(Enclosure: Order of Suspension, effective date: 04/20/2016)

STATE OF NEW JERSEY
MOTOR VEHICLE COMMISSION
CASE FILE NUMBER: LXXXX XXXXX 02454
OAL DOCKET NUMBER: MVH 07737-15

IN THE MATTER OF :

MICHAEL D. LATHAM :

FINAL DECISION

The Motor Vehicle Commission (Commission or NJMVC) hereby determines the matter of the proposed suspension of the New Jersey driving privilege of **MICHAEL D. LATHAM**, respondent, for his conviction of a drug/alcohol-related offense in the State of New York. Pursuant to N.J.S.A. 39:5-30, 39:5D-1 to 14 (the Interstate Driver License Compact or Compact), 39:4-50, and N.J.A.C. 13:19-11.1 to 11.2, respondent's New Jersey driving privilege is subject to suspension for a period of ten years (3,650 days), as this is his third alcohol/drug-related conviction. Prior to this final agency determination, I have reviewed and considered the Initial Decision rendered by the Administrative Law Judge (ALJ). No exceptions have been filed. Based upon a de novo review of the record presented, I shall affirm the recommendation of the ALJ. This final decision is written to add a few clarifications and to provide amplification as to the significant support found in the record for the ALJ's findings and conclusions. To the extent that I have not specifically modified a finding or conclusion herein, I have adopted those findings and conclusions of the ALJ and incorporate those by reference in this decision.

In her Initial Decision, the ALJ concluded and recommended that since respondent's undisputed New York conviction for driving while ability impaired due to drugs (NYDWAI-drugs), pursuant to N.Y. Veh. & Traf. Law §1192(4), was his third alcohol/drug-related offense, he is subject to a suspension of his New Jersey driving privilege for a mandatory period of ten years pursuant to N.J.S.A. 39:4-50(a)(3).

The ALJ clearly indicated her evaluation of the testimony and documentary proofs in the record as well as the arguments offered by respondent and concluded that "N.J.S.A. 39:4-50(a) and N.Y. Veh. & Traf. Law §1192(4) (Consol. 2015) are substantially similar regarding driving under the influence of drugs" and further concluded that "respondent's conviction for driving while impaired by drugs is a third offense as defined in N.J.S.A. 39:4-50(a)." Initial Decision at 8.

Based on an independent review of the record, I agree with the ALJ's conclusions. In this final decision, I only note some minor corrections, which serve to clarify the record but which do not affect the ultimate conclusion that respondent's NYDWAI-drugs conviction pursuant to N.Y. Veh. & Traf. Law §1192(4), based on his guilty plea to this statutory provision and its required elements,[1] is substantially similar to New Jersey's unified DUI statute, N.J.S.A. 39:4-50(a), which covers within it both

[1] The NYDWAI-drugs statutory provision, N.Y. Veh. & Traf. Law §1192(4), provides: "Driving while ability impaired by drugs. No person shall operate a motor vehicle while the person's ability to operate such a motor vehicle is impaired by the use of a drug as defined in this chapter." N.Y. Veh. & Traf. Law §114-a, in the same chapter – chapter 71 of the Consolidated Laws – as section 1192, provides: "The term 'drug' when used in this chapter, means and includes any substance listed in section thirty-three hundred six of the public health law." As noted by the ALJ, N.Y. CLS Pub. Health §3306 lists the schedules of controlled substances, which include narcotic (Schedule IV (b)), and hallucinogenic substances (Schedule I (d)), as well as other habit-producing drugs. It is also noted that New York's statutory scheme does not provide for any "lesser-included" offense for a driving-while-drugged offense; rather, the NYDWAI-drugs provision under §1192(4), is the sole driving-while-drugged offense, and is punished as a criminal misdemeanor in New York.

driving under the influence of alcohol as well as under the influence of drugs that cause impairment of one's ability to drive safely.

Statement of the Issues

The ALJ's initial decision correctly indicates the two issues to be determined in this matter: (1) based on the undisputed conviction of "driving while ability impaired by drugs" under N.Y. Veh. & Traf. Law §1192(4), pursuant to the Compact, N.J.S.A. 39:5D-1 to -14, and the governing regulations, N.J.A.C. 13:19-11.1, is the suspension of respondent's New Jersey driver's license appropriate?; and (2) if such suspension is appropriate under the Compact, how many of respondent's prior alcohol and/or drug-related driving convictions are applicable under N.J.S.A. 39:4-50 and the Compact in assessing the statutorily mandated term of suspension?

Analysis of Issue #1

The ALJ properly recognized that the suspension of a New Jersey driver's license is appropriate where an alcohol-related or drug-related driving violation occurred in another state under either of two circumstances: (1) the "conduct in that state constitutes driving under the influence under New Jersey law, *see N.J.S.A. 39:5D-4(a)*;" as well as (2) "the offense the defendant was convicted of in that state is of a substantially similar nature to driving under the influence under New Jersey law, *see N.J.S.A. 39:5D-4(c)*." See N.J. Div. of Motor Veh. v. Ripley, 364 N.J. Super. 343, 346-50 (App. Div. 2003) (in which the court specifically discusses the NYDWAI-alcohol offense and the fact that NYDWAI-alcohol contains the element of impaired driving ability, thus distinguishing it from a statute like the 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 State v. Zeikel, 423 N.J. Super. 34, 46, 47 (App. Div.

2011) (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."). Although set forth by the Ripley court in the context of analyzing the NYDWAI-alcohol offense[2], this analytic framework under the Compact similarly applies with equal force to an incident involving a conviction for NYDWAI-drugs. This is because the Compact covers both "[d]riving a motor vehicle under the influence of intoxicating liquor or a narcotic drug, or under the influence of any other drug to a degree which renders the driver incapable of safely driving a motor vehicle." (emphasis added). N.J.S.A. 39:5D-4(a)(2).

The ALJ in particular found that the N.Y. Veh. & Traf. Law §1192(4) (NYDWAI-drugs) statutory offense under which respondent was admittedly convicted[3] and New Jersey's DUI statute, N.J.S.A. 39:4-50(a), are substantially similar regarding driving under the influence of drugs. I agree with the ALJ's conclusion and offer the following comments as additional support for this determination.

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[2] Notably, a conviction under NYDWAI-alcohol, N.Y. Veh. & Traf. Law §1192(1), is a "traffic infraction", whereas respondent's conviction of NYDWAI-drugs, N.Y. Veh. & Traf. Law §1192(4), is a criminal "misdemeanor" offense, under New York law. See N.Y. Veh. & Traf. Law §1193(1)(a) and (b). Thus, there is an even heightened level of sanction attached to respondent's conviction for NYDWAI-drugs.

[3] Respondent was originally charged under N.Y. Veh. & Traf. Law §1192(3) (Driving while intoxicated) and N.Y. Veh. & Traf. Law §1192(2-a(a)) (Aggravated driving while intoxicated; per se), and the New York "Bill of Particulars" prepared as part of respondent's arrest contained notations which included an alleged breath test blood alcohol content (BAC) result of 0.22%, as well as officer observations of the physical condition of respondent and his driving that evening, field sobriety test results and oral admissions by respondent. (Exhibit P-4). It is specifically recognized, however, that those allegations in the Bill of Particulars were not adjudicated and the respondent was not convicted under those original charges as part of his guilty plea to the misdemeanor NYDWAI-drugs offense under N.Y. Veh. & Traf. Law §1192(4) and two separate traffic infractions, as indicated on the "Certificate of Conviction" from the State of New York, Otego Town Court, Criminal Part (entrance of guilty pleas certified as signed by the New York judge on the applicable "Simplified Information Certificates" (summonses)).

