

**STATE OF NEW JERSEY
MOTOR VEHICLE COMMISSION
CASE FILE NUMBER: DXXXX XXXXX 02656
OAL DOCKET NUMBER: MVH 05612-21**

IN THE MATTER OF :
FERNANDO DEBRITO : **FINAL DECISION**

The Motor Vehicle Commission (Commission) hereby determines the matter of the proposed indefinite suspension of the passenger endorsement to the New Jersey Commercial Driver's License (CDL) of **FERNANDO DEBRITO**, respondent, pursuant to N.J.A.C. 13:21-14.5(c)(13), based on notification of his arrest and the current criminal charge of lewdness that is pending against him.

The respondent was charged with a violation of N.J.S.A. 2C:14-4(b)(1), lewdness, defined as the "expos[ure of] his intimate parts for the purpose of arousing or gratifying the sexual desire of the actor or of any other person under circumstances where the actor knows or reasonably expects he is likely to be observed by a child who is less than 13 years of age where the actor is at least four years older than the child."

Prior to this final agency determination, I have reviewed and considered the Initial Decision of the Administrative Law Judge (ALJ), the Commission's October 4, 2021 letter of exceptions to the Initial Decision, and the respondent's October 7, 2021 reply to the Commission's letter of exceptions.¹ Based upon a de novo review of the record

¹ In his reply, the respondent represents that, after the administrative hearing record in this matter closed, the charge was downgraded, "deleting any reference to the act being in view of a child," and the matter was remanded to the Municipal court. (Respondent's reply at 2). The charge was changed to a violation of N.J.S.A. 2C:14-4(a), which provides:

presented, I reject in part the findings of fact and conclusions of law contained in the Initial Decision, reject the recommendation of the ALJ, and affirm the Commission's proposal of indefinite suspension of the respondent's passenger endorsement. The Commission notes that a suspension of the respondent's passenger endorsement for an "indefinite" term allows for the driver to reapply if he were to be acquitted of the pending serious criminal charge of lewdness or if such charge were later dismissed. Alternatively, if convicted, the respondent would be able to reapply after such time and efforts were made to be able to demonstrate sufficient rehabilitation ensuring that he would no longer pose a potential danger as the commercial driver of passengers. The Commission further notes that the respondent's underlying commercial driving privilege is not affected by this administrative indefinite suspension, as it only applies to the passenger endorsement.

The review of this proposed administrative action starts first with the statutory requirements for the passenger endorsement on a commercial driving privilege. Proof of good character by holders of a passenger endorsement is required by law.

Every holder of a special license issued pursuant to this section shall furnish to the chief administrator satisfactory evidence of continuing physical fitness . . . , good character, and experience at the time of application renewal or such other time as the chief administrator may require, and in such form as the chief administrator may require.

[N.J.S.A. 39:3-10.1 (emphasis added)].

"A person commits a disorderly persons offense if he does any flagrantly lewd and offensive act which he knows or reasonably expects is likely to be observed by other nonconsenting persons who would be affronted or alarmed." The Commission notes that the respondent has not moved to re-open the record seeking to have evidence as to such representation introduced into the administrative hearing record for this matter. N.J.A.C.1:2-18.5(d).

The passenger endorsement held by the respondent permits him to transport passengers of all ages, including school-age children. The regulations implementing N.J.S.A. 39:3-10.1 provide that

[i]n the absence of a conviction, the Chief Administrator of the Motor Vehicle Commission shall refuse to issue or shall revoke or suspend the passenger endorsement of any person arrested for, charged with or indicted for any crime or other offense if the Chief Administrator determines that such person is of bad character or is morally unfit to retain the privilege of holding a passenger endorsement, or is a potential danger to his or her passengers or to other motorists or to himself or herself.

[N.J.A.C. 13:21-14.5(c)(13)].

To be clear, a criminal conviction is not necessary for the Chief Administrator to exercise its authority to indefinitely suspend a passenger endorsement of a driver that the Chief Administrator determines is of bad character or a potential danger to others, while a serious criminal charge is pending.

For the reasons set forth below, I reject the following findings of facts in the Initial Decision:

3. The suspension was based on the fact that [respondent] received a summons for lewdness--“observed by a child.”

[Initial Decision at 6.]

First, the ALJ incorrectly found that the respondent’s passenger endorsement had already been suspended. However, the Scheduled Suspension Notice did not suspend the respondent’s passenger endorsement. Instead, it set in motion the administrative process whereby the respondent could request a hearing on the matter, which he did. Second, while the ALJ accurately cited the respondent’s charge, the Scheduled Suspension Notice was based upon the charge, not solely upon the element of “observed by a child.” Indeed,

the Scheduled Suspension Notice stated that the proposed suspension was based on “A DISQUALIFYING CRIMINAL ARREST AND/OR CONVICTION RECORD.” Hearing Exhibit P-2 (all capitals in original).

4. The NJMVC presented no other evidence detailing the offense DeBrito was charged with, which evidence was presented rather by respondent himself, and which consisted of the unrefuted Police investigation reports. There was no further evidence offered that it was respondent DeBrito who committed the lewd act.

[Initial Decision at 6].

In Finding of Fact 4, the ALJ incorrectly concludes that the Commission was required to prove the respondent’s guilt. As provided above, the charge is sufficient for the Commission to find that the respondent is of bad moral character and/or is a potential danger such that his passenger endorsement should be suspended pursuant to N.J.A.C. 13:21-14.5(c)(13).

5. The unrefuted exhibits, the Union Township., patrolmen investigation reports show soon after the purported victim was interviewed at her house, she was taken to see the man the police told her they were holding as “possibly the man” that victimized her and they were also holding the truck that was “possibly” the truck she saw.

6. At the place of the stop, while DeBrito was in detention by police and placed in front of the police vehicle, the victim was sitting in back of a police car in order to have a “clear view” of that man and also the nearby truck, and then was asked to identify the perpetrator. Despite obviously unfair conditions and circumstances to DeBrito, the victim only said that DeBrito “looked like” the man that victimized her. Further she responded, according to the on-scene identification report, that she was just “75%” certain of the man. During this so-called identification, she was “described as calm,” despite supposedly being confronted by the man who victimized her only minutes before.

7. Although the police dispatcher reported that the victim presumably said the perpetrator was in a “Blue Nissan Falcon Pickup

truck,["] when interviewed by Patrolman Tyler, she described only a "blue pick-up truck." Soon thereafter, during the "on scene identification", when confronted with DeBrito's vehicle and asked to identify it, she said only "I recognize the color."

[Initial Decision at 6-7].

In Findings of Fact 5-7, the ALJ incorrectly found that the investigation and evidence uncovered by the police was insufficient in warranting the respondent's arrest and indictment. Initial Decision at 6-7. However, the Scheduled Suspension Notice was based upon the charge itself, not the sufficiency of the evidence. The sufficiency of the evidence for the charge is a matter for the trial court in the criminal matter to decide. The investigation certainly established enough probable cause to initiate the criminal proceedings. A witness who provided a signed statement was able to identify the respondent, describe his behavior, confirm that a child was present, and describe the vehicle. Hearing Exhibits R-1 to R-5. Moreover, the police were able to observe that the respondent's belt was undone. Ibid. In addition, the ALJ was not able to issue an opinion regarding the credibility of the witness and investigating police officers because no live testimony was presented at the administrative hearing.

