

**STATE OF NEW JERSEY
MOTOR VEHICLE COMMISSION
CASE FILE NUMBER: MXXXX XXXXX 04725**

IN THE MATTER OF : **FINAL ADMINISTRATIVE DECISION
AND ORDER OF SUSPENSION**
VINCENT MAZZILLI : **(Hearing on the papers)**
SUSPENSION TERM: 730 DAYS
EFFECTIVE DATE: 03/01/22

This is the Motor Vehicle Commission's (Commission) Final Administrative Decision in the matter of Vincent Mazzilli (Mazzilli).

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

Pursuant to the Interstate Driver License Compact (N.J.S.A. 39:5D-4), the Commission issued a Scheduled Suspension Notice informing Mazzilli that his New Jersey driving privilege was subject to suspension for a period of 730 days (this was Mazzilli's second alcohol-related driving offense) 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.

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

13:19-11.1 to -11.2. A copy of the Scheduled Suspension Notice is attached hereto as Exhibit P-2.

In response to the Scheduled Suspension Notice, Mazzilli (representing himself), requested a hearing, arguing that he wasn't pulled over, his blood alcohol level was "unreadable," "and many things [the convicting town court] didn't consider," and that he needed a driver license for work and to support his family. Mazzilli's hearing request is attached hereto as Exhibit R-1.

The Commission issued a letter to Mazzilli acknowledging Mazzilli's hearing request, further advising Mazzilli that he was being afforded an opportunity for a hearing on the papers, and that it was his burden to demonstrate, "by clear and convincing evidence, that the State of New York conviction was based **exclusively** upon a violation of a proscribed blood alcohol concentration (BAC) of less than .08%." The Commission further stated that this was not "an opportunity to re-litigate [the New York] matter or to collaterally attack the New York court conviction in this administrative forum." The Commission also instructed Mazzilli to "provide a notarized affidavit setting forth all facts in support of [his] position and provide copies of any supporting documents or other evidence (including, but not limited to, the official plea transcript from the State of New York proceeding and/or official court order signed by the New York judge indicating specific findings made in connection with [his] conviction)." A copy of the Commission's July 29, 2019, letter is attached hereto as Exhibit P-3.

On August 22, 2019, Michael A. Gottlieb, a Florida-based attorney, authored a letter to the Commission on behalf of Mazzilli, requesting an extension of time to submit documentation, due to not having New Jersey counsel and a delay in obtaining documentation from the State of New York. Mazzilli appeared at a Commission agency and presented this letter along with another letter dated August 22, 2019, from a licensed alcohol and drug counselor indicating that

Mazzilli had successfully completed an alcohol awareness/education program and had been administered an alcohol screening and an addiction assessment, based upon which screening the counselor indicated that she did not believe Mazzilli has an alcohol or substance use disorder. A copy of Mr. Gottlieb's letter and the letter from the counselor are attached hereto collectively as Exhibit R-2.

The Commission responded on August 26, 2019, granting an extension to September 26, 2019. A copy of the Commission's August 26, 2019 letter to Mazzilli is attached hereto as Exhibit P-4.

On September 26, 2019, Mazzilli appeared at a Commission agency again regarding this matter, and submitted documentation to the Commission during the visit, including letters from the New York Department of Motor Vehicles and the New York State Police, and an email from the New York State Police, all providing instructions to Mazzilli or informing Mazzilli that it would take months to provide the requested records. Copies of the documents submitted to the Commission on September 26, 2019 are attached hereto collectively as Exhibit R-3.

The Commission granted a second extension, to November 12, 2019, as a result of the visit and documents received September 26, 2019. A copy of the Commission's September 26, 2019 letter to Mazzilli is attached hereto as Exhibit P-5.

On November 12, 2019, Mazzilli submitted two documents to the Commission: a copy of a Certificate of Disposition issued by the State of New York, Westchester County, Bedford Town Court (Criminal Part), dated August 21, 2019, and an Affidavit, dated November 11, 2019. Mazzilli's submissions are attached hereto collectively as Exhibit R-4.

According to the Certificate of Disposition, Mazzilli was arrested on June 7, 2018, and the matter was disposed of on February 6, 2019. He was originally charged with violations of N.Y. Veh. & Traf. Law §1192(3) (driving while intoxicated), N.Y. Veh. & Traf. Law §1192(2) (driving

while intoxicated; per se, requiring a BAC of .08% or more) and N.Y. Veh. & Traf. Law §1227(1) (consumption or possession of alcoholic beverages in a motor vehicle).

Mazzilli was convicted of a violation of N.Y. Veh. & Traf. Law §1192(1) (NYDWAI) on February 6, 2019, for the charge of violating N.Y. Veh. & Traf. Law §1192(3) (driving while intoxicated). The charges of violations of N.Y. Veh. & Traf. Law §1192(2) (driving while intoxicated; per se) and N.Y. Veh. & Traf. Law §1227(1) (consumption or possession of alcoholic beverages in a motor vehicle) were noted as “Covered” by the DWAI conviction. Exhibit R-4, Certificate of Disposition, State of New York, Westchester County, Bedford Town Court (Criminal Part).

In his Affidavit, Mazzilli argues that the 90-day suspension imposed by the State of New York “has run,” and “there is no reciprocity with New Jersey,” the New York DWAI conviction “is not a qualifying offense for suspension in New Jersey, since it is a lesser degree variant, and is not an offense which requires a blood alcohol of greater than .08%,” and the fine and surcharge imposed by the State of New York have been satisfied. Exhibit R-4, Mazzilli Affidavit.