Significantly, as noted above, the Compact itself has a very broad reach in describing the drugged-driving offense that it is meant to cover, by not only referencing a "narcotic drug" but also including "any other drug" to a degree which renders the driver incapable of safely driving a motor vehicle. N.J.S.A. 39:5D-4(a)(2). Additionally, the Compact explicitly calls for a broad construction in applying this particular provision, by stating that "[i]f the laws of a party State do not provide for offenses or violations denominated or described in precisely the words employed in subdivision (a) …, such party State shall construe the denominations and descriptions appearing in subdivision (a) hereof as being applicable to and identifying those offenses or violations of a substantially similar nature and the laws of such party State shall contain such provisions as may be necessary to ensure that full force and effect is given to this article." (emphasis added) N.J.S.A. 39:5D-4(c). Thus, there can be no doubt that the Compact requires the states to ensure an expansive application in covering any drug that may affect a driver's ability to safely operate a car.

Indeed in New York, the court in People v. Davis, 879 N.Y.S.2d 268, 269 (App. Term 2009), leave to appeal denied, 12 N.Y.3d 914, 912 N.E.2d 1076 (N.Y. 2009) held that "erratic operation" of a vehicle provided "probable cause to infer that defendant's ability to operate a motor vehicle was impaired to any extent" as required by VTL §§ 1192(1) and (4); and noted specifically that "the statutory prohibitions with respect to operating a motor vehicle while ability impaired by alcohol . . . and while ability impaired by drugs are identical as to the degree of impairment constituting the offense" (emphasis added)). With a similar focus on the New Jersey Legislature's intent to protect the public's safety on the highway, the New Jersey Supreme Court has instructed that, in considering whether there is a driving under the influence of drugs

offense under New Jersey's unified DUI statute, N.J.S.A. 39:4-50, the critical question is "[c]ompetency to operate a motor vehicle safely" and the "statute does not require that the particular narcotic[, hallucinogen, or habit-producing drug] be identified", State v. Tamburro, 68 N.J. 414, 421, 422 (1975), nor does a certain quantum of drugs need to be established to support a conviction. See State v. Bealor, 187 N.J. 574, 589 (2006).

In light of the above and the ALJ's analysis, I find, as did the ALJ, that the statutory offense set forth in New York's driving under the influence statutory scheme for driving under the influence of drugs, specifically denominated as driving-while-ability-impaired by drugs under N.Y. Veh. & Traf. Law §1192(4), is substantially similar to New Jersey's unified driving under the influence statute, N.J.S.A. 39:4-50. Both legislatures of these party states to the Compact have addressed the aim of the Compact in prohibiting driving when a person's ability to drive safely has been impaired by having used a drug (or drugs) that causes such impairment. It is additionally noted that the test of "substantial similarity" does not require exact equivalency; the Commission is charged with protecting safety on its roads and cannot ignore the danger represented by an offender who takes to the roadways in such an impaired condition.

Respondent in this case attempts to put forth two alternatives as to why his particular conduct in committing the New York offense of NYDWAI-drugs, as to which statute's elements he admittedly plead guilty, should not subject him to NJMVC's proposed administrative suspension action under the Compact. He alternatively suggests that he did not consume a drug that impaired his driving but only plead to that as his New York attorney advised him. Respondent also alternatively argues that there is no proof as to which drug or drugs impaired his ability to drive during that offense in New York. In addressing these alternative arguments, I must first note as these pertain

to considering what the “conduct” of respondent was in committing the New York offense rather than a statutory comparison, as discussed above, the Commission's finding (and ALJ's finding) as to the substantial similarity of the statutes resolves the ultimate issue and thus it is not required to reach this issue as indicated above in the Ripley, supra, 364 N.J. Super. at 346-50, holding.

Nonetheless, even upon examining these arguments made by respondent as to his particular conduct, the analysis does not call for a different result. The “conduct” to which respondent plead in entering his guilty plea, as represented by the elements of the NYDWAI-drugs statute, is sufficient to prove by a preponderance of the evidence, in this administrative Compact suspension action, that respondent is appropriately subject to suspension in accordance with New Jersey's statute and regulations. Respondent plead guilty specifically to having operated a motor vehicle while his ability to operate such motor vehicle was impaired by the use of a drug as listed in the schedules of controlled substances set forth in N.Y. CLS Pub. Health §3306, which include narcotic, hallucinogenic substances, as well as other habit-producing drugs as set forth in the schedules. Given the broad categories contained in New Jersey's DUI statute as construed by New Jersey case law, and in light of the particular standard of proof--preponderance of the evidence-- that applies in this administrative action, it is clear that it is well more likely than not that the drug from which his impairment must be deemed to have been caused, must reasonably be viewed as falling within New Jersey's broad categories as an initial matter, subject only to specific evidence presented by respondent in rebuttal. To allow for another finding as an initial matter (without requiring rebuttal evidence to the contrary) would lead to the absurd result that a bare “guilty plea” to NYDWAI-drugs could be used to defeat any administrative action under the

Compact where the drug (or drugs) used were in fact either narcotics, hallucinogenics, habit-producing drugs, or any combination of these types. Such result cannot be found to be in accord with the party states' intentions in entering the Compact. It is logical and warranted that respondent be allocated the burden of persuasion in the form of rebuttal evidence with respect to this issue, as respondent is clearly in the best position to access such proof if it did exist. That is, if the guilty plea negotiated was made specifically to a particular (as yet unidentified) drug that was listed in New York's controlled substance schedules but would not also be considered as fitting within New Jersey's broad categories set forth in its DUI laws, then respondent would have knowledge to identify explicitly that drug and the ability to present such proof in the form of the plea transcript or other official court document which would establish this.

Most significantly, here, there is a complete lack of evidence presented by respondent in the record to establish that there was some drug under which he was impaired which fell within the controlled substances listed in New York's statute which would not also fall within New Jersey's broadly described statutory categories. Respondent has failed to present any evidence, and there is no support in the record, to establish that he consumed an unidentified drug (or drugs) which impaired his ability to drive safely that is covered under the New York listing of controlled dangerous substances, but which would not also fall within the New Jersey statute's prohibition concerning driving under the influence of intoxicating “narcotic, hallucinogenic or habit-producing drug”. N.J.S.A. 39:4-50(a). Thus, I find that it is established on this record by a preponderance of the evidence that respondent's conduct, as represented by his guilty plea to NYDWAI-drugs, in the absence of rebuttal evidence entered into the record, falls within that proscribed under the Compact and New Jersey's cognate DUI

statute, accordingly subjecting respondent to the applicable administrative suspension term.

I also find that the ALJ appropriately rejected as not credible respondent's testimony that he only plead guilty to having driven while his ability to drive was impaired by a drug (or drugs) on the advice of counsel and had not consumed a drug making his driving ability impaired. I defer to the ALJ on this issue of credibility as she was in the position of hearing respondent's testimony, as well as note that his testimony is in direct conflict with the admission made as represented by the entry of the guilty plea. In sum, I concur with the ALJ's findings and conclusion that respondent, on this record, is correctly subject to administrative suspension action under the Compact and the governing regulations for his undisputed conviction of NYDWAI-drugs.

Analysis of Issue #2

How many of respondent's prior alcohol convictions are applicable under N.J.S.A. 39:4-50, the Compact, and N.J.A.C. 13:19-11.1, in assessing the statutorily mandated term of suspension?

I now turn to the second issue concerning whether respondent must receive the statutorily mandated suspension term of ten years for a third offender, or whether there is any reason that respondent's first two undisputed alcohol-related driving convictions should not serve to enhance the administrative Compact sanction applicable here in conformance with N.J.S.A. 39:4-50 and New Jersey case law. I concur with the ALJ's analysis and conclusion that respondent is properly sanctioned as a third-time offender under the Compact and the governing New Jersey law. The following comments are made to provide additional amplification and clarification.