Based on the evidence presented, I make the following additional Findings of Fact:

1. The respondent holds a passenger endorsement to his CDL, which allows him to transport passengers of all ages. The Commission does not issue restricted passenger endorsements that limit the age of the passengers or frequency of transporting them.
2. There is a direct connection between the conduct that is the basis of the arrest/pending criminal charge and public safety.
3. The respondent failed to provide any evidence of good character or that he

is not a potential danger to the public given the criminal conduct upon which he was charged.

Additionally, I have found the following errors in the conclusions of law in the Initial Decision.

First, the Initial Decision incorrectly determined that the Commission had the burden of proving the charge of lewdness and that proof of guilt is required under N.J.A.C. 13:21-14.5(c)(13). See Initial Decision at 7 (the Commission “has the burden of proof, by the preponderance of the evidence, that respondent engaged in the conduct that he was charged with;”) see also Initial Decision at 10 (“I **CONCLUDE** that respondent does not have a disqualifying criminal arrest or conviction record. To hold otherwise, would make a hearing superfluous because it would mean every charge, and every complaint, no matter how unsubstantiated, as is this case, could result in an indefinite suspension. Therefore, the petitioner’s suspension cannot be sustained.”).

The Commission, however, is not required to prove the underlying charge under N.J.A.C. 13:21-14.5(c)(13). The Commission did not conduct a criminal investigation, does not have access to all the evidence produced in a criminal case, and would not have access to all documentary and testimonial evidence, especially while the charges are pending. The administrative action being taken is not a substitute for the underlying criminal prosecution.

The relevant inquiry under N.J.A.C. 13:21-14.5(c)(13) is whether the licensee “is of bad character or is morally unfit to retain the privilege of holding a passenger endorsement, or is a potential danger to his or her passengers or to other motorists or to himself or herself,” not whether the respondent is guilty of the underlying charge. To that

end, once the Commission provides evidence of the arrest, investigation, and charge, the respondent is responsible for providing evidence demonstrating that he is of good character and not a potential danger, given the serious charge against him. Holders and applicants for passenger endorsements are required to “furnish to the chief administrator satisfactory evidence of continuing physical fitness . . . , good character, and experience at the time of application renewal or such other time as the chief administrator may require, and in such form as the chief administrator may require.” N.J.S.A. 39:3-10.1. However, the respondent failed to do so in this matter.

While the burden of establishing a fact is generally placed ‘on the person relying thereon,’” the burden of production shifts where knowledge of the information pertinent to the fact to be proven is within the possession of a particular party. State v. Wright, 410 N.J. Super. 142, 151, 155-56 (Law Div. 2008) (internal citations omitted). Here, any evidence showing good moral character resides with the respondent, not the Commission. Therefore, the burden shifts to the respondent to provide such evidence. This conclusion is consistent with public policy, as well as statute and caselaw. Public policy dictates that individuals holding passenger endorsements are entrusted with the safe transportation of the public and must not be a potential danger or threat to those passengers.

Other jurisdictions have come to similar conclusions regarding suspensions in the absence of a conviction and the requirement to prove criminal misconduct. In New York, the Second Circuit has held that suspensions of taxi drivers’ licenses based upon arrests without proof of guilt of the criminal charges did not violate the taxi drivers’ due process rights. Nnebe v. Daus, 931 F.3d 66, 83 (2d Cir. 2019). The court held that, instead, due

process requires that the drivers be afforded “an opportunity to show that his or her particular licensure does not cause a threat to public safety.” Ibid. As to proof of criminal charges, the court stated that it should be left “to be resolved in the criminal courts, with the burden on the prosecution to prove guilt beyond a reasonable doubt.” Id. at 90.

Here, it is undisputed that the respondent has been charged with a crime which the Commission has determined to be evidence of bad moral character. If the charges filed against the respondent are upheld, the respondent would be shown to present a clear risk of danger to the passengers transported by him. The main goal of administrative proceedings is to ensure safety to the public on the highway. Atkinson v. Parsekian, 37 N.J. 143, 155 (1962). The Commission has “the right to impose reasonable restrictions on the issuance of licenses for various occupations in order to protect the public health and safety.” Sanders v. Div. of Motor Vehicles, 131 N.J. Super. 95, 97 (App. Div. 1974). The respondent was required to demonstrate that the circumstances and behavior that led to his arrest are not that of a person who poses a potential threat to the passengers within his care, and he failed to do so.

It is, therefore, on this 13th day of December 2021, **ORDERED** that the passenger endorsement of the New Jersey CDL of **FERNANDO DEBRITO** be suspended indefinitely.

NOTE: The **effective date** of this suspension is set forth in the “Order of Suspension,” which the Commission encloses in this mailing.

A handwritten signature in black ink, appearing to read "B. Sue Fulton". The signature is fluid and cursive, with a long horizontal stroke at the end.

B. Sue Fulton
Chair and Chief Administrator

BSF: RDD

cc: Mark H. Ranges, Esq.
Cassandra E. Berry, Esq.

**STATE OF NEW JERSEY
MOTOR VEHICLE COMMISSION
CASE FILE NUMBER: FXXXX XXXXX 12652**

IN THE MATTER OF : **FINAL ADMINISTRATIVE DECISION
AND ORDER OF SUSPENSION**
ALBERT J. FRANCESCO : **(Hearing on the papers)**
SUSPENSION TERM: 90 DAYS
EFFECTIVE DATE: 12/30/21

This is the Motor Vehicle Commission's (Commission) Final Administrative Decision in the matter of Albert J. Francesco (Francesco).

This matter arises out of an Interstate Driver License Compact (N.J.S.A. 39:5D-1 to 5D-14) state notification sent by the New York Department of Motor Vehicles to the Commission, reporting that Francesco had been convicted of driving while ability impaired (NYDWAI). Francesco does not dispute this conviction. A copy of the Out-of-State Conviction report is attached hereto as Exhibit P-1 (reporting conviction under AAMVA "ACD CODE: A25"; which signifies "driving while impaired"¹).

Pursuant to the Interstate Driver License Compact (N.J.S.A. 39:5D-4), the Commission issued a Scheduled Suspension Notice informing Francesco that his New Jersey driving privilege was subject to suspension for a period of 90 days pursuant to N.J.S.A. 39:4-50, N.J.S.A. 39:5-30, N.J.S.A. 39:5D-4, and N.J.A.C. 13:19-11.1 to -11.2. A copy of the Scheduled Suspension Notice is attached hereto as Exhibit P-2.

