensing, any individual who: 1. Has been convicted of any felony . . . the circumstances of which substantially relate to the circumstances of the particular job or license activity . . ." (emphasis added) Subsection 1(cs) provides: "Notwithstanding s. 111.322, it is not employment discrimination because of a conviction record to revoke, suspend, or refuse to renew a license or permit under Ch. 125 if a person holding or applying for the license or permit has been convicted of one or more of the following: 1. Manufacturing, distributing or delivery of controlled substance or controlled substance analog under s. 961.41(1) . . ."

Under Chapter 125, Wisconsin Statutes, the Common Council is prohibited from granting an operator's permit to Mr. Schmitz unless that non-grant of license would be in violation of Chapter 111, Wisconsin Statutes. In order to not to be in violation of Chapter 111, Wisconsin Statutes, the City of Madison must find that the circumstances of Mr. Schmitz's felony conviction substantially relates to the circumstances of the particular job or license activity. No such finding has been made by the ALRC. (Please note that Section 111.322 1. (cs), Wisconsin Statutes, does not prohibit the original granting of a license, but only allows, but does not mandate, subsequent revocation, suspension or non-renewal.)

The City Attorney argues that Mr. Schmitz's felony conviction per se substantially relates to the circumstances of the particular job or license activity at issue herein, citing State ex rel. Smith v. Oak Creek, 139 Wis. 2<sup>nd</sup> 788 (1987). First of all, that case does not pertain to felony convictions, but only what constitutes a habitual law offender. Second, the statement cited by the City Attorney in support of his position that the City is prohibited in granting Mr. Schmitz an operator's permit is only non-binding dicta (not directly pertinent to the case) in a foot note in that decision and is non-binding upon this Common Council or the courts.

We find it incredible that given the statutory construction of Chapter 125 and Chapter 111, Wisconsin Statutes, and given the City's own equal opportunity ordinances which clearly state that you must look at the relationship of a criminal conviction and the job or permit being sought in order to give individuals the maximum opportunity for gainful employment, that the City Attorney is attempting to limit such opportunities by arguing to limit the Common Council powers of the basis of dicta in a case which is non-binding upon the Common Council. Under the present statutes and case law, we firmly believe that the City Attorney should be arguing that the Common Council has the discretion to grant, or not grant, as the case may be, the requested operators permit

On behalf of Mr. Schmitz, we respectfully request that you find that you do have the discretion to grant the license and that Mr. Schmitz's felony was not substantially related to the circumstances of the particular job or license activity. We ask that you grant Mr. Schmitz his applied for operator's permit.

Very truly yours,

  
Ronald M. Trachtenberg

RMT:srp  
091295

Cc: Mr. Roy A. Schmitz  
City of Madison, Office of the City Attorney  
Attn.: Assistant City Attorney Steve C. Brist



June 15, 2009

Dear ALRC Members,

I am writing regards to Roy Schmitz's application for an Operator's License. Roy has been a seasonal employee at the Edgewater Pier Café the last two summers and currently works in our Cove Lounge under my supervision. The ownership and mangement of the Edgewater Hotel are aware of Roy's past criminal convictions, and have been since he was hired in 2007. We do not consider them a factor in his job performance, which continues to be excellent. Roy is professional in his actions and courteous and helpful in his interactions with our guests. The ownership and management fully support Roy and believe his application should be approved. While he continues to work with our other licensed bar staff, Roy would be able to work on his own when needed if his application is approved, freeing him to work more hours and private functions. If any of you have any questions or concerns, I may be reached at 256-9071.

Sincerely,

Sonny Rahn

Bar Manager

Edgewater Hotel

**Jim Doyle**  
Governor



Division of Community Corrections  
2565 E. Johnson St.  
Madison, WI 53704

**Rick Raemisch**  
Secretary

**State of Wisconsin**  
**Department of Corrections**

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April 3, 2009

To Whom It May Concern:

Roy Schmitz successfully completed the conditions of probation and was given an early discharge on 2/10/09. All UA's taken during his supervision were negative. If you have any questions, I can be reached at (608)243-3330

Sincerely,

A handwritten signature in cursive script that reads "Dawn Lokken".

Dawn Lokken  
Probation/Parole Agent 11304