There is no dispute that respondent has two prior alcohol-related driving convictions in addition to the subject NYDWAI-drugs conviction discussed above. The first of these offenses occurred on September 11, 2009 in Colchester, New York, in which matter respondent entered a guilty plea to N.Y. Veh. & Traf. Law §1192(1), NYDWAI-alcohol (See Certified Abstract of Driver History Record and Exhibit P-2 Certificate of Disposition). The second of these offenses occurred on March 7, 2013, in Garfield, New Jersey, and respondent was convicted under N.J.S.A. 39:4-50, also pursuant to entry of a guilty plea (See Certified Abstract of Driver History Record and Exhibit P-3).

Addressing whether the first conviction in New York, for NYDWAI-alcohol, is properly considered for purposes of enhancing the administrative sanction for the 2014 NYDWAI-drug conviction pursuant to the Compact in this matter, the ALJ concluded that it should be so considered. I concur with this conclusion and provide the following additional support.

First, it is noted that it is well-established by New Jersey case law that N.Y. Veh. & Traf. Law §1192(1) (NYDWAI-alcohol) 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 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; N.J. Motor Vehicle 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 .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").

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 respondent's ability to operate a motor vehicle that is the critical statutory element established by respondent's conviction. Compare, N.J. Div. of Motor Veh. v. Ripley, 364 N.J. Super. 343, 349-50 (App. Div. 2003) (in which the court specifically discusses the NYDWAI-alcohol offense and the fact that NYDWAI-alcohol contains the element of impaired driving ability, thus distinguishing it from a statute like the 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.")

Most significantly here, respondent has failed to meet his affirmative burden to present "clear and convincing evidence" that his conviction under N.Y. Veh. & Traf. Law §1192(1) for that prior 2009 offense was based exclusively on a blood alcohol

concentration of less than 0.08%, as required by the limited exception in N.J.S.A. 39:4-50(a)(3). That very limited exception in the New Jersey statute most specifically will 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). This is plainly not the case for respondent's conviction under the NYDWAI-alcohol statutory provision for that 2009 offense.

It is further noted that the governing New Jersey case law repeatedly recognizes that "observational" evidence is also 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. 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. 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. 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). Moreover, the court in Zeikel, supra, 423 N.J. Super. at 48, confirms that a conviction of New Jersey's DWI 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.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.2d 625 (1979)).

In light of the above and the documents entered in the record concerning that 2009 offense and conviction (Exhibit P-2), it is clear that respondent did not and cannot meet his burden to present clear and convincing evidence that his NYDWAI-alcohol conviction was based exclusively on a BAC of below .08%, thus this conviction is properly considered as the first offense for purposes of determining the applicable suspension term required under the Compact and N.J.S.A. 39:4-50 for his most recent offense.

Addressing respondent's second DUI offense for which he was convicted in 2013 in New Jersey under N.J.S.A. 39:4-50, this second conviction falls directly under the governing New Jersey DUI statute, thus there is no question but that this conviction is properly considered as the second offense for enhancing the suspension term that applies here. Therefore, as did the ALJ, I find that respondent is properly subject to the suspension term mandated for a third-offender, a ten year suspension term.

Respondent contends that the municipal prosecutor's and municipal judge's agreement to sentence him in that municipal court proceeding as only a first-time

offender for this 2013 NJ DUI offense should control the administrative suspension term that can now be imposed for the subject 2014 NYDWAI-drug conviction at issue. In making this argument, respondent notes that a "first offense" three month suspension term was imposed by the court and points to a handwritten notation on the "Request to Approve Plea Agreement" signed by respondent and the prosecutor[4] (See Exhibit P-3). While it is true that the respondent did benefit from receiving first-offender treatment for that 2013 offense, the ALJ properly rejected respondent's argument that this prior sentencing must control the proper consideration for respondent's latest offense. As the ALJ appropriately cited, the controlling law is recounted in Zeikel, supra, 423 N.J. Super. at 44, in which the court instructs that:

> A defendant has no "vested right" in a prior sentence. State v. Nicolai, supra, 287 N.J. Super. at 531-32; see also State v. Jefimowicz, 119 N.J. 152, 162 (1990) (judicial obligation to enforce a legislatively mandated sentence). Thus, defendant had no right to expect that future DWI sentencing courts would be bound by a decision of a prior court of equal authority. The statute, not a prior court ruling, controls the appropriate sentence."
>
> [Id. at 44.]

[4] The ALJ correctly notes that it is not known who made such handwritten notation. The ALJ's recitation of what that notation was inadvertently omitted some words, thus, it is restated in full here: "NY impaired is w/out reading ["therefore" in shorthand symbol] is true impaired and NOT a prior. 0.09% = 3 mos. loss of license." The ALJ correctly rejects this as providing official court proof from the New York court sufficient to meet respondent's clear and convincing evidence burden of proof to establish that that prior NYDWAI-alcohol conviction was based exclusively on a BAC below .08%. Indeed, the documents for that prior New York offense reveal an allegation of refusal to submit to a chemical test, as well as other alleged evidence in the form of officer observations, driving behavior, field sobriety tests and admissions, which would serve to establish driving impairment if the matter had not been resolved by a negotiated guilty plea to the NYDWAI-alcohol offense, from the original charge under N.Y. Veh. & Traf. Law §1192(3) (Driving While Intoxicated, common law). (See Exhibit P-3 and P-2). Notably, the lack of any BAC reading serves to negate any attempt by respondent to meet his burden to prove his conviction was based exclusively on a BAC of below 0.08%, rather than an admission of the statutory element of driving impairment based on the other types of observational/physical evidence of impairment noted.

This is equally applicable in this Compact matter as the statute must control in Compact matters too. Accordingly, this latest subject conviction is appropriately treated as a third offense in light of the undisputed two prior alcohol-related driving convictions discussed.

In sum, because respondent failed to meet his affirmative burden to show by clear and convincing evidence that his prior NYDWAI-alcohol conviction was based exclusively on a BAC below .08, that prior conviction in 2010 as well as his undisputed 2013 conviction for NJ DUI, are both properly considered in determining the required suspension term in this matter. Accordingly, I find that the legislatively mandated suspension term for this third conviction is a ten year suspension of respondent's New Jersey driving privilege.

As noted above, the clarifications/amplifications in this final decision do not affect the ALJ's ultimate conclusion, nor do they alter the period of suspension that is statutorily mandated in these circumstances and was recommended by the ALJ. The ALJ carefully considered the testimony and documentary evidence and reached the legally warranted conclusion. Based on an independent review, the Commission also reaches this same conclusion.

Additionally, while it is not material to the substantive issues in the case as discussed above, I will note that there are many incorrect statements and inaccurate speculations contained in respondent's submitted closing brief pertaining to NJMVC's purported action or inaction with respect to the first two alcohol-related offenses. With respect to the first NYDWAI-alcohol conviction, the report of respondent's conviction for this New York offense came during a certain limited time period in which the NJMVC's computer programming had been modified as to this event's description but in making such description field change, inadvertently the programmed “consequences” in the

form of proposed suspension and surcharge administrative action notices were mistakenly “turned off” and thus not automatically generated as they now are for NYDWAI-alcohol reported convictions. Since the NJMVC receives enormously high volumes of violation/conviction reports from both in-state and out-of-state sources (more than one million convictions for traffic offenses per year), this process is necessarily automated, and hence there is reliance on the computer programming to automatically generate the applicable “scheduled suspension notices”. In actuality, respondent thus skirted having the required suspension notice generated at the time his out-of-state report came through and was entered into the system for that prior 2010 conviction, due to this temporary computer programming error.