¹ "ACD" is the AAMVA (American Association of Motor Vehicle Administrators) Code Dictionary which states use to translate traffic offense convictions and withdrawals into a uniform format, for transmitting under the National Driver Register/Problem Driver Pointer System (NDR/PDPS) and also the Commercial Driver License Information System (CDLIS). See generally, 49 U.S.C.S. §30304; 23 C.F.R. Ch. III, Pt. 1327 and App. A.

In response to the Scheduled Suspension Notice, Francesco (representing himself), requested a hearing, arguing: that he was stopped for “failure to signal a lane change,” and, as a result, was convicted of a violation of N.Y. Veh. & Traf. Law §1192(1), NYDWAI, which he argues, “is considered a traffic violation in [New York], and is not considered a crime,” that “this infraction” “would not be a violation in the State of New Jersey because in New York you can be issued a summons for a Blood Alcohol Content (BAC) between 0.05% - 0.079%,” and “the amount of [his] BAC in New Jersey would not have been an offense that would have been a violation of law.” Francesco also states that he relies on his driver license for employment. Francesco’s hearing request is attached hereto as Exhibit R-1.

The Commission issued a letter to Francesco acknowledging his hearing request, further advising Francesco that he was being afforded an opportunity for a hearing on the papers, and that it was his burden to demonstrate, “by clear and convincing evidence, that the State of New York conviction was based **exclusively** upon a violation of a **proscribed** blood alcohol concentration (BAC) of less than .08%.” The Commission further stated that this was not “an opportunity to re-litigate [the New York] matter or to collaterally attack the New York court conviction in this administrative forum.” The Commission also instructed Francesco to “provide a notarized affidavit setting forth all facts in support of [his] position and provide copies of any supporting documents or other evidence (including, but not limited to, the official plea transcript from the State of New York proceeding and/or official court order signed by the New York judge indicating specific findings made in connection with [his] conviction).” A copy of the Commission’s August 30, 2019, letter is attached hereto as Exhibit P-3.

Francesco submitted an affidavit in response to the Commission's August 30, 2019 letter, making the same arguments that he made in his hearing request. Francesco also included the following documents with his affidavit: Criminal Court of the City of New York form for Adjournment in Contemplation of Dismissal, Conditional Discharge, and Pre-Sentence Conditions, dated July 15, 2019, captioned People of the State of New York against Albert J. Francesco, in the criminal court designated "Kings DWI;" New York State Department of Motor Vehicles receipt for payment made, dated September 17, 2019; and New York State Department of Motor Vehicles Order of Suspension or Revocation. A copy of Francesco's affidavit and enclosures are attached hereto collectively as Exhibit R-2. Notably, Francesco did not present any documentation of a BAC result for the date of the violation, nor did he submit any documentation supporting an argument that the New York DWAI conviction was based exclusively upon a violation of a proscribed blood alcohol concentration (BAC) of less than .08%. The documents only support a conclusion that Francesco was convicted of a violation of N.Y. Veh. & Traf. Law §1192(1), NYDWAI and assessed a surcharge, fines, and ordered to attend the Impaired Driver Program (IDP), Victim Impact Panel (VIP) program, and Driver Improvement Program (DIP).

It is also notable that Francesco has not submitted any other evidence, such as an official plea transcript from the State of New York proceeding or official court order signed by the New York judge, indicating any specific court findings as to a BAC of less than .08% forming the exclusive basis of his conviction.

Based on the documentary exhibits in the record, I find the following:

1. As a result of the events of May 3, 2019, Francesco was convicted of a violation of N.Y. Veh. & Traf. Law §1192(1) ("NYDWAI").

2. None of the documents submitted by Francesco reflect a BAC whatsoever, or any findings showing that the New York conviction was based exclusively upon a violation of a proscribed BAC of less than .08%².
3. The New York DWAI statute, N.Y. Veh. & Traf. Law §1192(1), is not a per se offense as constructed and enacted by the New York legislature.

Analysis

There is no dispute that Francesco was convicted of NYDWAI. Thus, the sole issue to be determined here is whether Francesco has met his burden to prove, with clear and convincing evidence, that his New York conviction was for an offense “based exclusively upon a violation of a proscribed BAC of less than .08%.” In re: Maxine Basch, (unreported) (App. Div. 2013), Dkt. No. A-6009-11T1, 2013 N.J. Super. Unpub. LEXIS 1764 at 1, 6-7, and N.J.S.A. 39:4-50(a)(3). In the absence of such proof, Francesco is subject to the mandatory minimum 90-day suspension of his New Jersey driving privileges, pursuant to N.J.S.A. 39:4-50³, New Jersey’s driving while intoxicated (DWI) statute and N.J.A.C.

² Typically, in these types of New York cases, there would be documents supporting the original charges. Such documents would include the law enforcement officer’s indications of the various indicia supporting the arrest, which may include admissions, the officer’s observations, the results of field testing, and the results of chemical tests, if any. As the Commission has seen in numerous other NYDWAI cases it has reviewed, the document typically used by New York is a “DWI Bill of Particulars and Supporting Deposition,” which the officer uses to record information regarding the basis for the charges, including the observations of the driver, performance of field tests, driver admissions, chemical test information, and other evidence. Francesco is in the best position to have such official documentation. New York law requires that the supporting deposition and Bill of Particulars prepared by the state in support of the charges be made available to the defendant upon request, if not already provided to the defendant. NY CPL §100.25 and 200.95.

³ The version of N.J.S.A. 39:4-50 that was in effect on the date of the offense, May 3, 2019.

13:19-11.1 et seq.

Despite the requirement noted in the Commission's response to Francesco's hearing request that Francesco demonstrate, "by clear and convincing evidence, that the State of New York conviction was based **exclusively** upon a violation of a proscribed blood alcohol concentration of less than .08%," Francesco failed to submit any proofs whatsoever regarding a BAC. Moreover, Francesco did not submit any proofs that would show that his NYDWAI conviction was based exclusively on a BAC of less than .08%, that is: without any other observational evidence or admission as to the element of impaired driving ability. The simple fact that Francesco was convicted in New York of driving while ability impaired and not driving while intoxicated does not demonstrate, by clear and convincing evidence, that the State of New York conviction for driving while ability impaired was based exclusively upon a violation of a proscribed BAC of less than .08%.