Notably, Mazzilli did not present any argument, or documentation supporting an argument, that the New York DWAI conviction was based exclusively upon a violation of a proscribed blood alcohol concentration (BAC) of less than .08%. Indeed, in his hearing request, Mazzilli states that the blood alcohol level was “unreadable.” Exhibit R-1.

In sum, Mazzilli has not submitted any evidence, such as an official plea transcript from the State of New York proceeding or official court order signed by the New York judge, indicating any specific court findings as to a BAC of less than .08% forming the exclusive basis of his conviction, nor has Mazzilli argued that the DWAI conviction was based exclusively on a BAC of less than .08%.

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

1. As a result of the events of June 7, 2018, Mazzilli was charged with violations of N.Y. Veh. & Traf. Law §1192(3) (driving while intoxicated), N.Y. Veh. & Traf. Law §1192(2) (driving while intoxicated; per se, BAC of .08% or more) and N.Y. Veh. & Traf. Law §1227(1) (consumption or possession of alcoholic beverages in a motor vehicle). (Exhibit R-4, Certificate of Disposition, State of New York, Westchester County, Bedford Town Court (Criminal Part))
2. On February 6, 2019, Mazzilli was convicted of a violation of N.Y. Veh. & Traf. Law §1192(1) (“NYDWAI”). The NYDWAI conviction covered the charges under N.Y. Veh. & Traf. Law §1192(2) (driving while intoxicated; per se) and N.Y. Veh. & Traf. Law §1227(1) (consumption or possession of alcoholic beverages in a motor vehicle). (Exhibit R-4, Certificate of Disposition, State of New York, Westchester County, Bedford Town Court (Criminal Part))
3. None of the documents submitted by Mazzilli reflect a BAC whatsoever, or any findings showing that the New York conviction was based exclusively upon a violation of a proscribed BAC of less than .08%.²

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

4. The New York DWAI statute, N.Y. Veh. & Traf. Law §1192(1), is not a per se offense as constructed and enacted by the New York legislature.

Analysis

There is no dispute that Mazzilli was convicted of NYDWAI. Thus, the sole issue to be determined here is whether Mazzilli has met his burden to prove, with clear and convincing evidence, that his New York conviction was for an offense “based **exclusively** upon a violation of a proscribed BAC of less than .08%.” In re: Maxine Basch, (unreported) (App. Div. 2013), Dkt. No. A-6009-11T1, 2013 N.J. Super. Unpub. LEXIS 1764 at 1, 6-7, and N.J.S.A. 39:4-50(a)(3). In the absence of such proof, Mazzilli is subject to the mandatory minimum 730-day suspension of his New Jersey driving privileges, pursuant to N.J.S.A. 39:4-50³, New Jersey’s driving while intoxicated (DWI) statute and N.J.A.C. 13:19-11.1 et seq. As noted above, this is Mazzilli’s second alcohol-related driving offense. The first offense was committed in New Jersey on October 30, 2016, for which Mazzilli was convicted on June 1, 2017 in Upper Freehold municipal court.

Thus, despite the requirement noted in the Commission’s response to Mazzilli’s hearing request that Mazzilli 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%,” Mazzilli failed to submit any proofs whatsoever regarding a BAC. Moreover, Mazzilli did not submit any proofs that would show that his NYDWAI conviction was based exclusively on a BAC of less than .08%, that is: without any other observational evidence or admission as to the element of impaired driving ability. The simple fact that Mazzilli was convicted in New York of driving while ability impaired and not driving while intoxicated does

³ The version of N.J.S.A. 39:4-50 that was in effect on the date of the offense, June 7, 2018.

not demonstrate, by clear and convincing evidence, that the State of New York conviction for driving while ability impaired was based exclusively upon a violation of a proscribed BAC of less than .08%.

The controlling New Jersey case law has well established that the Commission has the authority to suspend a New Jersey licensee's driving privilege for an out-of-state conviction, pursuant to N.J.S.A. 39:5D-4, and that N.Y. Veh. & Traf. Law §1192(1) is substantially similar to N.J.S.A. 39:4-50. State v. Zeikel, 423 N.J. Super. 34, 44-49 (App. Div. 2011); New Jersey Div. of Motor Veh. v. Lawrence, 194 N.J. Super. 1, 2-3 (App. Div. 1983). See Mize v. NJMVC, (unreported) (App. Div. 2018), Dkt. No. A-0781-17T1, 2018 N.J. Super. Unpub. LEXIS 2542; Markowicz v. NJMVC, (unreported) (App. Div. 2018), Dkt. No. A-2492-15T1, 2018 N.J. Super. Unpub. LEXIS 257 (the driver's argument based on there being no BAC evidence for his NYDWA conviction was rejected by the Appellate Division and the court affirmed the NJMVC's suspension of the home state New Jersey driver license); Ford v. NJMVC, (unreported) (App. Div. 2014), Dkt. No. A-3117-12T1, 2014 N.J. Super. Unpub. LEXIS 304, at 5, certif. denied, 217 N.J. 587 (2014); Xheraj v. NJMVC, (unreported) (App. Div. 2013), Dkt. No. A-2125-12T1, 2013 N.J. Super. Unpub. LEXIS 2893; Wayne v. NJMVC, (unreported) (App. Div. 2013), Dkt. No. A-3008-12T1, 2013 N.J. Super. Unpub. LEXIS 1827, at 8-9; New Jersey Motor Veh. Comm'n v. Gethard, (unreported) (App. Div. 2012), Dkt. No. A-4657-10T3, 2012 N.J. Super. Unpub. LEXIS 287, at 5; In re: Alan D. Weissman, (unreported) (App. Div. 2009), Dkt. No. A-2154-07T3, 2009 N.J. Super. Unpub. LEXIS 1303, at 2 (the court specifically notes that "[n]either N.Y. Veh. & Traf. Law §1192(1) nor N.J.S.A. 39:4-50(a), require a minimum blood alcohol reading for a conviction"). See also State v. McCauley, (unreported) (App. Div. 2006), Dkt. No. A-4622-04T2, 2006 N.J. Super. Unpub. LEXIS 2422 (the court rejected McCauley's argument that he fit within the "very limited exception" in the statute, N.J.S.A. 39:4-50(a)(3), even assuming that his BAC