With respect to the second conviction and its corresponding court suspension order, respondent is completely mistaken as to NJMVC's authorized role in entering such onto respondent's driver history record. Contrary to respondent's theorized suggestion, NJMVC is not a party to such municipal court (or Law Division) proceedings and sentencing; NJMVC serves merely as a record-keeper in entering whatever the court ordered for the suspension term. NJMVC cannot intervene in such sentencing actions, as respondent would have one believe; instead it is the municipal prosecutor who represents the State in such actions. The court ordered suspension term is reported to NJMVC through the Automated Traffic System (ATS) and is electronically entered without substantive review by NJMVC to discover whether a court may have imposed an incorrect/illegal term. In any event, none of respondent's inaccurate notions offered in his closing brief about what led to respondent fortuitously receiving more lenient sanctions than were warranted for those two earlier convictions has any bearing

on the proper evaluation of the mandatory sanction that applies to this latest conviction, for the reasons noted above.

The Commission takes its responsibilities and obligations for protecting public safety from the threats posed by dangerous repeat DUI offenders very seriously, and that is why it was necessary to issue the corrective notices in this matter after the automated processes and initial clerical review had not produced the correct notice and correct proposed suspension term based on the facts in this case. This unfortunately led to additional procedural steps including having to withdraw the initial notices before manually correcting and issuing the applicable scheduled suspension notice prepared on April 10, 2015, which correctly reflects the statutorily mandated suspension term. In light of the procedural complexity in the circumstances of this matter, in order to give respondent his full due process to present any and all evidence to address this proposed administrative action based on this being a third time offense, as well as raise any legal arguments with respect to any of these issues, the Commission transmitted the matter for a plenary de novo contested case hearing at the Office of Administrative Law. As this matter proceeded as a de novo hearing, there is no merit to respondent's suggestion that the Commission limited the issues he could raise or the facts he could present in support of his arguments. Respondent's portrayal in his brief of the Commission's actions is well off the mark and wholly unsupported. This matter stands on the undisputed facts contained in this record; there can be no reasonable assertion of prejudice to respondent in addressing any of the issues that are material to resolution of this proposed Compact administrative suspension action.

ORDER

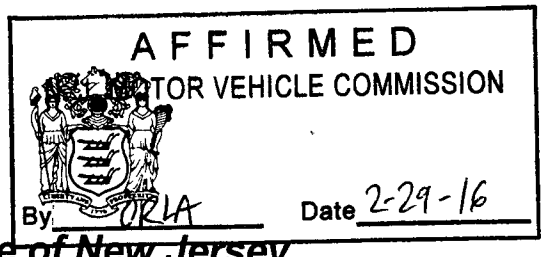
It is, therefore, on this 18th day of February, 2016, **ORDERED** that the New Jersey driving privilege of **MICHAEL D. LATHAM** be suspended for a period of 10 years; however, a credit for having served 71 days shall be applied (from 02/03/2015 to 04/13/2015 as indicated in the "Hearing Request Granted" letter dated April 10, 2015) such that the **suspension term will be for the remaining balance of 3,579 days**; and it is further

ORDERED that **MICHAEL D. LATHAM** attend and satisfactorily complete an approved alcohol education or rehabilitation program.

NOTE: The **effective date** of this suspension is set forth in the "Order of Suspension" which is enclosed.

Raymond P. Martinez
Chairman and Chief Administrator

Encl.
Cc: Robert D. Kobin, Esq. (w/encl.)



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT NO. MVH 11965-2015
AGENCY DKT NO. Mxxxx xxxxx 01782

NEW JERSEY MOTOR VEHICLE COMMISSION,
Petitioner,
v.
KEVIN S. McINTOSH,
Respondent.

Scharkner Michaud, Driver Improvement Analyst 2, for petitioner, New Jersey Motor Vehicle Commission, pursuant to N.J.A.C. 1.1-5 4(a)(2)

Kevin S. McIntosh, respondent, pro se

Record Closed: October 16, 2015 Decided: January 13, 2016

BEFORE **ELIA A. PELIOS**, ALJ

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter arises out of a proposed suspension of respondent Kevin McIntosh's driving privileges for 730 days pursuant to N.J.S.A. 39:3-37 and N.J.S.A. 39:5-30 for intentional misstatements of fact respondent made on an application to register his motor

vehicle By notice dated October 29, 2014, petitioner, Motor Vehicle Commission (MVC), notified respondent of the proposed suspension, and thereafter, respondent requested a hearing The Commission transmitted the matter to the Office of Administrative Law (OAL), where, on July 24, 2015, it was filed for determination as a contested case

A hearing was held and concluded on October 16, 2015, and the record closed on that date An order was entered to extend the time in which to file the initial decision in this matter.

FACTUAL DISCUSSION

Scharkner Michaud, Driver Improvement Analyst 2, testified on behalf of the petitioning agency. In July of 2014, respondent applied to renew the registration on his personal vehicle (P-2). He provided insurance information for a policy with Personal Service Insurance Company (PSIC) When the petitioning agency sought to verify the coverage, it was discovered that no such policy number existed or was in effect, and in fact, not enough digits were supplied. The agency noticed respondent of the discrepancy on October 29, 2014, through a notice of scheduled suspension (P-5) Respondent appealed, and a conference was held on February 10, 2015.

As a result of that conference, it was determined that at the time of application, respondent's license was suspended (P-1), and he could not get insurance in his own name. He therefore sought to have the vehicle insured under his fiancée's policy A review of her history revealed a PSIC policy in her name, which had a similar, but not identical number to the policy number provided by respondent. He had left off the last number. Respondent's vehicle had been insured under this policy, but the policy had been cancelled for non-payment on May 14, 2014, prior to the application. Respondent's fiancée obtained a new policy effective September 25, 2014 (P-4), but respondent's car was removed from that policy on September 26, 2014 Respondent has since had his driving privileges reinstated and has obtained insurance for the vehicle in his own name with Progressive Direct effective February 8, 2015 (P-3) Respondent's registration privileges were restored

on November 18, 2014, and his driving privileges were restored on November 20, 2014 (P-1).

Respondent testified on his own behalf. He acknowledges filing the application as presented, but states that he had no intent to make any misrepresentation He states that it was an accident to leave off the last number of the policy number, and believed that the policy was in effect at the time. He had no indication that the policy had been cancelled until he received notice from the petitioning agency, at which point he fixed the mistake. He would give money to his fiancée for insurance and did not know that her policy had been cancelled.

When the testimony of witnesses is in disagreement, it is the obligation and responsibility of the trier of fact to weigh the credibility of the witnesses in order to make factual findings. Credibility is the value that a fact finder gives to the testimony of a witness. The word contemplates an overall assessment of the story of a witness in light of its rationality, internal consistency, and manner in which it "hangs together" with other evidence Carbo v United States, 314 F.2d 718 (9th Cir. 1963). The term has been defined as testimony, which must proceed from the mouth of the credible witness and must be such as our common experience, knowledge, and common observation can accept as probable under the circumstances State v Taylor, 38 N J Super 6, 24 (App. Div. 1955); see also, Gilson v Gilson, 116 N.J. Eq 556, 560 (E & A. 1934) A fact-finder is expected to base decisions on credibility on his or her common sense, intuition or experience. Barnes v United States, 412 U.S 837 (1973). Credibility does not depend on the number of witnesses, and the finder of fact is not bound to believe the testimony of any witness In re Perrone, 5 N J 514 (1950)

Considering the testimonial and documentary evidence submitted in this matter, respondent's testimony simply does not "hang together" In order to accept respondent's testimony as fact, one would have to accept the unhappy coincidence of not one, but two mistakes the mistake in transcribing the policy number and in not knowing that the policy was no longer in effect This is simply not believable given the totality of the evidence,

and is further undercut by respondent's testimony that he did not learn of the issue until he received the notice of scheduled suspension, dated October 29, 2014 (P-5), even though his fiancée obtained new insurance, albeit briefly, on his vehicle over one month earlier on September 25, 2014 (P-4)

Based on the foregoing, I **FIND** that respondent intentionally misstated on his application to renew his vehicle registration that the vehicle had insurance coverage as described therein (P-2)

LEGAL ANALYSIS AND CONCLUSIONS

A person who offers an "intentional misstatement of a material fact in . . an application for registration of a motor vehicle . . . shall be subject to a fine of not less than $200 or more than $500, or imprisonment for not more than six months or both . . ." N.J.S.A. 39 3-37 The Motor Vehicle Commission's "director shall, upon proper evidence not limited to a conviction, revoke the registration of the motor vehicle or driver's license of a person who violates this section for a period of not less than six months or more than two years." Ibid.