The controlling New Jersey case law has well established that the Commission has the authority to suspend a New Jersey licensee's driving privilege for an out-of-state conviction, pursuant to N.J.S.A. 39:5D-4, and that N.Y. Veh. & Traf. Law §1192(1) is substantially similar to N.J.S.A. 39:4-50. State v. Zeikel, 423 N.J. Super. 34, 44-49 (App. Div. 2011); New Jersey Div. of Motor Veh. v. Lawrence, 194 N.J. Super. 1, 2-3 (App. Div. 1983). See Mize v. NJMVC, (unreported) (App. Div. 2018), Dkt. No. A-0781-17T1, 2018 N.J. Super. Unpub. LEXIS 2542; Markowicz v. NJMVC, (unreported) (App. Div. 2018), Dkt. No. A-2492-15T1, 2018 N.J. Super. Unpub. LEXIS 257 (the driver's argument based on there being no BAC evidence for his NYDWAI conviction was rejected by the Appellate Division and the court affirmed the NJMVC's suspension of the home state New Jersey

driver license); Ford v. NJMVC, (unreported) (App. Div. 2014), Dkt. No. A-3117-12T1, 2014 N.J. Super. Unpub. LEXIS 304, at 5, certif. denied, 217 N.J. 587 (2014); Xheraj v. NJMVC, (unreported) (App. Div. 2013), Dkt. No. A-2125-12T1, 2013 N.J. Super. Unpub. LEXIS 2893; Wayne v. NJMVC, (unreported) (App. Div. 2013), Dkt. No. A-3008-12T1, 2013 N.J. Super. Unpub. LEXIS 1827, at 8-9; New Jersey Motor Veh. Comm'n v. Gethard, (unreported) (App. Div. 2012), Dkt. No. A-4657-10T3, 2012 N.J. Super. Unpub. LEXIS 287, at 5; In re: Alan D. Weissman, (unreported) (App. Div. 2009), Dkt. No. A-2154-07T3, 2009 N.J. Super. Unpub. LEXIS 1303, at 2 (the court specifically notes that “[n]either N.Y. Veh. & Traf. Law §1192(1) nor N.J.S.A. 39:4-50(a), require a minimum blood alcohol reading for a conviction”). See also State v. McCauley, (unreported) (App. Div. 2006), Dkt. No. A-4622-04T2, 2006 N.J. Super. Unpub. LEXIS 2422 (the court rejected McCauley’s argument that he fit within the “very limited exception” in the statute, N.J.S.A. 39:4-50(a)(3), even assuming that his BAC was 0.06%, since New York’s driving while ability impaired statute, N.Y. Veh. & Traf. Law §1192(1), “on its face” is not a “per se” offense and his conviction under that provision “must have been based on other evidence”) and In re: Maxine Basch, MVC Chief Administrator Supplemental Final Decision and Final Order on Remand, issued January 8, 2016, found at http://www.nj.gov/mvc/pdf/about/jab_final_decisions16.pdf (suspension imposed for NYDWAI conviction in accord with Appellate Division remand instruction where a “plea bargain” had been entered to the lesser-included offense, also noting other potential evidence of impairment included officer observations, field sobriety tests and/or admissions, as well as a BAC result of .17%)⁴.

⁴ For context only, the Commission notes that in its experience handling the many out-of-

As constructed and enacted by the New York legislature, N.Y. Veh. & Traf. Law §1192(1) is specifically, on its face, not a per se type of offense; instead, it is the impairment of a person's ability to operate a motor vehicle that is the critical statutory element established by Francesco's conviction. Compare, New Jersey Div. of Motor Veh. v. Ripley, 364 N.J. Super. 343, 349-50 (App. Div. 2003) (in which the court specifically discusses the NYDWAI offense and the fact that NYDWAI contains the element of impaired driving ability, thus distinguishing it from a statute like the former Utah "alcohol-related reckless driving" statute that was at issue in that case, which Utah statute did not have impaired driving ability as an element of the offense); accord Zeikel, supra, 423 N.J. Super. at 46, 47 (the court "viewed 'impaired driving ability' as the crucial element necessary to apply the statute of another jurisdiction as substantially similar to New Jersey's DWI statute.").

state New York reported "driving while ability impaired" convictions, in those instances where the supporting documents are submitted, it is frequently the case that the NYDWAI conviction was the result of a "plea bargain" to this lesser-included offense and that the police reports and chemical test documents reveal potential evidence of BAC levels of .08 and above as well as observational-type evidence including field sobriety tests, officer observations, driving behavior, and/or driver admissions.

In a typical year, the Commission receives approximately 200 such driving while ability impaired reported convictions, for which it receives a significant number of hearing requests as to the proposed administrative suspension action. Such hearing requests are among the approximate 8,000 to 9,000 hearing requests the Commission handles for the various proposed administrative suspension actions issued each year, not including those involving the medical and fatal accident type cases. These arise from the enormous volume of both in-state and out-of-state reported convictions that are sent to the Commission on a daily basis, amounting to more than 1 million convictions yearly coming from the in-state court matters alone. The Commission recognizes that each of these DWAI case matters must be assessed on a case-by-case basis in accordance with the particular submissions made by the driver in an effort to meet the clear and convincing evidence standard for fitting within the limited affirmative defense in the New Jersey DWI statute.

In Zeikel, supra, the court determined that a conviction under New York's DWAI statute was "substantially similar" to a conviction under New Jersey's DWI statute to qualify as a prior conviction for sentencing purposes under N.J.S.A. 39:4-50(a)(3). Zeikel, supra, 423 N.J. Super. at 45-49. The court rejected the defendant's argument that New Jersey sets a higher threshold than New York by requiring a finding of "intoxication," reasoning that "[i]ntoxication not only includes obvious manifestations of drunkenness but any degree of impairment that affects a person's ability to operate a motor vehicle". Id. at 48. See also, State v. Aziz, (unreported) (App. Div. 2020), Dkt. No. A-1268-18T4, 2020 N.J. Super. Unpub. LEXIS 757, in which the Appellate Division affirmed the lower court's holding that the appellant's prior conviction for New York DWAI constituted a prior conviction under New Jersey law. In relying on Zeikel, the court stated: "[In Zeikel,] We held that absent proof that a New York DWAI conviction was based exclusively on a blood alcohol reading of less than .08, a DWAI conviction is 'substantially similar [in] nature' to driving under the influence under New Jersey law, and shall be treated as a prior conviction for sentencing enhancement purposes." Aziz, supra, at 2, quoting Zeikel, supra, at 48. The Aziz court further noted that, "[f]irst, a New York defendant conceivably may be prosecuted for DWAI, instead of DWI, simply because there is no BAC evidence at all" and "[s]econdly, a DWAI offender with less than .08 BAC still commits an offense substantially similar in nature to a New Jersey DUI under N.J.S.A. 39:4-50(a), so long as the less-than-.08 reading is not the exclusive basis for the New York conviction." Id. at 2-3. With the Aziz court further explaining that the totality of the circumstances in that case, if proved, concerning the field sobriety tests, the officer's observations and the defendant's driving behavior, as well as the driver's refusal to submit to a "binding"

chemical test, would be sufficient to “establish an observational DUI violation under [New Jersey] law.” Id. at 3-4.

