*Date of mailing: July 11, 2019

STATE OF NEW JERSEY
MOTOR VEHICLE COMMISSION
CASE FILE NUMBER: RXXXX XXXXX 52852

IN THE MATTER OF	**:**	**FINAL ADMINISTRATIVE DECISION AND ORDER OF SUSPENSION**
ANA M. RUBIO	**:**	**(Hearing on the papers)**
		SUSPENSION TERM: 90 DAYS
		EFFECTIVE DATE: 08/01/2019

This is the Motor Vehicle Commission's (Commission) Final Administrative Decision in the matter of Ana M. Rubio ("Rubio").

This matter arises out of an Interstate Driver License Compact state notification sent by the New York Department of Motor Vehicles to the Commission, reporting that Rubio had been convicted of driving while ability impaired ("NYDWAI"). Rubio does not dispute this conviction.

Pursuant to the Interstate Driver License Compact (N.J.S.A. 39:5D-4), the Commission issued a Scheduled Suspension Notice informing Rubio that her 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-1.

In response to the Scheduled Suspension Notice, Rubio wrote to the Commission requesting a hearing, stating that she was "charged in NY state with a traffic infraction (DWAI)…." Included with her hearing request were a Notice of Initial Enrollment in the New York State Department of Motor Vehicles Alcohol and Drug Rehabilitation Program (Impaired Driver Program), a Substance Use/Mental Status Evaluation, and an After Visit

Summary from the Hackensack UMC Emergency Department. Copies of Rubio's hearing request and accompanying documents are attached hereto collectively as Exhibit R-1.

The Commission issued a letter to Rubio acknowledging Rubio's hearing request. The Commission further advised Rubio that she was being afforded an opportunity for a hearing on the papers, and that it was Rubio's 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%. This is **not** an opportunity to re-litigate that matter or to collaterally attack the New York conviction in this administrative forum." Rubio was further advised to "provide a notarized affidavit setting forth all facts in support of your 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 your conviction)." A copy of the Commission's letter is attached hereto as Exhibit P-2.

Responding to the Commission's letter, Rubio submitted a letter attaching a Certificate of Disposition. According to the Certificate of Disposition, on March 24, 2018, Rubio was arrested and charged with three violations of New York Law, two of the violations involving alcohol-related offenses: N.Y. Veh. & Traf. Law § 1192(3) ("driving while intoxicated") and N.Y. Veh. & Traf. Law § 1194(1)(b) (failure to submit to breath and chemical tests). On May 3, 2018, Rubio was found guilty of a violation of N.Y. Veh. & Traf. Law § 1192(1) ("driving while ability impaired"). There was also an entry for the violation of N.Y. Veh. & Traf. Law § 1194(1)(b) (failure to submit to breath and chemical tests), indicating that it was "covered." A copy of the letter and Certificate of Disposition are

attached hereto collectively as Exhibit R-2. Notably, Rubio did not submit any other evidence, such as the official plea transcript from the State of New York proceeding or official court order signed by the New York judge indicating specific findings made in connection with her conviction.

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

1. On March 24, 2018, Rubio was arrested and charged with violations of N.Y. Veh. & Traf. Law § 1192(3) ("driving while intoxicated") and N.Y. Veh. & Traf. Law § 1194(1)(b) (failure to submit to a breath test). (Exhibit R-2)
2. On May 3, 2018, Rubio was found guilty of a violation of N.Y. Veh. & Traf. Law § 1192(1) ("driving while ability impaired"). There was also an entry for the violation of N.Y. Veh. & Traf. Law § 1194(1)(b) (failure to submit to a breath test), indicating that it was "covered." (Exhibit R-2)
3. None of the documents submitted by Rubio reflect a BAC whatsoever, or any findings indicating that the New York conviction was based exclusively upon a violation of a proscribed BAC of less than .08%.
4. There was no BAC because, as shown by the Certificate of Disposition, Rubio refused the breath test, and there has been no evidence whatsoever submitted by Rubio showing that a BAC was even obtained (Exhibit R-2)
5. The New York statute, N.Y. Veh. & Traf. Law § 1192(1) ("driving while ability impaired"), is not a per se offense as constructed and enacted by the New York legislature.
6. The charge of failing to take a breath test, Rubio's failure to submit BAC results, the original charge of driving while intoxicated under N.Y. Veh. & Traf. Law §

1192(3) (“driving while intoxicated,” which prohibits the operation of a motor vehicle “while in an intoxicated condition,” without regard to BAC), and the conviction for violation of N.Y. Veh. & Traf. Law § 1192(1) (“driving while ability impaired”) in conjunction with the covered charge of N.Y. Veh. & Traf. Law § 1194(1)(b), indicate that Rubio was convicted of driving while ability impaired under N.Y. Veh. & Traf. Law § 1192(1) based on observational evidence (such as police officer observations, field sobriety tests, and/or admissions).

