

07-1347  
Motor Vehicle  
Signed 04/07/2008

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BEFORE THE UTAH STATE TAX COMMISSION

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<p>PETITIONER,  Petitioner,  v.  MOTOR VEHICLE ENFORCEMENT DIVISION OF THE UTAH STATE TAX COMMISSION,  Respondent.</p>	<p><b>FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL DECISION</b></p> <p>Appeal No. 07-1347</p> <p>Tax Type: Salesperson License Tax Year: 2007</p> <p>Judge: Marshall</p>
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**Presiding:**

Jan Marshall, Administrative Law Judge

**Appearances:**

For Petitioner:     PETITIONER, *Pro Se*  
                              WITNESS 1, General Manager of COMPANY  
                              WITNESS 2, Sales Manager of COMPANY

For Respondent:    RESPONDENT REPRESENTATIVE, Motor Vehicle Enforcement  
                              Division

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for Formal Hearing on January 29, 2008. Petitioner is appealing the Commission's Order from the Initial Hearing in this matter upholding the suspension of his salesperson license to sell motor vehicles. Based on the testimony and evidence presented at the Formal Hearing, the Tax Commission hereby makes its:

FINDINGS OF FACT

1. On June 7, 2007, the Petitioner submitted a Motor Vehicle Salesperson Application ("application") to the Motor Vehicle Enforcement Division ("MVED").
2. Question number three of the application asks, "During the past 10 years, have you been convicted of any misdemeanors or felonies in Utah or any other state?" Petitioner checked the box marked "No".
3. The Division issued Petitioner a salesperson license on the basis that he did not have any convictions in the past ten years.

4. The Division subsequently received the results of Petitioner's criminal background check and discovered that Petitioner had the following violations within the past 10 years:

<u>DATE</u>	<u>VIOLATION</u>
8/8/00	Reckless Driving
5/25/02	Illegal Possession/Use of Controlled Substance
11/16/06	Possession with Intent to Distribute

5. Based on the Petitioner's convictions, the Division suspended Petitioner's salesperson license in a letter dated November 2, 2007.
6. At the Initial Hearing, Petitioner testified that the 2006 felony possession charges had been dismissed, and submitted an Order from the Third Judicial District Court in support. At the Formal Hearing, Petitioner explained that he did not disclose the charge because he had entered into a plea in abeyance and it was his understanding that it was not a "conviction," and that once he completed the requirements of drug court the charge would not show up on his record.
7. Petitioner stated that he is no longer on probation or parole for any of his convictions. Petitioner's criminal history report lists his current legal status as "discharged".
8. Petitioner testified at the Formal Hearing that he was not trying to do anything deceitful, but filled out his application as instructed by COMPANY.
9. WITNESS 2 testified at the Formal Hearing on Petitioner's behalf. WITNESS 2 stated that the Petitioner disclosed his criminal background during the COMPANY application process. Further, WITNESS 2 testified that it is their policy to run background checks on all applicants through "Screening One". The Petitioner's background check showed "no reportable records found." Petitioner submitted a copy of the criminal records search conducted by COMPANY which does show "no reportable records found."
10. Petitioner submitted a letter from WITNESS 3, COMPANY'S human resources manager, that explained that when Petitioner's background check was run, it came back with "no reportable records found". Petitioner was directed to check "no" in response to question number 3 on the application because COMPANY believed that the criminal record disclosed by Petitioner was old enough not to report.
11. Petitioner submitted a copy of his COMPANY application at the Formal Hearing. On the application it asks "Have you ever pled guilty or no contest to, or been convicted of, a misdemeanor or felony?" Petitioner checked a box indicating "Yes" and in the space provided, wrote "05/2001".

12. WITNESS 1, the General Manager of COMPANY testified at the Formal Hearing that Petitioner is a model employee, does a wonderful job, and is one of their top sales people.

13. For the Division, RESPONDENT REPRESENTATIVE testified at the Formal Hearing that the Petitioner's license was suspended because of the nature of Petitioner's convictions within the past 10 years and his failure to disclose those convictions on his application. RESPONDENT REPRESENTATIVE stated that the Division considers a "plea in abeyance" a violation under Utah Code Ann. §41-3-209. RESPONDENT REPRESENTATIVE concluded that based on the relevant statutory authority, the Division had no choice but to suspend Petitioner's salesperson license.