Governing New Jersey case law repeatedly recognizes that “observational” evidence is by itself sufficient in New Jersey to support a conviction under New Jersey’s unified DWI statute, N.J.S.A. 39:4-50, even without a BAC result. See, e.g., State v. Sorenson, 439 N.J. Super. 471, 479-82 (App. Div. 2015) (noting distinction between the “per se violation” and the “observation violation” both under New Jersey’s DWI statute, N.J.S.A. 39:4-50); State v. Campbell, 436 N.J. Super. 264, 267-68 (App. Div.), certif. denied, 220 N.J. 208 (2014) (noting that New Jersey DWI prosecutions under N.J.S.A. 39:4-50(a) may be pursued on “four distinct alternative grounds” one type of which is the “so-called ‘observation’ cases based on other non-BAC evidence of a defendant’s impairment while driving”); State v. Kent, 391 N.J. Super. 352, 384 (App. Div. 2007) (affirming a defendant’s DWI conviction based upon his erratic driving in causing a single-car accident and a police officer’s field observations of his multiple signs of inebriation, despite the inadmissibility of hearsay laboratory reports measuring the BAC level in defendant’s blood sample); see also State v. Howard, 383 N.J. Super. 538, 548 (App. Div.) (quoting State v. Kashi, 360 N.J. Super. 538, 545 (App. Div. 2003), aff’d, 180 N.J. 45 (2004)), certif. denied, 187 N.J. 80 (2006) (instructing that a violation of N.J.S.A. 39:4-50 can be proven “through either of two alternative evidential methods: proof of a defendant’s physical condition or proof of a defendant’s blood alcohol level.”).

Moreover, the court in Zeikel, supra, 423 N.J. Super. at 48 (App. Div. 2011), confirmed that a conviction of New Jersey’s driving while intoxicated statute is sustainable if it is supported by sufficient evidence of “any degree of impairment that affects a person’s

ability to operate a motor vehicle” while further highlighting that “[like] New Jersey, New York defines impairment broadly to include any degree of impairment of a person’s physical or mental abilities to operate a motor vehicle.” See also, In re Johnston, 75 N.Y.2d 403, 409-10, 553 N.E.2d 566, 554 N.Y.S.2d 88 (1990) (New York’s highest judicial tribunal construes “impairment” under N.Y. Veh. & Traf. Law § 1192(1) as meaning that “the actor by ‘voluntarily consuming alcohol . . . has actually impaired, to any extent, the physical and mental abilities which he is expected to possess in order to operate a vehicle as a responsible and prudent driver”; quoting People v. Cruz, 48 N.Y.2d 419, 427, 399 N.E.2d 513, 423 N.Y.S.2d 625 (1979)).

Although Francesco argues that his BAC would not have resulted in a violation of New Jersey law, he has failed to present any documentation of his BAC, or that his New York DWAI conviction was based exclusively on a BAC of less than .08%. Absent clear and convincing evidence presented by Francesco that a BAC of less than .08% was the exclusive basis of the NYDWAI conviction, Francesco’s New Jersey driving privilege is subject to suspension. See, e.g. Markowiec v. NJMVC, (unreported) (App. Div. 2018), Dkt. No. A-2492-15T1, 2018 N.J. Super. Unpub. LEXIS 257 (affirming the Commission’s final decision and order suspending Markowiec’s driving privilege based on an NYDWAI where Markowiec argued that there was no chemical test performed and that his BAC was under .08%, but there was no clear and convincing evidence, such as a plea transcript or court order showing that the conviction was based exclusively on a BAC of less than .08%. The court also emphasized that the finding of substantial similarity between a NYDWAI and a New Jersey DWI did not turn on evidence of a BAC level). A conviction for NYDWAI need not be based on BAC at all, or it may be based on a BAC

below .08 in combination with other observational evidence supporting the element of impaired driving ability.⁵

Given these factors, Francesco has failed to show, by clear and convincing evidence, that his NYDWAI conviction was based exclusively on a BAC of less than .08%, as is required to meet the very limited exception in New Jersey's DWI statute⁶.

It remains undisputed that Francesco was convicted by the State of New York of N.Y. Veh. & Traf. Law §1192(1), "driving while ability impaired," while holding and

⁵ Indeed, it is noted that under the New York DUI statute's "Probative value" section as to "Chemical test evidence", N.Y. Veh. & Traf. Law § 1195(2)(b), evidence of a BAC of .051 to .069, is considered "relevant evidence, but shall not be given prima facie effect, in determining whether the ability of such person to operate a motor vehicle was impaired by the consumption of alcohol." Therefore, for a conviction of NYDWAI to be entered there must have been other sufficient observational evidence to support the "impairment of ability to operate a motor vehicle" statutory element, as the NYDWAI provision is specifically not a per se offense. Similarly, if the BAC test result evidence was .05 or below, that range is considered "prima facie evidence that the ability of such person to operate a motor vehicle was not impaired by the consumption of alcohol", and thus again, this means that there must have been sufficient other observational evidence despite that BAC result to establish beyond a reasonable doubt the element of "impairment of ability to operate a motor vehicle" for such NYDWAI conviction. N.Y. Veh. & Traf. Law § 1195(2)(a).

⁶ That very limited exception in the New Jersey statute most specifically would apply where there was a conviction under a per se law in another state, for which the other state's per se threshold was lower, at the time of the offense, than the per se prong contained within the New Jersey "unified" DWI statute, N.J.S.A. 39:4-50 (which contains a per se prong as well as an observational prong). An example of this would be a New York DWI- per se .08 conviction, under N.Y. Veh. & Traf. Law § 1192(2) ("driving while intoxicated; per se"), that specifically occurred during the timeframe in which the New York per se statutory threshold had been lowered to .08 prior to the effective date of the New Jersey law changing its per se threshold from .10 to .08; namely between July 1, 2003 and January 19, 2004. See, New Jersey Div. of Motor Veh. v. Pepe, 379 N.J. Super. 411, 414, footnote 1 (App. Div. 2005) (in which the court points out the different effective dates for New York's and New Jersey's lowering of the statutory BAC per se threshold to .08); also, it is noted that currently the State of Utah has lowered its statutory per se threshold to a BAC of .05, thus specific Utah convictions under its DWI- per se provision would meet this limited exception.) This is not the case for Francesco's conviction under the NYDWAI statutory provision, N.Y. Veh. & Traf. Law §1192(1).

presenting a New Jersey driver's license. Accordingly, the State of New Jersey is required to suspend his New Jersey driving privilege in accordance with the Interstate Driver License Compact Agreement (N.J.S.A. 39:5D-1 to -14) and the New Jersey Administrative Code (N.J.A.C. 13:19-11.1).