I **CONCLUDE** that on the date as set forth herein, respondent offered a "misstatement of material fact," on an application for a motor vehicle registration, in violation of N J.S.A 39 3-37 Respondent specifically and affirmatively provided incorrect insurance information The MVC ". shall, upon proper evidence not limited to a conviction, revoke the . . driver's license of a person who violates this section for a period of not less than six months or more than two years." Ibid.

Thus, the only remaining issue is the appropriateness of the penalty proposed by petitioner The purpose of suspending a motorist's driving privileges is not necessarily punitive, but to ensure the public safety and the safety of other motorists Atkinson v Parsekian, 37 N J. 143, 155 (1962). The function of the MVC is "to impose suspensions for the purpose of reforming the particular motorist and not for the purpose of frightening and

deterring others, even though that may be an incidental result" Cresse v Parsekian, 81 N J Super 536, 549 (App Div. 1963).

The respondent has the burden to establish good cause for a deviation from the statutory penalty The essence of good cause is the "ability to afford relief in exceptional situations." Hovland v. Director, Division of Taxation, 204 N J Super. 595, 600 (App. Div. 1985).

Respondent clearly made an intentional misstatement on his application in order to register his vehicle. (P-2) The MVC considers certain factors to calculate an appropriate period of suspension, including "the person's driving record, prior warnings or driver improvement program attendance, maturity and any other aggravating or mitigating factor" N J A C. 13 19-10.2(b).

Here, respondent has an extremely lengthy negative driving record, including twenty orders of suspension.

Considering the foregoing, I **CONCLUDE** that a one-year suspension is an appropriate and reasonable suspension for respondent's misstatement on his application, rather than the maximum two-year suspension allowable under N J S A. 39 3-37 as proposed by the petitioning agency.

ORDER

Accordingly, I **CONCLUDE** that respondent's driver's license should be suspended for one year, pursuant to N.J.S.A. 39:3-37 and it is so **ORDERED**

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.

January 13, 2016
DATE

ELIA A. PELIOS, ALJ

Date Received at Agency: January 14, 2016

Date Mailed to Parties: 1/19/16

nd

WITNESSES

For Petitioner:

Scharkner Michaud

For Respondent:

Kevin McIntosh

EXHIBITS

For Petitioner:

P-1 Certified Abstract

P-2 NJ Vehicle Registration Application

P-3 Progressive Direct Verification of Insurance

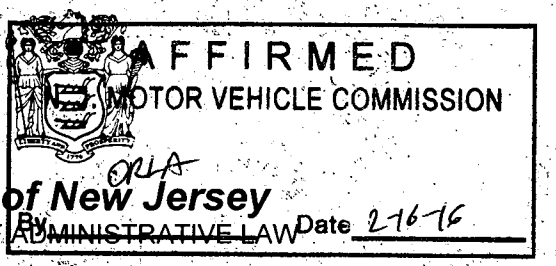
P-4 Temporary NJ Insurance Card

P-5 Scheduled Suspension Notice

P-6 Pre-Hearing Conference Report

For Respondent:

None



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. MVH 13949-15

AGENCY DKT. NO. PXXXX XXXXX 51732

NEW JERSEY MOTOR VEHICLE COMMISSION,

Petitioner,

v.

SHAKEMA T. PANKEY,

Respondent.

Nonee Lee Wagner, Deputy Attorney General, for petitioner (John J. Hoffman, Acting Attorney General of New Jersey, attorney)

Gregory A. Busch, Esq., for respondent (Busch & Busch, attorneys)

Record Closed: November 20, 2015 Decided: December 31, 2015

BEFORE **LESLIE Z. CELENTANO**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter arises out of a proposed suspension of respondent Shakema T. Pankey's driving privileges for 730 days pursuant to N.J.S.A. 39:3-37 and N.J.S.A. 39:5-30 for intentional misstatements of fact respondent made on an application to secure a driver's license. By notice dated April 7, 2015, petitioner, Motor Vehicle Commission, notified respondent of the proposed suspension and thereafter

respondent requested a hearing. The Commission transmitted the matter to the Office of Administrative Law (OAL), where, on August 17, 2015, it was filed for determination as a contested case.

A hearing was held and concluded on October 15, 2015. The parties filed closing summations and copies of all exhibits, and thereafter the record closed.

FACTS

Shakema T. Pankey and Shekema T. Smedley are the same person. Shekema Smedley however held a New Jersey driver's license that was suspended for a total for twenty years, and during that period of suspension, Shakema Pankey obtained driving privileges.

Respondent had her Smedley driving privileges suspended between April 18, 1994 and June 30, 1994, again between March 7, 1995, and March 23, 1995, and thereafter for nearly twenty years between May 26, 1995, and June 4, 2015. (P-1.) On September 27, 2008, respondent Smedley was issued an order of suspension for operating a vehicle during a suspension year. (P-1.)

On January 17, 2009, respondent completed an application for a driver's license in the name of Pankey. (P-5.) Another order for suspension for operating a vehicle during a suspension period was issued to respondent under the name of Smedley on April 4, 2009. (P-1.) On September 26, 2009, an order for non-payment of insurance surcharge was issued to respondent under the name of Smedley. Similarly, orders were issued for the non-payment of insurance surcharge to respondent (as Smedley) on July 25, 2010, and July 24, 2011.

On November 11, 2009, respondent applied for an examination permit in the name of Pankey. (P-3.) As part of her proof of identity she produced a Pennsylvania driver's license. The general certification at the end of the application reads as follow:

> A person who applies for a driver's license during suspension or revocation or gives a fictitious name, address or misstatement of fact, is subject, upon conviction to a fine of not more than $500 and/or imprisonment at the discretion of the court. Application is also subject to suspension of driving privileges for a period of not more than two years. Authority 39:3-34 and 39:3-37.
>
> [P-3.]

On that date, respondent also applied for an identification card in the name of Pankey. (P-4.) On her application she indicated that her driving privileges were not suspended in any state. (P-4.) The application also contained the certification set forth above.

Respondent's driving abstract reveals that on July 25, 2010, and July 24, 2011, orders were again issued for suspension for the non-payment of the insurance surcharge under the Smedley license. Thereafter, on October 22, 2013, application for a new license under the Pankey name was made. Once again respondent did not note that her driving privileges were then suspended, and once again, the same certification is reflected on the application.

On April 6, 2015, respondent was issued a scheduled suspension notice for a two-year suspension of her driving privileges under the name of Smedley for having made a misstatement on her application. Documentation was thereafter submitted to petitioner at a meeting on May 4, 2015, confirming the date of respondent's marriage to Eric Smedley and the date they were divorced, with no change of name back to Pankey reflected. Thereafter, a consent order dated May 15, 2015, was presented to petitioner authorizing respondent to resume the use of her maiden name of Pankey as of that date.

