

05-1439
SALES PERSON LICENSE
TAX YEAR: 2005
SIGNED: 01-10-2006
COMMISSIONERS: P. HENDRICKSON, R. JOHNSON, P. DEPAULIS, M. JOHNSON
GUIDING DECISION

BEFORE THE UTAH STATE TAX COMMISSION

PETITIONER,)	
)	ORDER
Petitioner,)	
)	Appeal No. 05-1439
v.)	
)	Tax Type: Sales Person License
MOTOR VEHICLE ENFORCEMENT)	
DIVISION OF THE UTAH STATE TAX)	Tax Year: 2005
COMMISSION,)	
)	Judge: Robinson
Respondent.)	

Presiding:
R. Spencer Robinson, Administrative Law Judge

Appearances:
For Petitioner: PETITIONER REP., Attorney for Petitioner
For Respondent: RESPONDENT REP. 1, Assistant Attorney General
 RESPONDENT REP. 2l, Assistant Director, MVED

STATEMENT OF THE CASE

This matter came before the Commission for an Initial Hearing pursuant to the provisions of Utah Code Ann. 959-1-502.5, on October 31, 2005. Petitioner is challenging the Respondent's suspension of his license to sell motor vehicles.

On May 23, 2005, Petitioner applied for a motor vehicle salesperson license. Respondent granted Petitioner's application. Following receipt of information from the Bureau of Criminal Identification, Respondent sent notice to Petitioner on September 15, 2005, of its decision to suspend Petitioner's license. Included in that letter was notice to Petitioner he could appeal that

Appeal No. 05-1439

decision. On October 5, 2005, Petitioner's attorney wrote a letter requesting a hearing on behalf of Petitioner.

Following the hearing, Petitioner's attorney submitted a document captioned "STATEMENT BY DEFENDANT BEFORE PLEADING NO CONTEST." It arrived in the Appeals Unit on November 30, 2005. The 4th District Court received the document, accepted a plea of no contest to two counts of securities fraud, two counts of selling unregistered securities, and two counts of sale by an unlicensed agent. The court is holding the no contest pleas in abeyance subject to the conditions set forth in the agreement included in the document.

Petitioner has agreed to make restitution in the amount of \$\$\$\$\$. He has also agreed to refrain from selling securities without a license, to provide honest and truthful testimony to the Division of Securities and to cooperate in any investigation of his former employer, short of forfeiting his Fifth Amendment privilege against self incrimination, to engage in any type of fraud or misrepresentation in selling securities, or aiding and abetting others in so doing.

Petitioner is on probation thirty-six months. If he successfully completes the conditions of the agreement, he will be allowed to withdraw his no contest plea and have the case against him dismissed.

In his STATEMENT BY DEFENDANT BEFORE PLEADING NO CONTEST, Petitioner states, "By pleading no contest, I am admitting that the state could prove sufficient facts to convict me of the charges to which I am pleading. Specifically, I concede that the state could prove the following:" The document then sets forth specific information regarding the counts to which the Petitioner pled no contest. For example, with respect to Count I, it states, in part,

"In or around DATE, I directly solicited an investment in CITY from PERSON A, a resident of Utah. In connection with the offer and sale of the investment to PERSON

A, I willfully made several material misstatements of fact and failed to state several material facts."

Similar statements regarding the other counts follow. Each is worded as the foregoing is, containing affirmative statements of what the Petitioner did or did not do. The document also contains the following statement. "Short of forfeiting my Fifth Amendment privilege, I will provide honest and truthful testimony to the Division, and fully cooperate with any state or federal investigation of CITY;"

APPLICABLE LAW

Utah Code Ann. §41-3-209 states, in pertinent part

••••

(2)(a) If the administrator finds that there is reasonable cause to deny, suspend, or revoke a license issued under this chapter, the administrator shall deny, suspend, or revoke the license.

(b) Reasonable cause for denial, suspension, or revocation of a license includes, in relation to the applicant or license holder or any of its partners, officers, or directors:

••••

(x) a violation of any state or federal law involving fraud;

DISCUSSION

The circumstances of this case are similar to those addressed in Salzl v. Dept. of Workforce Services, 2005 UT App 399; 2005 Utah App. LEXIS 382. In Salzl, the Petitioner, Pat Salzl, employed by the Utah State Developmental Center, was charged with abuse of a vulnerable adult, a class C misdemeanor, and attempted witness tampering, a class A misdemeanor. The abuse charge was based on allegations she used an improper technique to move a non-compliant disabled adult across new carpet. The tampering charge was based on allegations she called the USDC medical director and asked him to "make a statement on the record that it was medically necessary to drag the patient, as this would stop the police investigation." She pled no contest to both charges and the court held the pleas in abeyance. She was later allowed to withdraw her pleas and have the

criminal charges dismissed. At issue in Salzl was whether, under the circumstances summarized above, Ms. Salzl was eligible for unemployment benefits.