was 0.06%, since New York’s driving while ability impaired statute, N.Y. Veh. & Traf. Law §1192(1), “on its face” is not a “per se” offense and his conviction under that provision “must have been based on other evidence”) and In re: Maxine Basch, MVC Chief Administrator Supplemental Final Decision and Final Order on Remand, issued January 8, 2016, found at http://www.nj.gov/mvc/pdf/about/jab_final_decisions16.pdf (suspension imposed for NYDWAI conviction in accord with Appellate Division remand instruction where a “plea bargain” had been entered to the lesser-included offense, also noting other potential evidence of impairment included officer observations, field sobriety tests and/or admissions, as well as a BAC result of .17%).⁴

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 Mazzilli’s conviction. Compare, New Jersey Div. of Motor Veh. v. Ripley, 364 N.J. Super. 343, 349-50

⁴ For context only, the Commission notes that in its experience handling the many out-of-state New York reported “driving while ability impaired” convictions, in those instances where the supporting documents are submitted, it is frequently the case that the NYDWAI conviction was the result of a “plea bargain” to this lesser-included offense and that the police reports and chemical test documents reveal potential evidence of BAC levels of .08% and above as well as observational-type evidence including field sobriety tests, officer observations, driving behavior, and/or driver admissions.

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

(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.”).

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

a New Jersey DUI under N.J.S.A. 39:4-50(a), so long as the less-than-.08 reading is not the exclusive basis for the New York conviction.” Id. at 2-3. With the Aziz court further explaining that the totality of the circumstances in that case, if proved, concerning the field sobriety tests, the officer’s observations and the defendant’s driving behavior, as well as the driver’s refusal to submit to a “binding” chemical test, would be sufficient to “establish an observational DUI violation under [New Jersey] law.” Id. at 3-4.

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

Moreover, the court in Zeikel, supra, 423 N.J. Super. at 48 (App. Div. 2011), confirmed

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

Additionally, it is noted that Mazzilli was charged with a violation of N.Y. Veh. & Traf. Law §1192(2) (driving while intoxicated; per se - .08 BAC) and N.Y. Veh. & Traf. Law §1192(3) (driving while intoxicated), yet Mazzilli has failed to present any documentation supporting an argument that his New York conviction was based exclusively on a BAC of less than .08%. Along with the .08 BAC per se charge, Mazzilli was charged under N.Y. Veh. & Traf. Law §1192(3) (driving while intoxicated), which does not require a BAC; it may be based solely on observational evidence such as the police officer's observations, field tests, driver admissions, and/or manner of driving. In light of these charges, there would have been supporting evidence of impairment of driving ability. Absent clear and convincing evidence presented by Mazzilli that a BAC of less than .08% was made the exclusive basis of the NYDWAI conviction, Mazzilli's New Jersey driving privilege is subject to suspension. See, e.g. Markowiec v. NJMVC, (unreported) (App. Div. 2018), Dkt. No. A-2492-15T1, 2018 N.J. Super. Unpub. LEXIS 257 (affirming the Commission's final decision and order suspending Markowiec's driving privilege based on a NYDWAI where Markowiec argued that there was no chemical test performed and

that his BAC was under .08%, but there was no clear and convincing evidence, such as a plea transcript or court order showing that the conviction was based exclusively on a BAC of less than .08%. The court also emphasized that the finding of substantial similarity between a NYDWAI and a New Jersey DWI did not turn on evidence of a BAC level). A conviction for driving while ability impaired need not be based on BAC at all, or it may be based on a BAC below .08 in combination with other observational evidence supporting the element of impaired driving ability.⁵

Given these factors, Mazzilli has failed to show, by clear and convincing evidence, that his NYDWAI conviction was based exclusively on a BAC of less than .08%, as is required to meet the very limited exception in New Jersey's DWI statute.⁶

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

⁶ That very limited exception in the New Jersey statute most specifically would apply where there was a conviction under a per se law in another state, for which the other state's per se threshold was lower, at the time of the offense, than the per se prong contained within the New Jersey "unified" DWI statute, N.J.S.A. 39:4-50 (which contains a per se prong as well as an observational prong). An example of this would be a New York DWI- per se .08 conviction, under N.Y. Veh. & Traf. Law § 1192(2) ("driving while intoxicated; per se"), that specifically occurred during the timeframe in which the New York per se statutory threshold had been lowered to .08 prior to the effective date of the New Jersey law changing its per se threshold from .10 to .08; namely between July 1, 2003 and January 19, 2004. See, New Jersey Div. of Motor Veh. v. Pepe, 379 N.J. Super. 411, 414, footnote 1 (App. Div. 2005) (in which the court points out the different effective dates for New York's and New Jersey's lowering of the statutory BAC per se threshold to .08); also, it is noted that currently the State of Utah has lowered its statutory per se threshold to a BAC of .05, thus specific Utah convictions under its DWI- per se

It remains undisputed that Mazzilli 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 his New Jersey driving privilege in accordance with the Interstate Driver License Compact Agreement (N.J.S.A. 39:5D-1 to -14) and the New Jersey Administrative Code (N.J.A.C. 13:19-11.1).

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

provision would meet this limited exception.) This is not the case for Mazzilli’s conviction under the NYDWA I statutory provision, N.Y. Veh. & Traf. Law §1192(1).