APPLICABLE LAW

The denial, suspension, and revocation of a salesperson license are governed by Utah Code Ann. §41-3-209(2) as follows:

- (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...
  - (vi) making a false statement on any application for a license under this chapter or for special license plates;
  - (vii) a violation of any state or federal law involving controlled substances...

Utah Code Ann. §41-3-209(2) (2007).

CONCLUSIONS OF LAW

The Commission finds that the Division had reasonable cause to suspend the Petitioner's salesperson license. Utah Code Ann. §41-3-209 mandates that the division "shall" deny, revoke, or suspend a license for "reasonable cause" and provides that both a violation of state or federal law involving a controlled substance and making a false statement on an application are reasonable cause. It is not disputed that Petitioner has been convicted of a violation involving a controlled substance. The Commission finds that the omission of Petitioner's criminal history from the application is at the very least, negligent. The Motor Vehicle Salesperson Application clearly asks, "During the past 10 years, have you been convicted of any misdemeanors or felonies in Utah or any other state?" The Petitioner marked the box indicating no, knowing that he had

two convictions in addition to the charges that were subsequently dismissed. Accordingly the Commission finds that the Petitioner made a false statement on his application.

Although the Division had reasonable cause to deny Petitioner a license, the Commission may consider other factors, such as the passage of time since the most recent conviction, the number and nature of convictions, the payment of restitution, and termination of probation or parole. The Commission has consistently used clearing probation and parole as a guideline to allow salesperson licenses to individuals who have been convicted of the crimes set forth in Utah Code Ann. §41-3-209. Petitioner is no longer on probation or parole for any of his convictions. However, the Commission is unwilling to exercise its discretion to grant a salesperson license to an applicant who knowingly and intentionally made a false statement on their application, even if at the direction of the dealership.

DECISION AND ORDER

Based on the foregoing the Commission upholds the suspension of Petitioner's salesperson license for a period of nine months from the mailing date at the bottom of this Order. During the period of this suspension, the Commission orders the Division to deny any re-application by Petitioner. Following a suspension period of nine months, the Commission orders the Division to make investigation into Petitioner's criminal history. If Petitioner's criminal history shows no charges or convictions other than the 2000 and 2002 convictions currently showing on Petitioner's criminal history report, the Commission will lift its suspension and allow the Division to license Petitioner. If Petitioner has other criminal charges or convictions, the Division is directed to deny the license and allow the Petitioner to appeal to the Commission as Petitioner sees fit. It is so ordered.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2008.

\_\_\_\_\_  
Jan Marshall  
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 \_\_\_\_\_, 2008.

Pam Hendrickson

R. Bruce Johnson

Commission Chair

Commissioner

D'Arcy Dixon Pignanelli  
Commissioner

DISSENT

I disagree with the majority with respect to the severity of the offense and the length of the suspension. There is compelling evidence, acknowledged in the Order, that Petitioner's employer was not only complicit in the improper filing of the application, but actually directed PETITIONER to answer "no." While this may not be enough to completely excuse Petitioner's omission, it is sufficiently mitigating to allow for a lesser punishment than imposed by the majority. It is reasonable to me that an applicant would willingly follow the direction of an employer. Furthermore, I can understand that an individual would believe that a report stating "no reportable records found" would be sufficient to address the question of reporting convictions, particularly where an individual has cleared parole and charges have been dismissed. At the same time however, some accountability is in order for making a false statement, even under the circumstances present in this case. Accordingly, I would reduce the suspension to thirty days.

Marc B. Johnson  
Commissioner

**Notice of Appeal Rights:** You have twenty (20) days after the date of this order to file a Request for Reconsideration with the Tax Commission Appeals Unit pursuant to Utah Code Ann. §63-46b-13. A Request for Reconsideration must allege newly discovered evidence or a mistake of law or fact. If you do not file a Request for Reconsideration with the Commission, this order constitutes final agency action. You have thirty (30) days after the date of this order to pursue judicial review of this order in accordance with Utah Code Ann. §59-1-601 and §63-46b-13 et. seq.

*JM/07-1347.fof*