Analysis

There is no dispute that Rubio was convicted of NYDWAI. Thus, the sole issue to be determined here is whether Rubio has met her burden to prove, with clear and convincing evidence, that her New York conviction was for an offense “based **exclusively** upon a violation of a proscribed BAC of less than .08%.” In re: Maxine Basch, 2013 N.J. Super. Unpub. LEXIS 1764, at 1,7, and N.J.S.A. 39:4-50(a)(3). In the absence of such proof, Rubio is subject to the mandatory minimum 90-day suspension of her New Jersey driving privileges, pursuant to N.J.S.A. 39:4-50, New Jersey’s driving while intoxicated (DWI) statute and N.J.A.C. 13:19-11.1 et seq.

Despite the requirement noted in the Commission’s response to Rubio’s hearing request that Rubio 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%,” Rubio failed to submit any information whatsoever regarding BAC, or even an argument that her conviction was based exclusively upon a violation of a proscribed blood alcohol concentration of less than .08%.

The simple fact that Rubio 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%.

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 driving while intoxicated 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 driving while intoxicated 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 driving while intoxicated statute, N.J.S.A. 39:4-50); 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, 423 N.J. Super. 34, 48 (App. Div. 2011), confirms 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.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)).

Additionally, it is noted that Rubio was charged with failure to submit to breath and chemical testing, in violation of N.Y. Veh. & Traf. Law § 1194(1)(b), an indication that there was no BAC obtained. Indeed, Rubio failed to present any documentation, or even to make the argument, that her BAC was under .08% and that her New York conviction was based exclusively on a BAC of under .08%. This indicates that there had to have been other evidence of driving ability impairment to support the New York driving while impaired conviction (and to initially support instituting the original charge under N.Y. Veh. & Traf. Law §1192(3), the common law driving while intoxicated). See 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 privileges 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).

Given these factors, it is clear that Rubio's NYDWAI conviction here could not have been and was not shown to have been based exclusively on a BAC of less than .08%, as is required to meet the very limited exception in New Jersey's DWI statute[1].

It remains undisputed that Rubio was convicted by the State of New York of N.Y. Veh. & Traf. Law § 1192(1), "driving while ability impaired," while holding and presenting a New Jersey driver's license. Accordingly, the State of New Jersey is required to suspend Rubio's New Jersey driving privilege in accordance with the Interstate Driver License Compact Agreement (N.J.S.A. 39:5D-4 et seq.) 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-

[1] 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 Rubio's conviction under the NYDWAI statutory provision, N.Y. Veh. & Traf. Law § 1192(1).

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[.]'"); and 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.")

It is well established by New Jersey case law 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, supra, at 44-49; 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; Markowiec v. NJMVC, (unreported) (App. Div. 2018), Dkt. No. A-2492-15T1, 2018 N.J. Super. Unpub. LEXIS 257; 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 .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%).

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 Rubio'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").

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.

It remains undisputed, and I therefore find, that Rubio was convicted of an alcohol-related driving offense that occurred on March 24, 2018, in the State of New York (for which she was convicted on May 3, 2018). 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 Rubio's 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; 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 was proper. **The effective date of suspension of Rubio's driving privilege is August 1, 2019. (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, Rubio 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, Rubio 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.[2] 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 by calling (609) 815-2950.

B. Sue Fulton
Chair and Chief Administrator

BSF:eha/kw

[2] Although this matter was in the process of being transmitted 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 were 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).

EXHIBIT LIST

P-1 Copy of Scheduled Suspension Notice, dated June 8, 2018 (2 pages- front and back)

P-2 Copy of Commission letter to Rubio advising Rubio of her opportunity to submit clear and convincing evidence of conviction being exclusively based on a BAC of less than .08, dated July 30, 2018 (2 pages)

Rubio's Exhibits

R-1 Copy of hearing request, dated June 27, 2018, with enclosures: Notice of Initial Enrollment in the New York State Department of Motor Vehicles Alcohol and Drug Rehabilitation Program (Impaired Driver Program); a Substance Use/Mental Status Evaluation; and an After Visit Summary from the Hackensack UMC Emergency Department (total: 5 pages)

R-2 Copy of letter and Certificate of Disposition received from Rubio dated August 7, 2018 (total: 2 pages)-Order