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

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

The court in Pepe, supra, 379 N.J. Super. at 416, specifically held that the "suspension imposed by NJDMV is in accordance with the statute, N.J.S.A. 39:4-50, and not redundant to the penalty imposed in New York, which involved only defendant's driving privileges within that state." (citing Boyd v. Div. of Motor Vehicles, 307 N.J. Super. 356, 360 (App Div.), certif. denied, 154 N.J. 608 (1998), emphasis added). The Pepe court further instructed that "under the doctrine of dual sovereignty, the double jeopardy clause does not bar two states from prosecuting a defendant for the same offense." Id. at 418. The Pepe court also considered Pepe's constitutional equal protection, res judicata/collateral estoppel and laches-type arguments in the context of that Compact case and found those to be without merit.

It remains undisputed, and I therefore find, that Mazzilli was convicted of an alcohol-

related driving offense that occurred on June 7, 2018, in the State of New York (for which he was convicted on February 6, 2019). As such, pursuant to N.J.S.A. 39:5D-4, 39:5-30, 39:4-50 and N.J.A.C. 13:19-11.1 et seq., I order Mazzilli's New Jersey driving privilege to be suspended for 730 days. The suspension period imposed here is the minimum mandated by New Jersey statute for this second alcohol-related driving offense, which was committed before December 1, 2019⁷; there is no discretion to impose a reduced suspension term.

Conclusion and Final Order

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

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

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

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

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

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

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

The effective date of suspension of Mazzilli’s driving privilege is March 1, 2022. (Suspension term: 730 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, Mazzilli 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, Mazzilli may present any official documentation as to such classes/program to the Intoxicated Driver Program (IDP)/Intoxicated Driver Resource Center (IDRC), which will determine whether these can be accepted in partial or full satisfaction of the IDP alcohol/drug education program required pursuant to N.J.S.A. 39:4-50(b) and N.J.A.C. 13:19-11.2.

This constitutes the Commission’s final decision in this matter.⁸ Any appeal from this decision must be made to the Appellate Division of the Superior Court by filing a Notice of Appeal with the Appellate Division within 45 days from the date of this decision. If an appeal is filed with the court, pursuant to Court Rule, R. 2:5-1(e), service of copies of all papers must be made on both the New Jersey Motor Vehicle Commission, Chief Administrator, as well as the Attorney General. The Appellate Division may be contacted by calling (609) 815-2950.

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

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

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

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



B. Sue Fulton
Chair and Chief Administrator

BSF:eha/kw

[pro se]

EXHIBIT LIST

*copies redacted of other drivers' personal identifying information

Commission Exhibits

- P-1 Copy of NYDMV Out-of-State Conviction report dated February 12, 2019, received by NJMVC February 14, 2019 (1 page, redacted)
- P-2 Copy of Scheduled Suspension Notice dated May 5, 2019 (2 pages, front and back of notice)
- P-3 Copy of Commission letter to Mazzilli advising him of the opportunity to submit clear and convincing evidence of conviction being exclusively based on a BAC of less than 0.08% (affording a hearing on the papers), dated July 29, 2019 (2 pages)
- P-4 Copy of Commission letter to Mazzilli, dated August 26, 2019 (1 page)
- P-5 Copy of Commission letter to Mazzilli, dated September 26, 2019 (2 pages)

Mazzilli's Exhibits

- R-1 Copy of hearing request (2 pages)
- R-2 Copy of letter from Michael A. Gottlieb, dated August 22, 2019 (1 page); and copy of letter from Lisa Harmon Mollicone, Licensed Clinical Alcohol and Drug Counselor, dated August 22, 2019 (3 pages)
- R-3 Copies of letters from New York Department of Motor Vehicles, dated September 10, 2019 (1 page); New York State Police, dated September 25, 2019 (1 page); and email from the New York State Police, dated September 11, 2019 (1 page)
- R-4 Copies of Certificate of Disposition issued by the State of New York, Westchester County, Bedford Town Court (Criminal Part), dated August 21, 2019 (1 page); and Affidavit, dated November 11, 2019 (2 pages)

**STATE OF NEW JERSEY
MOTOR VEHICLE COMMISSION
CASE FILE NUMBER: RXXXX XXXXX
09872**

IN THE MATTER OF : **FINAL ADMINISTRATIVE DECISION
AND ORDER OF SUSPENSION**
NELSON D. ROSARIO, JR. : **(Hearing on the papers)**
SUSPENSION TERM: 730 DAYS
EFFECTIVE DATE: 03/14/22

This is the Motor Vehicle Commission's (Commission) Final Administrative Decision in the matter of Nelson D. Rosario, Jr. (Rosario).

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

Pursuant to the Interstate Driver License Compact (N.J.S.A. 39:5D-4), on February 23, 2020, the Commission issued a Scheduled Suspension Notice informing Rosario that his New Jersey driving privilege was subject to suspension for a period of 730 days (this was Rosario's second alcohol-related driving offense) pursuant to N.J.S.A.

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

39:4-50, N.J.S.A. 39:5-30, N.J.S.A. 39:5D-4, and N.J.A.C. 13:19-11.1 to -11.2. A copy of the Scheduled Suspension Notice is attached hereto as Exhibit P-2.

In response to the Scheduled Suspension Notice, Rosario wrote a letter requesting a hearing (representing himself, although indicating he wanted “to bring legal counsel” to address the matter). In his hearing request, he asked that his license not be suspended² and provided details as to a variety of personal hardships – work/family/medical/financial—that a suspension of his New Jersey driving privilege would entail in his particular situation. He argued that he “did not get a DUI/DWI in NY State, which would’ve been a criminal offense.” Regarding his blood alcohol concentration (BAC) during the convicted offense, he further asserted that he has “proof that [h]e was under both, NJ [and] NY’s legal B.A.C. of .08% and was given a DWAI.” He also alternatively requested leniency as to the suspension term, if any suspension is to be imposed, noting that the State of New York “awarded . . . a 90-day suspension.”³ Rosario’s hearing request is attached hereto as Exhibit R-1.