The governing regulation, N.J.A.C. 13:19-11.1(a) and (b), provides that out-of-state convictions shall be given the same effect as if such convictions had occurred in the State of New Jersey. Indeed, N.J.A.C. 13:19-11.1(b) explicitly states that New Jersey driving privileges shall be suspended pursuant to New Jersey law. See, e.g., Martinez v. NJMVC, (unreported) (App. Div. 2010), Dkt. No. A-0147-09T3, 2010 N.J. Super. Unpub. LEXIS 597 at 4-5; see also New Jersey Div. of Motor Vehicles v. Egan, 103 N.J. 350, 357 (1986) (the New Jersey Supreme Court reviewed and upheld the policy of the Director of the Division of Motor Vehicles to exercise the discretion granted by N.J.S.A. 39:5D-4 to "uniformly impos[e] New Jersey's more stringent penalty instead of being reduced to 'the least common denominator of other States[.]'"); DiGioia v. NJMVC, (unreported) (App. Div. 2021), Dkt. No. A-3587-19, 2021 N.J. Super. Unpub. LEXIS 533 (the court declared, in affirming the Commission's imposition of suspension of the New Jersey home state license for a New York conviction, that "the Compact simply requires that New Jersey consider appellant's New York conviction as if the offense occurred in New Jersey, which the Commission indisputably did"); State v. Luzhak, 445 N.J. Super. 241, 248 (App. Div. 2016) (the court again emphasized that New Jersey has a "strong public policy against drunk driving"); and State v. Thompson, 462 N.J. Super. 370, 375 (App. Div. 2020) (in which the Appellate Division reiterated the New Jersey Supreme Court's declaration regarding the construction of the DWI laws: "As the Supreme Court

held in [State v. Tischio, 107 N.J. 504 (1987)] – and it apparently bears repeating – ‘[w]e are thus strongly impelled to construe [the statute] flexibly, pragmatically and purposefully to effectuate the legislative goals of the drunk-driving laws,’ [Id. at 514] which, of course, are to rid our roadways of the scourge of drunk drivers [Id. at 512]. See also [State v. Mulcahy, 107 N.J. 467, 479 (1987)] (recognizing, in quoting [State v. Grant, 196 N.J. Super. 470, 476 (App. Div. 1984)], that the drunk driver remains ‘one of the chief instrumentalities of human catastrophe’).”

Furthermore, it is also well-established by New Jersey case law that it is proper under the doctrine of dual sovereignty, and specifically is not a violation of double jeopardy, for the "home state" which issued the driver license to impose the statutorily mandated suspension after receiving a report of such out-of-state alcohol-related driving conviction under the Interstate Compact. See Pepe, supra, 379 N.J. Super. at 418-419; In re Johnson, 226 N.J. Super. 1 (App. Div. 1988); and Lawrence, supra, 194 N.J. Super. at 2-3.

The court in Pepe, supra, 379 N.J. Super. at 416, specifically held that the “suspension imposed by NJDMV is in accordance with the statute, N.J.S.A. 39:4-50, and not redundant to the penalty imposed in New York, which involved only defendant’s driving privileges within that state.” (citing Boyd v. Div. of Motor Vehicles, 307 N.J. Super. 356, 360 (App Div.), certif. denied, 154 N.J. 608 (1998), emphasis added). The Pepe court further instructed that “under the doctrine of dual sovereignty, the double jeopardy clause does not bar two states from prosecuting a defendant for the same offense.” Id. at 418. The Pepe court also considered Pepe’s constitutional equal protection, res judicata/collateral estoppel and laches-type arguments in the context of that Compact

case and found those to be without merit.

Finally, Francesco's argument that the NYDWAI conviction was an "infraction" and not a "crime" must be rejected. As stated above, the pertinent fact is that Francesco was convicted of a violation of NYDWAI, which is substantially similar to N.J.S.A. 39:4-50. State v. Zeikel, supra, 423 N.J. Super. 34, 44-49. Accordingly, absent clear and convincing evidence that his NYDWAI conviction was based exclusively on a BAC of less than .08%, his New Jersey driving privilege is subject to suspension.

As to any contention related to the New York "conditional discharge" aspect of Francesco's New York sentencing, such argument would be rejected too. Under New York law for such NYDWAI matters the "conditional discharge" does not indicate that there has been no conviction or that the charges have been or will be dismissed. Rather, it indicates that as part of the sentencing on the NYDWAI conviction Francesco was given a type of conditional release (from the potential jail term and from a required period of supervised probation) that imposed a set of terms and conditions with which Francesco was required to comply. See N.Y. CLS Penal §65.05 and 65.10. Indeed, in New York, a violation of any of the listed conditions for the conditional discharge may result in revocation of the sentence and a return to court for resentencing/potential jail term. Thus, conditional discharge in New York is a sentencing option for the judge; nowhere does it provide that the charges will become dismissed. (It is noted that the term "conditional discharge" is used differently by different states, in different contexts.)

It remains undisputed, and I therefore find, that Francesco was convicted of an alcohol-related driving offense that occurred on May 3, 2019, in the State of New York (for which he was convicted on July 15, 2019). As such, pursuant to N.J.S.A. 39:5D-4,

39:5-30, 39:4-50 and N.J.A.C. 13:19-11.1 et seq., I order his New Jersey driving privilege to be suspended for 90 days. The suspension period imposed here is the minimum mandated by New Jersey statute for this alcohol-related driving offense, which was committed before December 1, 2019⁷; there is no discretion to impose a reduced suspension term.

Conclusion and Final Order

Based on the foregoing, I conclude that the Commission's proposed suspension is proper. I specifically conclude that Francesco's submissions to the Commission are insufficient to meet his affirmative burden to show, by clear and convincing evidence, that his NYDWAI conviction was based exclusively on a BAC below .08%. The New Jersey legislature, in N.J.S.A. 39:4-50, explicitly required that the submitted evidence meet this high standard of proof. The New Jersey Supreme Court has stated:

The clear and convincing evidence standard is not a hollow one, as

[c]lear-and-convincing evidence is that which produces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable the factfinder to come to a clear conviction, without hesitancy, of the precise facts in issue.

[New Jersey Div. of Youth & Family Servs. v. I.S., 202 N.J. 145, 168 (2010), quoting In re Seaman, 133 N.J. 67, 74 (1993) (citation, internal quotation and editing marks omitted).]

Francesco's submissions to the Commission fall far short of this standard and cannot be

⁷ The NJ DWI statutory penalties were amended effective December 1, 2019 for offenses committed on or after that date. Thus, the amended penalties do not apply here. State v. Scudieri, No. A-0352-20, 2021 N.J. Super. LEXIS 136 (App. Div. Nov. 1, 2021)

said to constitute “evidence so clear, direct and weighty and convincing as to enable the factfinder to come to a clear conviction, without hesitancy, of the precise facts in issue.”

The effective date of suspension of Francesco’s driving privilege is December 30, 2021. (Suspension term: 90 days).

Also, pursuant to the governing statutory and regulatory requirements under N.J.S.A. 39:4-50(b) and N.J.A.C. 13:19-11.2, Francesco must successfully complete or show satisfactory proof of completion of an alcohol/drug education and highway safety program. It is noted that with respect to any alcohol education classes/program already completed pursuant to the New York conviction, Francesco may present any official documentation as to such classes/program to the Intoxicated Driver Program (IDP)/Intoxicated Driver Resource Center (IDRC), which will determine whether these can be accepted in partial or full satisfaction of the IDP alcohol/drug education program required pursuant to N.J.S.A. 39:4-50(b) and N.J.A.C. 13:19-11.2.