At the hearing, Investigator John Williamson (Investigator or Williamson) testified on behalf of the MVC. Williamson testified that he performs security fraud investigations for the MVC after having served as a State Trooper for over twenty-five years.

In 2011, the MVH wanted to ensure the integrity of its licensing system. It commissioned Safran Morpho Trust, U.S.A. to "scrub" the MVC's computer system. They ran all the photos in the MVH computer system through an algorithm that compared photos and identified potential matches. Once the system indicated a potential match, a live investigator would confirm the two photos were actually the same person. The MVC would then conduct an investigation.

Investigator Williamson explained that when an individual gets a driver's license, the applicant submits "six points" of identification, and is then photographed. The photograph is then entered into a computer system. He identified two photos that appeared to be the same individual, associated with two different licenses issued to two different individuals, Shakema T. Pankey and Shekema T. Smedley. On January 17, 2009, respondent appeared at the MVC office in Newark, and applied for an ID card in the name of Shakema T. Pankey.

TESTIMONY

John Williamson

Investigator Williamson explained that the facial recognition software makes an algorithm of the face and the computer identifies matches and then a human checks them. He indicated that respondent has a distinctive mark on her neck where there are three moles. From the pictures it was apparent that this was the same person although the names were different. One picture was associated with the name Shekema Smedley, and the other with Shakema Pankey. Both pictures were associated with the same date of birth but the records had never been linked. The license under the name Smedley was suspended on May 26, 1995, and restored on May 28, 2014.

Investigator Williamson testified that on October 24, 2013, an investigation began which revealed that Ms. Smedley had appeared, applied for, and received an identification card on January 17, 2009 (which an individual was permitted to use even if not eligible for a license). On November 10, 2009, respondent received a permit

under the name of Pankey and a license under the same name, with no reference on the application paperwork to a prior NJ driver's license. The license under the name Pankey was renewed on October 22, 2013. Investigator Williamson testified that because the statute of limitations is five years, they could not send this matter to the prosecutor, but rather sent it for administrative action instead.

After applying on January 17, 2009, for the ID card, respondent's license was suspended the following day, January 18, 2009, for non-payment of an insurance surcharge. There are a number of other entries in 2009 including April 4, 2009, for operating during a period of suspension, and July 26, 2009, for non-payment of an insurance surcharge which resulted in another suspension. When respondent obtained her ID card in January 2009, she never indicated that her license was suspended under a different name. She presented a Pennsylvania driver's license at the time, and so she did not have to take the test and was issued a New Jersey license. Investigator Williamson testified that respondent would have had to clear up all the issues under the Smedely name to get rid of the suspensions, and instead applied under the Pankey name and provided documentation.

He also testified that while respondent was divorced from Mr. Smedely in the 1990's, she did not change her name back to Pankey until May 15, 2015, well after she had been notified of all the violations.

Shakema T. Pankey

Ms. Pankey testified that her first name is spelled Shakema and that there is an error on her birth certificate that her mother never had corrected. She testified that she lived in NJ when she first obtained her drivers' license and that in 1991 she married Mr. Smedley, who she divorced in 1994. She testified she only used the Smedely name when she was married and after she was divorced, resumed using the name Pankey.

Ms. Pankey testified that she left NJ for Pennsylvania approximately twelve or thirteen years ago and lived there for approximately eight years before moving back to

NJ. Her son was born on November 18, 1999. She had his birth certificate re-issued in June of 2015 and his name is Isaah Pankey, and her name appears on his birth certificate as Shakema T. Pankey.

In January 2009 she obtained an ID card and license under the name of Pankey and testified that she uses that name on her tax returns, her lease, and at all times. She is a cosmetology educator. On January 19, 2009, she took the cosmetology exam two days after obtaining her ID in the name of Smedely. She had gone to motor vehicles to get an ID in her married name because she did not have her divorce papers then and someone at the cosmetology board instructed that she needed an ID in the name of Smedley; and that if she later produced her divorce papers indicating she could use Pankey, her license could be changed. She stated that Smedley was not her name anymore and that she never used the ID card for anything else other than to take the exam.

She testified that she first learned that license was suspended when she received mail stating that she had not proven her identity. She stated that she had not used the Smedley name in years. She also agreed that the Motor Vehicle Abstract reflects several tickets in 2009 for operating a vehicle while suspended, but she has no recollection of having received any tickets in 2009. She testified that her Pankey license from 2009 has been renewed and she had no idea her license under the name Smedley had been suspended.

Respondent went to the MVC in January 2015 to see what the letter was about that she had received. She then paid approximately $2,000 for tickets and warrants.

Respondent agreed that she relinquished her Pennsylvania license when she returned to New Jersey after living in Whitehall, Pennsylvania for approximately eight years. She indicated she had to get the ID card to get the cosmetology exam because she had used the other name previously and they would not let her take the exam unless she had proof of her divorce showing that her name had been Smedley. She stated she did not get the ID from Pennsylvania where her license was still valid

because she had no time to do so as she was taking the test two days later. She also had no time to get a copy of her divorce decree.

Respondent testified that she never got any of the suspension notices and had no idea that she was suspended for parking violations before going to Pennsylvania.

John Williamson (on rebuttal)

Investigator Williamson testified that his files indicate notices were sent to respondent in Whitehall, Pennsylvania and that the automated tickets were sent there as well. Following the October 9, 2002, violation of operating while suspended, a notice was sent to respondent at 725 Woodberry Lane, Whitehall, Pennsylvania, which was the address she used. Moreover, when her license was restored after she had paid all the outstanding tickets, one of the tickets she paid was one that had been sent to the Whitehall, Pennsylvania address.

DISCUSSION AND CONCLUSIONS

A person who offers an "intentional misstatement of a material fact in . . . an application for a driver's license . . . shall be subject to a fine of not less than $200 or more than $500, or imprisonment for not more than six months or both . . . ." N.J.S.A. 39:3-37. The Motor Vehicle Commission "director shall, upon proper evidence not limited to a conviction, revoke the registration of the motor vehicle or driver's license of a person who violates this section for a period of not less than six months or more than two years." Ibid.

I **CONCLUDE** that on multiple dates as set forth herein, petitioner offered a "misstatement of material fact," on multiple applications, in violation of N.J.S.A. 39:3-37, and used her maiden name, which she was not authorized to resume until May 15, 2015, pursuant to a Consent Order entered by the Court on that date. Respondent specifically and affirmatively stated on multiple applications that she did not have a suspended license. The MVC " . . . shall, upon proper evidence not limited to a

conviction, revoke the . . . driver's license of a person who violates this section for a period of not less than six months or more than two years." Ibid.

Thus, the only remaining issue is the appropriateness of the penalty proposed by petitioner. The purpose of suspending a motorist's driving privileges is not necessarily punitive, but to ensure the public safety and the safety of other motorists. Atkinson v. Parsekian, 37 N.J. 143, 155 (1962). The function of the MVC is "to impose suspensions for the purpose of reforming the particular motorist and not for the purpose of frightening and deterring others, even though that may be an incidental result." Cresse v. Parsekian, 81 N.J. Super. 536, 549 (App. Div. 1963).

The respondent has the burden to establish good cause for a deviation from the statutory penalty. The essence of good cause is the "ability to afford relief in exceptional situations." Hovland v. Director, Division of Taxation, 204 N.J. Super. 595, 600 (App. Div. 1985).