The Commission issued a letter to Rosario acknowledging Rosario’s hearing request, further advising Rosario that he was being afforded an opportunity for a hearing on the papers, and that it was his burden to demonstrate, “by clear and convincing evidence, that the State of New York conviction was based **exclusively** upon a violation of a proscribed blood alcohol concentration (BAC) of less than .08%.” The Commission further stated that this was not “an opportunity to re-litigate [the New York] matter or to collaterally attack the New York court conviction in this administrative forum.” The

² The proposed “scheduled” suspension was “stayed” based on receipt of the timely hearing request from Rosario, pending issuance of this final decision/order.

³ It is noted that such New York-imposed suspension would concern only his reciprocity privileges within New York.

Commission also instructed Rosario to “provide a notarized affidavit setting forth all facts in support of [his] position and provide copies of any supporting documents or other evidence (including, but not limited to, the official plea transcript from the State of New York proceeding and/or official court order signed by the New York judge indicating specific findings made in connection with [his] conviction).” A copy of the Commission’s March 23, 2020, letter is attached hereto as Exhibit P-3.

Rosario did not provide any further documentation to the Commission at all. Significantly, after a follow-up phone call with Rosario in April of 2021, the Commission sent another copy of the March 23, 2020 letter to him, which letter, as previously stated, explains the need for and types of documentary submission to make in support of an argument as to the exclusive basis for his NYDWAI conviction. Despite again having sent to him this letter with its specific instructions, the Commission has still, to this date, not received any further submissions from Rosario. Therefore, it remains that Rosario did not present any argument, or documentation supporting an argument, that the New York DWAI conviction was based exclusively upon a violation of a proscribed blood alcohol concentration (BAC) of less than 0.08%.

In sum, Rosario has not submitted any evidence, such as an official plea transcript from the State of New York proceeding or official court order signed by the New York judge, indicating any specific court findings as to a BAC of less than 0.08% forming the exclusive basis of his conviction, nor has Rosario specifically argued that the DWAI conviction was based exclusively on a BAC of less than 0.08% in any responsive submission.⁴

⁴ Noting that it was because Rosario had raised the issue of his BAC level in his hearing request and made assertions concerning the proofs that he would submit, that the

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

1. On February 3, 2020, Rosario was convicted of a violation of N.Y. Veh. & Traf. Law §1192(1) (“NYDWAI”), arising from an incident which occurred on October 26, 2019.
2. The one document submitted by Rosario for this “hearing on the papers” record, despite the specific instructions in the Commission’s March 23, 2020 letter which was sent to him twice, does not reflect a BAC whatsoever, or any findings showing that the New York conviction was based exclusively upon a violation of a proscribed BAC of less than 0.08%.⁵
3. The New York DWAI statute, N.Y. Veh. & Traf. Law §1192(1), is not a per se offense as constructed and enacted by the New York legislature.
4. The subject NYDWAI conviction is Rosario’s second alcohol/drug-related driving offense, and it was committed within ten years of his first alcohol/drug-related driving offense.

Commission had afforded Rosario this opportunity to come forward with evidentiary proof to try to support such potential argument concerning an exclusive basis for his NYDWAI conviction as this is set out in the New Jersey DWI statute.

⁵ Typically, in these types of New York cases, there would be documents supporting the original charges. Such documents would include the law enforcement officer’s indications of the various indicia supporting the arrest, which may include admissions, the officer’s observations, the results of field testing, and the results of chemical tests, if any. As the Commission has seen in numerous other NYDWAI cases it has reviewed, the document typically used by New York is a “DWI Bill of Particulars and Supporting Deposition,” which the officer uses to record information regarding the basis for the charges, including the observations of the driver, performance of field tests, driver admissions, chemical test information, and other evidence. Rosario is in the best position to have such official documentation. New York law requires that the supporting deposition and Bill of Particulars prepared by the state in support of the charges be made available to the defendant upon request, if not already provided to the defendant. NY CPL §100.25 and 200.95.

5. Rosario was previously convicted of DWI and “refusal” charges under N.J.S.A. 39:4-50 and 39:4-50.4, both arising from the same incident which occurred on May 14, 2016 in Hazlet, New Jersey.

Analysis

There is no dispute that Rosario was convicted of NYDWAI. Thus, the sole issue to be determined here is whether Rosario has met his burden to prove, with clear and convincing evidence, that his New York conviction was for an offense “based **exclusively** upon a violation of a proscribed BAC of less than .08%.” In re: Maxine Basch, (unreported) (App. Div. 2013), Dkt. No. A-6009-11T1, 2013 N.J. Super. Unpub. LEXIS 1764 at 1, 6-7, and N.J.S.A. 39:4-50(a)(3). In the absence of such proof, Rosario is subject to the mandatory minimum 730-day suspension of his New Jersey driving privileges, pursuant to N.J.S.A. 39:4-50⁶, New Jersey’s driving while intoxicated (DWI) statute and N.J.A.C. 13:19-11.1 et seq. As noted above, this is Rosario’s second alcohol-related driving offense. The first offense was committed in New Jersey on May 14, 2016, for which Rosario was subsequently convicted (on July 19, 2016)⁷, in Hazlet Township municipal

⁶ The version of N.J.S.A. 39:4-50 that was in effect on the date of the offense, October 26, 2019.

