



AFFIRMED
MOTOR VEHICLE COMMISSION

By ORVA
State of New Jersey

Date 1-22-18

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. MVH 07736-17

AGENCY DKT NO DXXXX

XXXX 07862

**NEW JERSEY MOTOR VEHICLE
COMMISSION,**

Petitioner,

v

DUSTIN T. DUNLAP,

Respondent

Cassandra Berry, Regulatory Officer for petitioner, pursuant to N.J.A.C. 17-27.5(a)(2)

Arun Sharma Lavine, Esq., for respondent

Record Closed: November 15, 2017

Decided: December 7, 2017

BEFORE **CATHERINE A. TUOHY, ALJ**

STATEMENT OF THE CASE

This proceeding is brought under N.J.S.A. 39:3-10.1 and N.J.A.C. 13:21-14.5(a) and (c) to suspend indefinitely the New Jersey passenger endorsement on the Commercial Driver License (CDL) of respondent Dustin T. Dunlap. The issues are

whether respondent committed a disqualifying crime or offense within the meaning of N.J.A.C. 13 21-14 5(a) and (c), and if so, whether respondent has affirmatively demonstrated sufficient rehabilitation to justify a waiver under N.J.A.C. 13 21-14.5(d).

PROCEDURAL HISTORY

By Scheduled Suspension Notice dated May 7, 2015, the Motor Vehicle Commission (Commission) proposed to suspend respondent's passenger endorsement indefinitely, effective June 5, 2015 because he failed to satisfy the requirements for the endorsement on his CDL based on information that he had a disqualifying criminal arrest and/or conviction record (P-3). Respondent timely requested a hearing (P-4). The Commission conducted an informal pre-hearing conference on December 28, 2015 (P-9). The Commission transmitted the matter to the Office of Administrative Law (OAL) where it was filed on May 25, 2017 as a contested case pursuant to N.J.S.A. 52:14B-1 to 15 and 14F-1 to 13. The matter was heard on October 24, 2017 and the record remained opened until November 8, 2017, to permit respondent to produce documentary evidence to support his position that he is rehabilitated. On November 9, 2017 respondent submitted the following documents: a July 17, 2017 letter from Kenneth W Rice Sr, President of the Amalgamated Transit Union (ATU) Local 540 indicating that respondent was in a company approved employee assistance program and was near completion, a July 15, 2017 letter from Abdul Monarch, Recording Secretary, ATU Local 540 indicating that respondent has a good work ethic and a promising future, an undated confidential letter from Kevin O'Neill, Senior EAP Counsellor outlining respondent's successful treatment for addiction and ongoing involvement in NJ Transits' EAP plan since respondent's admission to the program on June 21, 2017, and two letters of recommendations from coworkers and one letter of reference from a former professor. The record closed following receipt of written summations on November 15, 2017.

FACTUAL DISCUSSION AND FINDINGS

The Commission chose not to present testimony at the hearing and relied upon the documents submitted in discovery (P-1 through P-14) which were entered into evidence and made a part of the record.

Dustin T. Dunlap testified on his own behalf. He has been employed by New Jersey Transit for nine and a half years and as a bus mechanic for the last six years. One of the job requirements for a bus mechanic is that he have a passenger endorsement. He has never transported passengers and most likely never will transport passengers except perhaps another mechanic. Should he lose his passenger endorsement for more than six months, he will be terminated. Mr. Dunlap and his girlfriend have three children, twin boys and a girl. His girlfriend is in nursing school and he is the sole provider for his family.

Mr. Dunlap does not dispute the facts set forth in his criminal record, but claims to be rehabilitated. However, he was recently charged in June 2017 in Willingboro with drug possession and is being represented by an attorney. The codefendant in the case is his cousin who was the target of the investigation. Mr. Dunlap was working on a vehicle at his mother's house when the raid occurred. At the time, his cousin was residing with his mother. They both were arrested but Mr. Dunlap expects to be exonerated once the matter is heard.