§35A-4-405 (2)(b) was the statutory language at issue. It states,

For the week in which the claimant was discharged for dishonesty constituting a crime or any felony or class A misdemeanor in connection with the claimant's work as shown by the facts, together with the claimant's admission, or as shown by the claimant's conviction of that crime in a court of competent jurisdiction and for the 51 next following weeks.

The Salzl court said,

Finally, Petitioner argues that Respondent unreasonably concluded that the class A misdemeanor was "admitted or established by a conviction in a court of law," Utah Admin. Code R994-405-210(1)(c), because a plea in abeyance that ultimately results in a dismissal does not constitute an admission to or a conviction of a crime. We disagree, and conclude that entering into a plea in abeyance for a class A misdemeanor constitutes an admission, if not a conviction, to that crime for the purposes of section [35A-4-405\(2\)\(b\)](#).

....

Similarly, although it is less clear that a "plea of no contest" constitutes an admission for the purposes of section [35A-4-405\(2\)\(b\)](#), we conclude that it does. "A plea of no contest indicates the accused does not challenge the charges . . . and if accepted by the court shall have the same effect as a plea of guilty . . ." Utah Code Ann. § [77-13-2\(3\)](#). If Petitioner pleaded no contest to the charges, without having that plea held in abeyance, there would be no question that she would be ineligible for benefits under section [35A-4-405\(2\)\(b\)](#). *See* Utah Admin. Code R994-405-213(2) ("Under Subsection [35A-4-405\(2\)\(b\)](#) , a plea of 'no contest' is considered a conviction" for administrative purposes). Because Petitioner's plea, be it guilty or no contest, was held in abeyance and the charge ultimately dismissed, no conviction resulted. However, it would be illogical and inconsistent with provisions of the Employment Security Act as a whole to permit Petitioner and other like claimants to utilize the combination of a no contest plea and a plea in abeyance to create a loophole in section [35A-4-405\(2\)\(b\)](#). Such would be contrary to the overarching purpose of section [35A-4-405](#), which is to make certain classes of workers ineligible for benefits, including those discharged for serious crimes. *See* Utah Code Ann. § [35A-4-405](#).

Utah Code Ann. §41-3-209(2)(b)(x) states that violations of the law involving fraud constitute reasonable cause for suspending a license. Petitioner is currently on probation to the court for six felonies, two of which expressly involve fraud in the sale of securities. The question is whether Petitioner's plea of no contest establishes violations of the law constituting reasonable cause

Appeal No. 05-1439

for suspending his license.

Workforce Services administrative rules provide that a plea of no contest constitutes a conviction. While Motor Vehicle Enforcement administrative rules do not contain such a provision, the Workforce Services rule simply recognizes that accepted no contest plea results in a conviction. As the Salzl court noted, Ms. Salzl's no contest plea was held in abeyance. Thus, no conviction was established by her entering the no contest plea. Nevertheless, the Salzl court held her failure to contest the charges was sufficient to sustain the denial of unemployment benefits.

The Commission finds Petitioner's acknowledgement that the State could prove he "made several material misstatements of fact and failed to state several material facts" in connection with the sale of securities which were not registered, and which he was not licensed to sell, establishes violations of state law involving fraud. The overarching purpose of §41-3-209 (2)(b)(x) is to prevent such persons from being licensed to sell motor vehicles.

DECISION AND ORDER

Based on the foregoing, the Commission sustains the Administrator's decision to suspend Petitioner's license to sell motor vehicles. It is so ordered.

This decision does not limit a party's right to a Formal Hearing. However, this Decision and Order will become the Final Decision and Order of the Commission unless any party to this case files a written request within thirty (30) days of the date of this decision to proceed to a Formal Hearing. Such a request shall be mailed to the address listed below and must include the Petitioner's name, address, and appeal number:

Utah State Tax Commission
Appeals Division
210 North 1950 West
Salt Lake City, Utah 84134

Appeal No. 05-1439

Failure to request a Formal Hearing will preclude any further appeal rights in this matter.

DATED this _____ day of _____, 2006.

R. Spencer Robinson
Administrative Law Judge

BY ORDER OF THE UTAH STATE TAX COMMISSION.

The Commission has reviewed this case and the undersigned concur in this decision.

DATED this _____ day of _____, 2006.

Pam Hendrickson
Commission Chair

R. Bruce Johnson
Commissioner

Palmer DePaulis
Commissioner

Marc B. Johnson
Commissioner