⁷ While it is not necessary for the analysis of this matter since it is the fact of conviction, with its corresponding offense date, rather than the specific conviction date for the prior offense, which are the material data entries for purposes of this Compact administrative suspension action, it is noted that it is the New Jersey court’s Automated Traffic System (ATS) electronic database which provides the conviction date. By means of an ATS transmission, the court electronically reports to the Commission the particulars of the conviction. Here, the two prior N.J.S.A. 39:4-50 (DWI) and N.J.S.A. 39:4-50.4 (refusal) court convictions arising from the one May 14, 2016 incident were reported by the New Jersey court and posted by the Commission to Rosario’s Certified Abstract of Driver History Record; see State v. Luzhak, 445 N.J. Super. 241, 248-49 (App. Div. 2016) (in which the court reaffirms the propriety of abstract’s admission as a business record pursuant to N.J.R.E. 803(c)(6) and (8), citing State v. Zalta, 217 N.J. Super. 209, 214 (App. Div. 1987) and State v. Pitcher, 379 N.J. Super. 308, 319 (App. Div. 2005), certif. denied, 186 N.J. 242 (2006)).

court.

Despite the requirement noted in the Commission's response to Rosario's hearing request that Rosario 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%," Rosario failed to submit any proofs whatsoever regarding a BAC. Moreover, Rosario did not submit any proofs that would show that his NYDWAI conviction was based exclusively on a BAC of less than 0.08%, that is: without any other observational evidence or admission as to the element of impaired driving ability. The simple fact that Rosario was convicted in New York of driving while ability impaired and not driving while intoxicated or another alcohol/drug-related driving charge 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 0.08%.

The controlling New Jersey case law has well established that the Commission has the authority to suspend a New Jersey licensee's driving privilege for an out-of-state conviction, pursuant to N.J.S.A. 39:5D-4, and that N.Y. Veh. & Traf. Law §1192(1) is substantially similar to N.J.S.A. 39:4-50. State v. Zeikel, 423 N.J. Super. 34, 44-49 (App. Div. 2011); New Jersey Div. of Motor Veh. v. Lawrence, 194 N.J. Super. 1, 2-3 (App. Div. 1983). See Mize v. NJMVC, (unreported) (App. Div. 2018), Dkt. No. A-0781-17T1, 2018 N.J. Super. Unpub. LEXIS 2542; Markowicz v. NJMVC, (unreported) (App. Div. 2018), Dkt. No. A-2492-15T1, 2018 N.J. Super. Unpub. LEXIS 257 (the driver's argument based on there being no BAC evidence for his NYDWAI conviction was rejected by the Appellate Division and the court affirmed the NJMVC's suspension of the home state New Jersey driver license); Ford v. NJMVC, (unreported) (App. Div. 2014), Dkt. No. A-3117-12T1,

2014 N.J. Super. Unpub. LEXIS 304, at 5, certif. denied, 217 N.J. 587 (2014); Xheraj v. NJMVC, (unreported) (App. Div. 2013), Dkt. No. A-2125-12T1, 2013 N.J. Super. Unpub. LEXIS 2893; Wayne v. NJMVC, (unreported) (App. Div. 2013), Dkt. No. A-3008-12T1, 2013 N.J. Super. Unpub. LEXIS 1827, at 8-9; New Jersey Motor Veh. Comm'n v. Gethard, (unreported) (App. Div. 2012), Dkt. No. A-4657-10T3, 2012 N.J. Super. Unpub. LEXIS 287, at 5; In re: Alan D. Weissman, (unreported) (App. Div. 2009), Dkt. No. A-2154-07T3, 2009 N.J. Super. Unpub. LEXIS 1303, at 2 (the court specifically notes that “[n]either N.Y. Veh. & Traf. Law §1192(1) nor N.J.S.A. 39:4-50(a), require a minimum blood alcohol reading for a conviction”). See also State v. McCauley, (unreported) (App. Div. 2006), Dkt. No. A-4622-04T2, 2006 N.J. Super. Unpub. LEXIS 2422 (the court rejected McCauley’s argument that he fit within the “very limited exception” in the statute, N.J.S.A. 39:4-50(a)(3), even assuming that his BAC was 0.06%, since New York’s driving while ability impaired statute, N.Y. Veh. & Traf. Law §1192(1), “on its face” is not a “per se” offense and his conviction under that provision “must have been based on other evidence”) and In re: Maxine Basch, MVC Chief Administrator Supplemental Final Decision and Final Order on Remand, issued January 8, 2016, found at http://www.nj.gov/mvc/pdf/about/jab_final_decisions16.pdf (suspension imposed for NYDWAI conviction in accord with Appellate Division remand instruction where a “plea bargain” had been entered to the lesser-included offense, also noting other potential evidence of impairment included officer observations, field sobriety tests and/or admissions, as well as a BAC result of .017%).⁸

⁸ For context only, the Commission notes that in its experience handling the many out-of-state New York reported “driving while ability impaired” convictions, in those instances where the supporting documents are submitted, it is frequently the case that the NYDWAI conviction was the result of a “plea bargain” to this lesser-included offense

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 Rosario’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.”).

In Zeikel, supra, the court determined that a conviction under New York’s DWAI statute was “substantially similar” to a conviction under New Jersey’s DWI statute to

and that the police reports and chemical test documents reveal potential evidence of BAC levels of 0.08% and above as well as observational-type evidence including field sobriety tests, officer observations, driving behavior, and/or driver admissions.