Respondent clearly made multiple, intentional misstatements on multiple applications in order to obtain a driver's license, because her previous driver's license under Smedley had been suspended multiple times. (P-1.) Undoubtedly, respondent obtained the driver's license in the name of Pankey to enable her to drive during the multi-year suspension. Respondent would have been given an additional six-month suspension for each instance he was caught driving during that period of suspension. N.J.A.C. 13:19-10.8(a)(1). Moreover, the MVC can still seek an additional six-month suspension for each instance that respondent drove during the suspension. N.J.A.C. 13:19-10.8(a)(2). The MVC considers certain factors to calculate an appropriate period of suspension, including "the person's driving record, prior warnings or driver improvement program attendance, maturity and any other aggravating or mitigating factor." N.J.A.C. 13:19-10.2(b).

Here, respondent has a lengthy negative driving record, including two suspensions prior to the most recent twenty-year suspension.

In any event, I **CONCLUDE** that a two-year suspension is a substantial and lengthy penalty. The MVC seeks to impose the maximum suspension pursuant to N.J.S.A. 39:3-37, due to the multiple misstatements on multiple documents. I **CONCLUDE** instead to impose the minimum penalty of six months. See N.J.S.A. 39:3-37.

ORDER

Accordingly, I **CONCLUDE** that respondent's driver's license should be suspended for six months, pursuant to N.J.S.A. 39:3-37 and it is so **ORDERED**.

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, P.O. 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.

December 31, 2015
DATE

LESLIE Z. CELENTANO, ALJ

Date Received at Agency: 12-31-15

Date Mailed to Parties: JAN 6 - 2016

dr

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

APPENDIX

Witnesses

For Petitioner:

John Williamson

For Respondent:

Shakema T. Pankey

Exhibits

For Petitioner:

P-1 Certified Abstract

P-2 Copy of NJ Motor Vehicle Transaction File Record for an Examination Permit on November 10, 2009

P-3 Copy of NJ Motor Vehicle Transaction File Record For an Identification Card

P-4 Copy of NJ Motor Vehicle Transaction File Record for a Driver's License for Shakema T. Pankey

P-5 Copy of NJ Motor Vehicle Transaction File Record for a driver's license for Shekema Smedley

P-6 Copy of NJ Motor Vehicle Transaction File for application for a driver's license for Shekema Smedley

P-7 Copy of image printout From Safran Morpho Trust U.S.A. created on June 8, 2015

P-8 Copy of NJMVC Image Retrieval Details dated June 8, 2015

P-9 Copy of Superior Court of NJ Certificate of Divorce dated January 23, 2015

P-10 Copy of NJ Superior Court Consent Order dated May 15, 2015

P-11 Copy of Motor Vehicle Services Multiple Name Search Printout, NJ Digital Driver's License issued October 22, 2013, Social Security case for Shakema Tawana Pankey, cosmetology and hairstyling license, and PSE&G

P-12 Copy of NJ State Department of Health Certificate of Live Birth Issue January 23, 2015

P-13 Copy of NJ State Department of Health Certificate of Marriage Issued January 23, 2015

P-14 Copy of NJ Motor Vehicle Commission License Review Questionnaire dated January 23, 2015

P-15 Copy of NJ Motor Vehicle Commission Notice to Attend dated May 4, 2015

P-16 Copy of Hearing Request Letter dated April 20, 2015

P-17 Copy of Schedule Suspension Notice dated April 7, 2015

P-18 Page for NJ Automated Traffic System General Inquiry Indicating Violations sent to Pankey address in Whitehall, PA

For Respondent:

R-1 Certificate of Birth

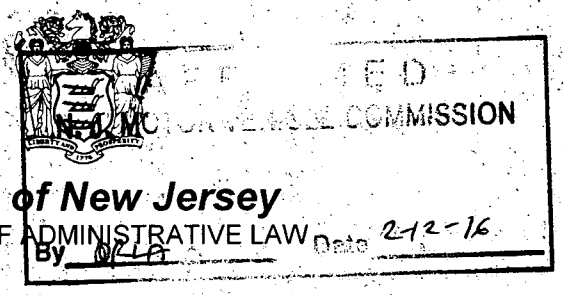
State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

33 Washington Street
Newark, NJ 07102
(973) 648-6008

A copy of the administrative law judge's decision is enclosed.

This decision was mailed to the parties on JAN 6 - 2016



INITIAL DECISION

OAL DKT. NO. MVH 17034-14

AGENCY DKT. NO. BXXXX XXXXX

04652

MOTOR VEHICLE COMMISION,

Petitioner,

v.

RICHARD N. BAILEY, JR.,

Respondent.

MVC, proceeded without representation pursuant to N.J.A.C. 1:1-5.6 and relies upon the documents filed.

Raymond L. Armour, Esq. for respondent (Raymond Armour, Attorney at Law, attorneys)

Record Closed: December 28, 2015 Decided: December 28, 2015

BEFORE **LELAND S. MCGEE**, ALJ:

This is an appeal by Richard N. Bailey, Jr. ("Respondent") challenging a proposed indefinite suspension of his commercial driving privileges pursuant to N.J.S.A. 39:5-30 as a result of a determination that he has a disqualifying criminal arrest and/or conviction record pursuant to N.J.A.C. 13:21-14.5(a) and (c). The issue to be decided in this case is whether Respondent's driving privileges should be indefinitely suspended.

PROCEDURAL HISTORY

On April 11, 2014, the Motor Vehicle Commission (MVC or Petitioner) sent a Notice to Respondent advising him of a scheduled suspension effective May 10, 2014, for an indefinite term. On May 6, 2014, Respondent formally appealed the scheduled suspension. On May 14, 2014, MVC issued Supplemental Specifications. The matter was transmitted to the Office of Administrative Law ("OAL") as a contested case, pursuant to the provisions of N.J.S.A. 52:14B-1 through -15 and N.J.S.A. 52:14F-1 through -13, and was filed with the OAL on December 16, 2014. A hearing was scheduled for February 6, 2015. It was adjourned at the request of Respondent in order to give the newly retained attorney an opportunity to review the file. Another hearing was scheduled for June 24, 2015. It was adjourned at the request of Respondent in order to allow time for settlement discussions with Petitioner. On December 28, 2015, a hearing was held by the undersigned, and the record closed

FINDING OF FACTS

I **FIND** the following undisputed underlying **FACTS** of this case:

Respondent is fifty-years-old and resides in East Orange, New Jersey. He has been a New Jersey Transit Bus Driver for over seventeen years and has held a CDL license for twenty years. He is the father of two children and driving has been his sole source of income.

On March 24, 2014, Respondent completed his tour at approximately 4:58 p.m. at the Newark Penn Station bus terminal. He entered the terminal in order to use the rest room and greeted Ms. Katherine James, an employee of one of the coffee shops in the train station. Respondent was familiar with Ms. James because he has spoken with her several times during the prior year and they had become friendly. Respondent testified that he merely "hugged" her when he greeted her.

Respondent testified that shortly after he arrived home, he was arrested. He was charged with. Count 1, Criminal Sexual contact pursuant to N.J.S.A. 2C:14-3B, and Count 2, Criminal Restraint pursuant to N.J.S.A. 2C:13-2B, both 4th degree offenses. Ms. James was the alleged victim. (P-9)

On October 6, 2014, Respondent entered a guilty plea to an amended Count 1 which was reduced to a Petty Disorderly Person's offense pursuant to N.J.S.A. 2C:33-4B. Count 2 was dismissed. (R-2) Respondent was placed on probation for a period of six (6) months. Ibid. In accepting this plea, the Honorable Verna G. Leath, JSC, determined that the mitigating factors in this case were:

1. Respondent's conduct neither caused nor threatened serious harm.
2. Respondent's conduct was the result of circumstances unlikely to recur.
3. The character and attitude of Respondent indicated that he is unlikely to commit another offense.
4. Respondent is particularly likely to respond affirmatively to probationary treatment.
5. The imprisonment of Respondent would entail excessive hardship to him and his dependents.