Mr. Dunlap plead guilty on March 18, 2017 to a disorderly persons' offense for simple assault. He explained that the incident involved a family dispute regarding missing money that got out of hand. He completed drug and alcohol and anger management counselling. He currently is involved in an intensive program with his employer, New Jersey Transit. In January 2016, Mr. Dunlap was fired from New Jersey Transit due to his April 2015 arrest. He was out of work a year and a half. During that time, he collected unemployment and attended truck driving school in case he was not reinstated by with New Jersey Transit. Mr. Dunlap completed truck driving school and now has his Commercial Drivers "A" license. His union arbitrated his case and he was reinstated by New Jersey Transit in May 2017. As a condition to being reinstated, he

successfully underwent a ninety-day out-patient intensive employee assistance program (EAP) sponsored by New Jersey Transit. Mr. Dunlap then returned to work in August 2017. The EAP is an intensive five-year program that involves drug screens and counselling. Mr. Dunlap has been compliant with this program to date.

On cross-examination, respondent admitted that he has been arrested three more times since the April 2015 arrest. Mr. Dunlap understands that it is a privilege to have a passenger endorsement and it is valuable because it allows you to transport passengers with that endorsement.

In July 2015, respondent was charged with aggravated assault and unlawful possession of a weapon. The judgment of conviction was shown to respondent (P-11). The charges were downgraded to simple assault and purposely/knowingly causing bodily injury, a disorderly persons' offense. The Judgment of Conviction set forth aggravating and mitigating factors considered in Mr. Dunlap's sentencing. The aggravating factors considered were the risk that Mr. Dunlap would commit another offense and the need for deterring him and others from violating the law. The mitigating factor considered by the court in sentencing was that Mr. Dunlap would likely respond to probationary treatment. The sentencing judge noted that respondent was thirty years old and these were his first and second upper court convictions, but both for disorderly persons. Mr. Dunlap had three municipal court convictions. The judge found that the aggravating factors outweighed the mitigating factors in sentencing the respondent (P-11, page 4). Mr. Dunlap was shown P-14 which involved his arrest on June 8, 2017 for various offenses including possession of a controlled dangerous substance (CDS) and possession of CDS with intent to distribute. Those charges are currently pending.

Based upon the testimonial and documentary evidence and having had the opportunity to observe the appearance and demeanor of the respondent, I **FIND** as **FACT** that respondent plead guilty to a disorderly persons' offense as a result of his April 25, 2015 arrest for various CDS charges. I also **FIND** as **FACT** that respondent plead guilty to simple assault-purposely/knowingly causing bodily injury pursuant to

N J S A: 2C 12-1A(1) on November 14, 2016. I further **FIND** as **FACT** that respondent is currently participating in an employee assistance program.

LEGAL ANALYSIS AND CONCLUSIONS

Under the police authority of the State, the Administrator of the Commission has the right to impose reasonable restrictions on the issuance of licenses for various occupations in order to protect the public health and safety. Sanders v Division of Motor Vehicles, 131 N J Super 95, 97 (App Div. 1974) It further has been said that the primary objective of administrative proceedings before the Director "is to foster safety on the highway" Atkinson v Parsekian, 37 N J 143, 155 (1962)

In 1986, the federal Commercial Motor Vehicle Safety Act was enacted at 49 U S C A § 2701 to 2718 Section 2708 of the federal act required the states to adopt commercial driver licensing laws in compliance with federal standards or have their highway funds withheld In response, the legislature enacted the New Jersey Commercial Driver License Act in 1990. N J S A. 39 3-10.9, to 10 31. N J S A 39 3-10 creates a special license for drivers of a motor vehicle with a capacity of more than six passengers, and directs that an applicant for such a license present satisfactory evidence of his or her "previous experience", "good character" and "physical fitness" The statute authorizes the chief administrator of the Commission to suspend or revoke a passenger endorsement for a violation of the motor vehicle laws "or on other reasonable grounds, or where, in his opinion, the licensee is either physically or morally unfit to retain same" Ibid