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

qualify as a prior conviction for sentencing purposes under N.J.S.A. 39:4-50(a)(3). Zeikel, supra, 423 N.J. Super. at 45-49. The court rejected the defendant's argument that New Jersey sets a higher threshold than New York by requiring a finding of "intoxication," reasoning that "[i]ntoxication not only includes obvious manifestations of drunkenness but any degree of impairment that affects a person's ability to operate a motor vehicle". Id. at 48. See also, State v. Aziz, (unreported) (App. Div. 2020), Dkt. No. A-1268-18T4, 2020 N.J. Super. Unpub. LEXIS 757, in which the Appellate Division affirmed the lower court's holding that the appellant's prior conviction for New York DWAI constituted a prior conviction under New Jersey law. In relying on Zeikel, the court stated: "[In Zeikel,] We held that absent proof that a New York DWAI conviction was based exclusively on a blood alcohol reading of less than 0.08%, a DWAI conviction is 'substantially similar [in] nature' to driving under the influence under New Jersey law, and shall be treated as a prior conviction for sentencing enhancement purposes." Aziz, supra, at 2, quoting Zeikel, supra, at 48. The Aziz court further noted that, "[f]irst, a New York defendant conceivably may be prosecuted for DWAI, instead of DWI, simply because there is no BAC evidence at all" and "[s]econdly, a DWAI offender with less than .08 BAC still commits an offense substantially similar in nature to a New Jersey DUI under N.J.S.A. 39:4-50(a), so long as the less-than-.08 reading is not the exclusive basis for the New York conviction." Id. at 2-3. With the Aziz court further explaining that the totality of the circumstances in that case, if proved, concerning the field sobriety tests, the officer's observations and the defendant's driving behavior, as well as the driver's refusal to submit to a "binding" chemical test, would be sufficient to "establish an observational DUI violation under [New Jersey] law." Id. at 3-4.

Governing New Jersey case law repeatedly recognizes that "observational"

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

Moreover, the court in Zeikel, supra, 423 N.J. Super. at 48 (App. Div. 2011), confirmed that a conviction of New Jersey's driving while intoxicated statute is sustainable if it is supported by sufficient evidence of “any degree of impairment that affects a person's ability to operate a motor vehicle” while further highlighting that “[like] New Jersey, New York defines impairment broadly to include any degree of impairment of a person's physical or mental abilities to operate a motor vehicle.” See also, In re Johnston, 75 N.Y.2d 403, 409-10, 553 N.E.2d 566, 554 N.Y.S.2d 88 (1990) (New York's

highest judicial tribunal construes “impairment” under N.Y. Veh. & Traf. Law § 1192(1) as meaning that “the actor by ‘voluntarily consuming alcohol . . . has actually impaired, to any extent, the physical and mental abilities which he is expected to possess in order to operate a vehicle as a responsible and prudent driver’”; quoting People v. Cruz, 48 N.Y.2d 419, 427, 399 N.E.2d 513, 423 N.Y.S.2d 625 (1979)).

Additionally, despite the content in his letter declaring that, “I HAVE PROOF THAT I WAS UNDER BOTH, NJ & NY’S LEGAL B.A.C. OF 08%...”, Rosario has failed to present any documentation supporting this argument, and demonstrating that his New York conviction was based exclusively on a BAC of less than 0.08%. Absent clear and convincing evidence presented by Rosario that a BAC of less than 0.08% was made the exclusive basis of the NYDWAI conviction, Rosario’s New Jersey driving privilege is subject to suspension. See, e.g. Markowiec v. NJMVC, (unreported) (App. Div. 2018), Dkt. No. A-2492-15T1, 2018 N.J. Super. Unpub. LEXIS 257 (affirming the Commission’s final decision and order suspending Markowiec’s driving privilege based on a NYDWAI where Markowiec argued that there was no chemical test performed and that his BAC was under 0.08%, 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 0.08%. The court also emphasized that the finding of substantial similarity between a NYDWAI and a New Jersey DWI did not turn on evidence of a BAC level). A conviction for driving while ability impaired need not be based on BAC at all, or it may be based on a BAC below .08 in combination with other observational evidence supporting the element of impaired driving ability.⁹

⁹ Indeed, it is noted that under the New York DUI statute’s “Probative value” section as to “Chemical test evidence”, N.Y. Veh. & Traf. Law § 1195(2)(b), evidence of a BAC of .051

Given these factors, Rosario has failed to show, by clear and convincing evidence, that his NYDWAI conviction was based exclusively on a BAC of less than 0.08%, as is required to meet the very limited exception in New Jersey's DWI statute.¹⁰

It remains undisputed that Rosario 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 his New Jersey driving privilege in accordance with the Interstate Driver License Compact Agreement (N.J.S.A. 39:5D-1 to -14) and the New Jersey

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

¹⁰ 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 0.08% 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 0.08% prior to the effective date of the New Jersey law changing its per se threshold from 0.10% to 0.08%; 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 0.08%); 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 Rosario's conviction under the NYDWAI statutory provision, N.Y. Veh. & Traf. Law §1192(1).

Administrative Code (N.J.A.C. 13:19-11.1).