This constitutes the Commission’s final decision in this matter.⁸ Any appeal from this decision must be made to the Appellate Division of the Superior Court by filing a Notice of Appeal with the Appellate Division within 45 days from the date of this decision. If an appeal is filed with the court, pursuant to Court Rule, R. 2:5-1(e), service of copies of all papers must be made on both the New Jersey Motor Vehicle Commission, Chief Administrator, as well as the Attorney General. The Appellate Division may be contacted

⁸ Although this matter had been considered among those that were being processed for transmission to the Office of Administrative Law for a plenary hearing, upon further review by the Commission it was noted that there are no factual issues requiring an evidentiary hearing and therefore this final administrative decision and order was issued. See Frank v. Ivy Club, 120 N.J. 73, 98 (1990), cert. denied, 498 U.S. 1073, 111 S. Ct. 799, 112 L. Ed.2d 860 (1991); Pepe, supra, 379 N.J. Super. 411 (App. Div. 2005).

by calling (609) 815-2950.

Note: Due to the novel coronavirus (COVID-19) emergency, the Superior Court, Appellate Division has provided specific instructions for the filing of papers. Please visit the Judiciary's website at www.njcourts.gov/courts/appellate.html.

If you file an appeal with the court and you are seeking a stay of this Order while your appeal is pending, your request for stay, made pursuant to New Jersey Court Rule 2:9-7, must be in writing and submitted to the Commission (NJMVC) with proof that a notice of appeal has been filed with the Appellate Division. Your request for stay and proof of filing should be submitted to the Office of Legal and Regulatory Affairs, NJMVC (attention: STAY REQUEST/ APP. DIV. PROOF OF FILING) either by fax to (609) 984-1528, or by email to: StayrequestAppDivcase@mvc.nj.gov. *Please include a fax number or an email address where the determination as to your stay request will be sent.

[Further Note: A stay of this Order is not automatically granted upon filing a Notice of Appeal with the Appellate Division. In requesting that a stay be granted in conjunction with the filing of your appeal, you have the burden to show that your case meets each of the factors set out in New Jersey case law to warrant the issuance of that type of injunctive relief. See, Garden State Equality v. Dow, 216 N.J. 314, 320 (2013).]



B. Sue Fulton
Chair and Chief Administrator

BSF:eha/kw

[pro se]

EXHIBIT LIST

*copies redacted of other drivers' personal identifying information

Commission Exhibits

- P-1 Copy of NYDMV Out-of-State Conviction report dated July 18, 2019 (1 page, redacted)
- P-2 Copy of Scheduled Suspension Notice dated August 1, 2019 (2 pages, front and back)
- P-3 Copy of Commission letter to Francesco advising him of the opportunity to submit clear and convincing evidence of conviction being exclusively based on a BAC of less than 0.08% (affording a hearing on the papers), dated August 30, 2019 (1 page)

Francesco's Exhibits

- R-1 Copy of hearing request (2 pages)
- R-2 Copy of Francesco's Affidavit dated September 23, 2019 with enclosures: Criminal Court of the City of New York form for Adjournment in Contemplation of Dismissal, Conditional Discharge, and Pre-Sentence Conditions, dated July 15, 2019; New York State Department of Motor Vehicles receipt for payment made, dated September 17, 2019; and New York State Department of Motor Vehicles Order of Suspension or Revocation (total: 5 pages)



A F F I R M E D
N. J. MOTOR VEHICLE COMMISSION

Date 12-27-21

State of New Jersey
 OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. MVH 03773-21

AGENCY DKT. NO. LXXXX-XXXXX-10752

NEW JERSEY MOTOR VEHICLE COMMISSION,

Petitioner,

v.

CARMEN LOMBARDI,

Respondent.

Kenneth Vercammen, Esq., for petitioner, New Jersey Motor Vehicle Commission
 (Kenneth Vercammen & Associates, attorneys)

Carmen Lombardi, respondent, pro se

Record Closed: November 8, 2021

Decided: November 10, 2021¹

BEFORE **EVELYN J. MAROSE**, ALJ/Ret., on recall:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On March 17, 2021, the New Jersey Motor Vehicle Commission (“NJMVC”) issued a Scheduled Suspension Notice (“Notice”) to Carmen Lombardi (“Lombardi”). The Notice

¹ In Accordance with Executive Order No. 103 and Executive Order No. 127.

advised Lombardi that his driving privileges were scheduled to be suspended for 36 months/1080 days. (P-20.) After reviewing the Notice, on March 22, 2021, Lombardi filed a letter requesting a Hearing at the Office of Administrative Law. (P-5.) The matter was transmitted to the OAL on April 27, for determination as a contested case pursuant to N.J.S.A. 52:14f-1to -13.

On May 11, 2021, the Honorable Gail Cookson, ALJ, held a Preliminary Hearing, at which time she concluded and ordered that Lombardi's driving privileges not be suspended pending a final agency decision as to the suspension. (P-6.) A "Zoom" hearing took place on August 6, 2021. A written summation was filed on behalf on the NJDMV on August 17, 2021. A written summation was filed by Lombardi on August 23, 2021. The record closed on November 8, 2021, subsequent to a telephonic conference held with the parties regarding admitted evidence.

FINDING OF FACTS

Having had an opportunity to consider the evidence, observe the witnesses who testified via a Zoom Hearing and consider the written summations, I **FIND** the following to be pertinent **FACTS** in this case:

On October 12, 2017, at approximately 9:55 a.m. a two-motor vehicle – pedestrian accident occurred westbound on State Highway 67, at the intersection with Bridge Plaza North, in Fort Lee Boro, Bergen County, New Jersey. The weather was overcast. The blacktop roadway surface was dry. (P-17.)

Lombardi failed to perceive that the driver of the vehicle in front of him had stopped prior to making a left turn. Lombardi failed to stop and struck the vehicle in front of him, causing the vehicle in front of him to strike a pedestrian, who was crossing in the marked intersection. Lombardi left the scene of the accident and did not return to the scene or report the accident or his involvement in the accident for approximately one hour. The pedestrian was transported to Hackensack University Center in critical condition. She was pronounced dead at 5:44 p.m. that evening.

As a result of the investigation of the accident. Lombardi was initially charged with one count of Leaving the Scene of a Motor Vehicle Accident with Serious Bodily Injury, a third-degree crime. (R-18.) Following the death of the pedestrian, the charges against Lombardi were amended. He was then charged with one count of Leaving the Scene of a Motor Vehicle Accident Resulting in Death, a second-degree crime. He was also charged with Careless Driving and Following Too Closely.² (R-18.)

Lombardi's driving abstract indicates that he was involved in two prior driving accidents—one in 2006 and one in 2007. Lombardi's driving abstract also indicates that he was charged with speeding on three occasions, failure to observe a traffic control device on one occasion, operating under the influence of liquid/drugs on ^{one} ~~two~~ occasions and improper operation on a highway within marked lanes on two occasions. No charges are reflected on Lombardi's abstract from the date of the accident at issue, October 12, 2017, to April 12, 2021, to the date of the abstract provided. (R-15.)