Here, the Commission asserts that respondent is not fit to hold the passenger endorsement because he has a disqualifying criminal record as defined by N J A.C. 13 21-14 5(c)(12)

Under rules promulgated by the Commission regarding the issuance of passenger endorsements, N J A.C. 13 21-14 1, et seq., the Administrator "may not issue a passenger endorsement, or may revoke, or suspend a passenger endorsement

of any person when it is determined that the applicant or holder of such license has [a] criminal record which is disqualifying." The circumstances when a driver will be said to have a disqualifying record are set forth in N J A C 13 21-14 5(c)(12), which states:

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

1. He or she has been convicted of, or forfeited bond or collateral upon, any of the following

(1) An offense involving the manufacture, transportation, possession, sale or habitual use of a controlled dangerous substance as defined in the New Jersey Controlled Substance Act,

(2) A crime or other offense involving deviant or illicit social behavior such as rape, incest, sodomy or carnal abuse,

(3) A crime or other offense involving the use of force or the threat of force to or upon a person or property, such as armed robbery, assault and arson;

(4) Any crime or other offense indicative of bad moral character, [or]

(5) He fails to notify the Division that he has been arrested for, charged with, indicted for, convicted of, or forfeited bond or collateral upon any crime or other offense within 14 days after the date of such event

Nevertheless, the law vests the Chief Administrator with discretion on this type of suspension both because of the permissive use of "may" rather than the mandatory "shall" language above and because it has reserved the right to waive any portion of the disqualifying regulation "[if] sufficient and reasonable grounds are established at a hearing" N J A C 13 21-14 5(d). Proof of rehabilitation establishes grounds to waive the regulation. Sanders, supra, 131 N J Super at 98. The standards set forth in the

Rehabilitated Convicted Offenders Act provides guidance in assessing whether the proofs are sufficient to justify a waiver of a disqualifying condition. See N J S A 2A 168A-1 to -3. As a matter of policy, "it is in the public interest to assist the rehabilitation of convicted offenders by removing impediments and restrictions upon their ability to obtain employment or to participate in vocational or educational rehabilitation programs based solely on the existence of a criminal record" N J S A 2A 168A-1.

Various factors are enumerated in N J S A 2A.168A-2 to determine whether a conviction for a crime relates adversely to a particular occupation. The factors include: (1) the nature and duties of the occupation; (2) the nature and seriousness of the crime, (3) the circumstances under which the crime occurred, (4) the date of the crime, (5) the age of the person when the crime was committed; (6) whether the crime was an isolated or repeated incident; (7) social conditions which may have contributed to the crime, and (8) any evidence of rehabilitation, including good conduct in the community, counseling or psychiatric treatment received, acquisition of additional academic or vocational schooling, or the recommendation of persons who have or have had the person under their supervision.

In this case, respondent was initially noticed by the Commission on May 7, 2015 that his passenger endorsement was to be suspended indefinitely commencing June 5, 2015 due to his disqualifying criminal arrest and/ or conviction record arising from his arrest on April 25, 2015 (P-3). Thereafter, the Commission issued Supplemental Specifications which included the April 25, 2015 CDS arrest as well as respondent's additional November 5, 2015 arrest for various CDS offenses (P-6). On April 25, 2015, respondent was arrested and charged with five different drug related crimes, one of which included the sale of Controlled Dangerous Substances (CDS) on school property (P-5). Less than three months later, on July 17, 2015, respondent was again arrested and charged with attempted aggravated assault with a deadly weapon for an unlawful purpose (P-11 and P-12). On November 5, 2015 respondent was arrested for a third time for eight weapons and drug offenses, including CDS on school property, possession of a firearm for unlawful purpose and possession of marijuana with intent to

distribute (P-5, page 2). Lastly, on June 8, 2017, respondent was arrested for a fourth time and charged with five different drug crimes (P-14). Respondent pled guilty to two separate disorderly person offenses as a result of the April and July 2015 arrests (P-11).