The governing regulation, N.J.A.C. 13:19-11.1(a) and (b), provides that out-of-state convictions shall be given the same effect as if such convictions had occurred in the State of New Jersey. Indeed, N.J.A.C. 13:19-11.1(b) explicitly states that New Jersey driving privileges shall be suspended pursuant to New Jersey law. See, e.g., Martinez v. NJMVC, (unreported) (App. Div. 2010), Dkt. No. A-0147-09T3, 2010 N.J. Super. Unpub. LEXIS 597 at 4-5; see also New Jersey Div. of Motor Vehicles v. Egan, 103 N.J. 350, 357 (1986) (the New Jersey Supreme Court reviewed and upheld the policy of the Director of the Division of Motor Vehicles to exercise the discretion granted by N.J.S.A. 39:5D-4 to “uniformly impos[e] New Jersey’s more stringent penalty instead of being reduced to ‘the least common denominator of other States[.]’”); DiGioia v. NJMVC, (unreported) (App. Div. 2021), Dkt. No. A-3587-19, 2021 N.J. Super. Unpub. LEXIS 533 (the court declared, in affirming the Commission’s imposition of suspension of the New Jersey home state license for a New York conviction, that “the Compact simply requires that New Jersey consider appellant’s New York conviction as if the offense occurred in New Jersey, which the Commission indisputably did”); Luzhak, supra, 445 N.J. Super. at 248 (the court again emphasized that New Jersey has a “strong public policy against drunk driving”); and State v. Thompson, 462 N.J. Super. 370, 375 (App. Div. 2020) (in which the Appellate Division reiterated the New Jersey Supreme Court’s declaration regarding the construction of the DWI laws: “As the Supreme Court held in [State v. Tischio, 107 N.J. 504 (1987)] – and it apparently bears repeating – ‘[w]e are thus strongly impelled to construe [the statute] flexibly, pragmatically and purposefully to effectuate the legislative goals of the drunk-driving laws,’ [Id. at 514] which, of course, are to rid our roadways of the scourge of drunk drivers [Id. at 512]. See also [State v.

Mulcahy, 107 N.J. 467, 479 (1987)] (recognizing, in quoting [State v. Grant, 196 N.J. Super. 470, 476 (App. Div. 1984)], that the drunk driver remains ‘one of the chief instrumentalities of human catastrophe’).”

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

The court in Pepe, supra, 379 N.J. Super. at 416, specifically held that the “suspension imposed by NJDMV is in accordance with the statute, N.J.S.A. 39:4-50, and not redundant to the penalty imposed in New York, which involved only defendant’s driving privileges within that state.” (citing Boyd v. Div. of Motor Vehicles, 307 N.J. Super. 356, 360 (App Div.), certif. denied, 154 N.J. 608 (1998), emphasis added). The Pepe court further instructed that “under the doctrine of dual sovereignty, the double jeopardy clause does not bar two states from prosecuting a defendant for the same offense.” Id. at 418. The Pepe court also considered Pepe’s constitutional equal protection, res judicata/collateral estoppel and laches-type arguments in the context of that Compact case and found those to be without merit.

It remains undisputed, and I therefore find, that Rosario was convicted of an alcohol-related driving offense that occurred on October 26, 2019, in the State of New York (for which he was convicted on February 3, 2020). As such, pursuant to N.J.S.A. 39:5D-4, 39:5-30, 39:4-50 and N.J.A.C. 13:19-11.1 et seq., I order his New Jersey driving

privilege to be suspended for 730 days. The suspension period imposed here is the minimum mandated by New Jersey statute for this second alcohol-related driving offense, which was committed before December 1, 2019.¹¹ With respect to Rosario's numerous family obligations and financial difficulties due to unemployment stated in his hearing request, there is no discretion for the Commission to impose a reduced suspension term based on consideration of hardship or otherwise.

Conclusion and Final Order

Based on the foregoing, I conclude that the Commission's proposed suspension is proper. I specifically conclude that Rosario's lack of submission(s) to the Commission are undeniably insufficient to meet his affirmative burden to show, by clear and convincing evidence, that his NYDWAI conviction was based exclusively on a BAC below 0.08%. The New Jersey legislature, in N.J.S.A. 39:4-50, explicitly required that the submitted evidence meet this high standard of proof. The New Jersey Supreme Court has stated:

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

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

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

¹¹ The NJ DWI statutory penalties were amended effective December 1, 2019 for offenses committed on or after that date. Thus, the amended penalties do not apply here. State v. Scudieri, No. A-0352-20, 2021 N.J. Super. LEXIS 136 (App. Div. Nov. 1, 2021)

Rosario's submissions to the Commission fall far short of this standard and cannot be said to constitute "evidence so clear, direct and weighty and convincing as to enable the factfinder to come to a clear conviction, without hesitancy, of the precise facts in issue."

The effective date of suspension of Rosario's driving privilege is March 14, 2022. (Suspension term: 730 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, Rosario 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, Rosario 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.¹² 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

¹² Although this matter had been considered among those that were being processed for transmission to the Office of Administrative Law for a plenary hearing, upon further review by the Commission it was noted that there are no factual issues requiring an evidentiary hearing and therefore this final administrative decision and order was issued. See Frank v. Ivy Club, 120 N.J. 73, 98 (1990), cert. denied, 498 U.S. 1073, 111 S. Ct. 799, 112 L. Ed.2d 860 (1991); Pepe, supra, 379 N.J. Super. 411 (App. Div. 2005).

by calling (609) 815-2950.

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

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

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



B. Sue Fulton
Chair and Chief Administrator

BSF:kw/mn

[pro se]

EXHIBIT LIST

*copies redacted of other drivers' personal identifying information

Commission Exhibits

- P-1 Copy of NYDMV Out-of-State Conviction report dated February 6, 2020, received by the Commission on February 21, 2020 (1 page, redacted)
- P-2 Copy of the Commission's Scheduled Suspension Notice, dated February 23, 2020 (2 pages, front and back of notice)
- P-3 Copy of the Commission's letter to Rosario advising him of the opportunity to submit clear and convincing evidence of the conviction being exclusively based on a BAC of less than 0.08% (affording a hearing on the papers), dated March 23, 2020 (2 pages)

Rosario's Exhibits

- R-1 Copy of hearing request letter from Rosario (2 pages, handwritten, stamped received March 17, 2020), with enclosed copy of the Commission's Scheduled Suspension Notice (2 pages, dated February 23, 2020)