Respondent was required to comply with an extensive list of Standard Conditions of Adult Probation. (R-3) On March 31, 2015, Respondent's case was discharged because he had satisfied all of the requirements of his probation. This was one (1) month prior to the end of his six-month probationary period.

Respondent offered letters in support of his character from Dr. Robert Daniel Collin, Exhibit R-5; Tanya R. Walker, Office of Wayne Smith, Mayor, Township of Irvington, Exhibit (R-6); and Michelle Roberts, (Exhibit R-7).

It is the duty of the trier of fact to weigh each witness's credibility and make a factual finding. Credibility is the value a fact-finder assigns to the testimony of a witness, and it incorporates the overall assessment of the witness's story in light of its

rationality, consistency, and how it comports with other evidence. Carbo v. United States, 314 F.2d 718 (9th Cir., 1963); see In re Polk, 90 N.J. 550 (1982). Credibility findings "are often influenced by matters such as observations of the character and demeanor of witnesses and common human experience that are not transmitted by the record." State v. Locurto, 157 N.J. 463 (1999). A fact-finder is expected to base decisions on credibility on his or her common sense, intuition or experience. Barnes v. United States, 412 U.S. 837, 93 S. Ct. 2357, 37 L. Ed. 380 (1973).

The finder of fact is not bound to believe the testimony of any witness, and credibility does not automatically rest astride the party with more witnesses. In re Perrone, 5 N.J. 514 (1950). Testimony may be disbelieved, but may not be disregarded at an administrative proceeding. Middletown Twp. v. Murdoch, 73 N.J. Super. 511 (App. Div. 1962). For example, a respondent failed to prove by a preponderance of the credible evidence that a cottage training technician had left a client unattended and was therefore in neglect of her duties. Chin v. Woodbine Dev. Ctr., 96 N.J.A.R.2d (CSV) 457.

I **FIND** that Respondent was a credible witness. Further, Petitioner did not produce any witnesses in support of its decision or to refute Respondent's testimony.

LEGAL ANALYSIS

N.J.S.A. 39:5-30 provides that the driving privileges of an individual may be suspended when it is in the best interest of public safety. The imposition of a suspension rests on a determination "that the highway would be a safer place for the public if the violator were removed as a driver for some period of time." Atkinson v. Parsekian, 37 N.J. 143, 155 (1962). "The primary object of the statute is to enforce the safety on the highway and not to impose criminal punishment to vindicate public justice." Id.

N.J.A.C. 13:21-14.5(a) states:

> Applicants for passenger endorsements shall submit an application as prescribed. Applicants shall be at least 21 years of age, have a minimum of three years driving experience, be of good character and physically fit and possess a valid New Jersey driver license. Fingerprinting will be required.

N.J.A.C. 13:21-14.5(c)12 states:

> The Chief Administrator of the Motor Vehicle Commission may not issue a passenger endorsement, or may revoke or suspend the passenger endorsement of any person when it is determined that the applicant or holder of such passenger endorsement has:

12. A criminal record that is disqualifying. The phrase "crime or other offense" as used hereinafter shall include crimes, disorderly persons offenses or petty disorderly persons offenses as defined in the "New Jersey Code of Criminal Justice" and any offenses defined by any other statute of this State. A driver has a disqualifying record if:

> i. He or she has been convicted of, or forfeited bond or collateral upon, any of the following:
>
> (1) An offense involving the manufacture, transportation, possession, sale or habitual use of a "controlled dangerous substance" as defined in the "New Jersey Controlled Substance Act";
>
> (2) A crime or other offense involving deviate or illicit social behavior such as rape, incest, sodomy or carnal abuse;
>
> (3) A crime or other offense involving the use of force or the threat of force to or upon a person or property, such as armed robbery, assault and arson;
>
> (4) Any crime or other offense indicative of bad moral character; or
>
> (5) He or she fails to notify the Motor Vehicle Commission that he or she has been arrested for, charged with, indicted for, convicted of, or forfeited bond or collateral upon any crime or other offense within 14 days after the date of such event.

In the present case, Respondent entered a guilty plea for a Petty Disorderly Persons offense. There is no evidence in the record that the underlying incident was

anything more than a misunderstanding of Respondent's intentions. Certainly Respondent has paid a very high price for such a "misunderstanding," however, Respondent was a credible witness. The undersigned is persuaded that the events, as recounted by Respondent under oath, were true. Respondent speculated as to the motivation of the alleged victim for bringing these charges, however, there is no evidence in the record to corroborate such hearsay speculation. As such, it will not be considered in this determination. Of greater relevance are the mitigating factors that Judge Leath considered – and which the undersigned believes are true – in accepting Respondent's plea, as well as the loss of income that Respondent has already suffered.

CONCLUSION AND ORDER

Based on the findings of fact and legal authority, I **CONCLUDE** that Respondent's New Jersey passenger endorsement should not be suspended for an indefinite period of time. Based upon the Petty Disorderly Persons offense that he pled guilty to, the enumerated mitigating factors, the credibility of Respondent's testimony, and the fact that Respondent has been deprived of his livelihood since March 25, 2014, I **CONCLUDE** that the period of suspension that Respondent has already served, is sufficient in this case. Therefore, I hereby **ORDER** Respondent's New Jersey Passenger Endorsement be immediately restored.

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.

December 28, 2015
DATE

LELAND S. McGEE, ALJ

Date Received at Agency: December 28, 2015

Date Mailed to Parties: January 4, 2016
lr

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

WITNESSES

For Petitioner:

None

For Respondent:

Richard N. Bailey

EXHIBITS

For Petitioner:

P-1 Certified Abstract
P-2 Scheduled Suspension Notice dated 4/11/14
P-3 Hearing request dated 5/6/14
P-4 New Jersey State Police Arrest Notification dated 3/24/14
P-5 NJMVC Supplemental Specifications letter dated 5/14/14
P-6 NJMVC Passenger Endorsement Warning Notice dated 7/14/14
P-7 Mitigating Circumstances including Evidence of Rehabilitation
P-8 NJ Automated Complaint System Defendant Detail Inquiry Complaint # W-2014-005409 dated 7/14/14
P-9 New Jersey Promis/Gavel Event Detail Case# 14001865 dated 7/14/14
P-10 New Jersey Promis/Gavel Statewide Defendant Name List dated 9/17/14
P-11 New Jersey Promis/Gavel Statewide Defendant Description dated 9/17/14
P-12 New Jersey Promis/Gavel Statewide Defn/Case List dated 9/17/14
P-13 New Jersey Promis/Gavel Defendant Detail dated 9/17/14
P-14 New Jersey Promis/Gavel Charging Document List dated 9/17/14
P-15 New Jersey Promis/Gavel Indictment Detail dated 9/17/14
P-16 New Jersey Promis/Gavel Charge/Disposition dated 9/17/14
P-17 New Jersey Promis/Gavel Scheduled Event dated 9/17/14

P-18 ATS/ACS Code Tables

P-19 Conference Report dated 7/14/14

For Respondent:

R-1 Complaint – Warrant

R-2 Judgment of Conviction

R-3 Standard Conditions of Adult Probation

R-4 Letter from Essex Vicinage Probation Services

R-5 Letter from Dr. Robert Daniel Collin

R-6 Letter from the Office of the Mayor

R-7 Letter from the office of NJ Transit

R-8 Pre-Trial Information Exchange

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

33 Washington Street
Newark, NJ 07102
(973) 648-6008

A copy of the administrative law judge's decision is enclosed.

This decision was mailed to the parties on January 4, 2016