Lombardi was arraigned on June 12, 2018, in the Superior Court of New Jersey, Law Division, Criminal Part. (P-1.) On June 18, 2018, with the consent of the Bergen County Prosecutor and after a plea of guilty to Leaving the Scene of a Fatal Accident (a 2nd degree criminal offense), Lombardi was granted entry into Pre-Trial Intervention, with a term of two years, (P-2, P-3.) A Pre-Trial Intervention Order of Dismissal was entered on June 5, 2020. (P-9.)

ANALYSIS AND CONCLUSIONS OF LAW

The Motor Vehicle Commission is empowered to suspend a motorist's driving privileges for a violation of any provision of the Motor Vehicle statutes or for any "reasonable grounds." N.J.S.A. 39:5-30. Need alone cannot be the deciding factor in permitting a respondent to continue driving. See Div. of Motor Vehicles v. Morton, 4

² As a result of the investigation of this accident, the driver of the car that was in front of Lombardi's vehicle, which hit the pedestrian, was issued a motor vehicle summons by the Fort Lee Police Department, for careless driving.

N.J.A.R. 95 (Dir. of Motor Vehicles, 1982). In today's motorized society virtually everyone needs a driver's license to earn a living and perform normal daily activities.

Though a court may, at the time of entry of a guilty plea, order that a plea shall not be evidential in any civil proceeding, the protections afforded by such a civil reservation are limited to those civil actions where a plaintiff seeks to recover monetary damages. (P-2, P-3, P-20.) The protections do not apply to actions initiated by a governmental agency, such as the Motor Vehicle Commission. State v. Lacey, NJ Super, 123. (App. Div. 2010)

As noted above, though Lombardi's vehicle did not strike the pedestrian in this accident, his actions in following the car in front of him too closely and failing to stop when the car in front of him stopped for the pedestrian who was crossing in the designated crosswalk, resulted in the car in front of Lombardi's vehicle fatally striking the pedestrian. Further, Lombardi did not report the accident but rather left the scene of the accident for approximately an hour before returning.

As a result of this accident, Lombardi had several traffic summonses issued to him, including violations for following too closely, careless driving and leaving the scene of a motor vehicle crash. A Criminal Complaint was issued to Lombardi (2C:11-5.1) for Leaving the Scene of a Fatal Accident. With the assistance of legal counsel, Lombardi plead guilty to the 2nd Degree Criminal Offense of leaving the scene of an accident involving a fatality. (P-3, P-7.)

Counsel for the NJMVC asserts that, based upon Lombardi's actions on October 12, 2017, including his acknowledged leaving the scene of a fatal accident, the scheduled suspension by the Commission of 36 months/1080 days is appropriate. Lombardi requests that no suspension of his driving privileges be imposed.

Lombardi states that the accident occurred almost four years ago and details the negative impact it has already had on his life. He states that has suffered emotionally and financially, and that his suffering has had a negative impact upon his health. He lost his job, could not collect unemployment benefits and after six months had to accept a job

in a different field where he makes less money but is entitled to health insurance. (R-1.) He wants to be "able to move on" and states losing his driving privileges will "put his family at risk." He needs his license to be able to drive to and from work and doctor's appointments. He, as a kidney transplant recipient, is particularly concerned that should he have to take public transportation to work, during this pandemic, it will put his health at risk.

I note that despite whatever impact a term of loss of his driving privileges will have upon Lombardi and his family, it is hugely disproportionate to the impact Lombardi's failure to stop, as the driver ahead of him had done, has caused. A pedestrian, walking in the crosswalk, lost her life and her family lost her. In addition, while the trauma of being a driver involved in an automobile accident would naturally impact Lombardi, it does not excuse his failure to remain at the scene, report the accident and help in any way he could.

While I recognize that Lombardi's driving abstract does not reflect any motor vehicle violations since the accident and while I recognize that having his driving privileges suspended for any period of time will have a negative impact upon Lombardi and perhaps his family, I am not persuaded that imposing "some" suspension of his driving privileges is not appropriate. According, I **CONCLUDE** that Lombardi's driving privileges should be suspended but for a reduced number of months/days.

ORDER

It is hereby **ORDERED** that the scheduled 36 months/1080 days suspension of the driving privileges of Carmen Lombardi be **REDUCED** to an 18 months/540 days suspension.


I hereby **FILE** my initial decision with the **CHIEF ADMINISTRATOR OF THE MOTOR VEHICLE COMMISSION** for consideration.

This recommended decision may be adopted, modified or rejected by the **CHIEF ADMINISTRATOR OF THE MOTOR VEHICLE COMMISSION**, who by law is authorized

to make a final decision in this matter. If the Chief Administrator of the Motor Vehicle Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **CHIEF ADMINISTRATOR OF THE MOTOR VEHICLE COMMISSION, 225 East State Street, PO Box 160, Trenton, New Jersey 08666-0160**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

November 10, 2021
DATE


EVELYN J. MAROSE, ALJ/Ret., on recall

Date Received at Agency:

November 10, 2021

Date Mailed to Parties:

November 10, 2021

EJM/dr

APPENDIX

Witnesses

For NJMVC

Michael Biabloblock, Fort Lee Police Department, Badge #227

For Lombardi

Carmen Lombardi

Exhibits

For NJMVC

- P-1 Arraignment Order, dated June 12, 2018
- P-2 Criminal Action Order, Granting Lombardi Entry Into Pre-Trial Intervention, dated June 18, 2018
- P-3 New Jersey Judiciary Plea Form, wherein Lombardi pled guilty to leaving the scene of a fatal accident
- P-4 Preliminary Law Enforcement Incident Report, dated October 13, 2017
- P-5 Letter from Lombardi, Requesting Hearing
- P-6 Order Preliminary Hearing, dated May 11, 2021, issued by the Honorable Gail M. Cookson, ALJ
- P-7 Complaint -summons, dated October 13, 2017, for the second-degree crime of leaving the scene of an accident
- P-8 Case Summary, dated May 5, 2020
- P-9 Pretrial Intervention Order of Dismissal Under R, 3:28-7(b)(1)
- P-10 Not admitted into evidence
- P-11 Not admitted into evidence
- P-12 Not admitted into evidence
- P-13 Not admitted into evidence
- P-14 Amended Answers to Interrogatories, dated August 3, 2021
- P-15 Abstract of Driver History Record, dated April 12, 2021
- P-16 Fatal Accident Investigation Unit

- P-17 New Jersey Police Crash Investigation Report
- P-18 Arrest Report Fort Lee Police Department
- P-19 Case Report, Office of the County Prosecutor, County of Bergen,
#BCP1700923
- P-20 Notice of Scheduled Suspension, dated March 17, 2021

For Lombardi

- R-1 Letter of Termination of Employment, by Alliance Inspection Management,
Lombardi's employer, dated May 20, 2018
- R-2 Letter from GEICO insurance, dated November 7, 2017, seeking
information about the accident, from its policyholder, Lombardi

DECISION COVER SHEET

This decision

 HAS

 HAS NOT

**BEEN EMAILED TO THE PARTIES.
PLEASE PROCESS ACCORDINGLY**