Respondent testified that he has undergone treatment for alcohol and drug addiction and is currently involved in an employee assistance program at work. He underwent an intensive ninety day out-patient treatment program and returned to work in August 2017 and will continue to be monitored for the next five years. Respondent submitted a letter from his counselor, indicating that he has been compliant with the program and that he continues to be case managed and will receive ongoing, random drug and alcohol testing over the next five years (R-1). Although it is commendable that respondent is involved in this treatment program, it is premature to state that this is sufficient rehabilitation to justify a waiver. Respondent recently began treatment in June of 2017 and is still undergoing treatment. Furthermore, his record of arrests indicate that his arrests are not isolated or remote incidents. Respondent's outstanding criminal charges from his most recent arrest on June 8, 2017 further weighs against any claims of rehabilitation.

I **CONCLUDE** that respondent's guilty plea to a disorderly persons' offense as a result of his April 25, 2015 arrest on various CDS charges is a disqualifying record as it falls within the offense involving the manufacture, transportation, possession, sale or habitual use of a 'controlled dangerous substance' as defined in the 'New Jersey Controlled Substance Act'. I also **CONCLUDE** that respondent's guilty plea on November 14, 2016 to N.J.S.A. 2C 12-1A(1) simple assault – purposely/knowingly causing bodily injury is a disqualifying record as it falls within the offense involving the use of force or threat of force to or upon a person or property. I further **CONCLUDE** that respondent has failed to affirmatively demonstrate sufficient rehabilitation to justify a waiver pursuant to N.J.A.C. 13:21-14 5(d).

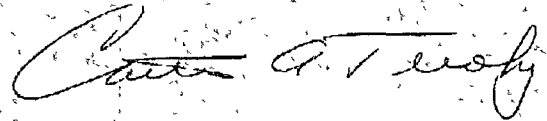
ORDER

It is **ORDERED** that the Scheduled Suspension Notice issued against the passenger endorsement on respondent Dustin T Dunlap's Commercial Driver License be and hereby is **AFFIRMED**

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

This recommended decision may be adopted, modified or rejected by the **CHIEF ADMINISTRATOR OF THE MOTOR VEHICLE COMMISSION**, who by law is authorized to make a final decision in this matter. If the Chief Administrator of the Motor Vehicle Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10

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



December 7, 2017
DATE

CATHERINE A. TUOHY, ALJ

Date Received at Agency

December 7, 2017 (emailed)

Date Mailed to Parties

12/8/17

/mel

WITNESSES

For Petitioner:

None

For Respondent:

Dustin T. Dunlap

EXHIBITS

For Petitioner:

- P-1 Petitioner's certification dated May 22, 2017 of documents mailed to respondent (two pages)
- P-2 Drivers' Abstract of Dustin T. Dunlap (ten pages)
- P-3 Scheduled Suspension Notice
- P-4 Respondent's request for a fair hearing
- P-5 New Jersey State Police Arrest Notification dated April 25, 2015 (three pages)
- P-6 NJMVC Supplemental Specifications dated November 19, 2015 (two pages)
- P-7 NJMVC Supplemental Specifications to be completed by driver (two pages)
- P-8 Mitigating Circumstances including Evidence of Rehabilitation
- P-9 Conference Report dated December 28, 2015 two pages
- P-10 Request for Judgment of Conviction 16-05-0500 dated May 10, 2017 (two pages)
- P-11 Motion for Dismissal of Indictment Judgment of Conviction Superior Court (four pages)

- P-12 NJ Automated Complaint System, Complaint Summary, Complaint Inquiry and Complaint Narrative Inquiry dated May 16, 2017 (three pages)
- P-13 New Jersey Promis/Gavel Statewide Defn/Case list dated November 19, 2015 (two pages)
- P-14 New Jersey State Police Arrest Notification for June 8, 2017 (eight pages)

For Respondent:

- R-1 Confidential letter to NJMVC from Kevin O'Neill, Senior EAP Counsellor, New Jersey Transit (undated)