

09-1771
MOTOR VEHICLE
TAX YEAR: 2009
SIGNED: 04-06-2009
COMMISSIONERS: R. JOHNSON, M. JOHNSON, D. DIXON
EXCUSED: P. HENDRICKSON
GUIDING DECISION

BEFORE THE UTAH STATE TAX COMMISSION

<p>PETITIONER, Petitioner, v. MOTOR VEHICLE ENFORCEMENT DIVISION OF THE UTAH STATE TAX COMMISSION, Respondent.</p>	<p>INITIAL HEARING ORDER</p> <p>Appeal No. 09-0771</p> <p>Tax Type: Salesperson License Tax Year: 2009</p> <p>Judge: Marshall</p>
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Presiding:

Jan Marshall, Administrative Law Judge

Appearances:

For Petitioner: PETITIONER REP, Esq.
PETITIONER

For Respondent: RESPONDENT REP, Chief Investigator, MVED

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for an Initial Hearing pursuant to the provisions of Utah Code Ann. §59-1-502.5 on March 25, 2009. Petitioner (“Applicant”) is appealing the Respondent’s (“Division”) denial of his salesperson license to sell motor vehicles.

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:

- (i) lack of a principal place of business;
- (ii) lack of a sales tax license required under Title 59, Chapter 12, Sales and use Tax Act;
- (iii) lack of a bond in effect as required by this chapter;
- (iv) current revocation or suspension of a dealer, dismantler, auction, or salesperson license issued in another state;
- (v) nonpayment of required fees;
- (vi) making a false statement on any application of a license under this chapter or for special license plates;
- (vii) a violation of any state or federal law involving motor vehicles;
- (viii) a violation of any state or federal law involving controlled substances;
- (ix) charges filed with any county attorney, district attorney, or U.S. attorney in any court of competent jurisdiction for a violation of any state or federal law involving motor vehicles;
- (x) a violation of any state or federal law involving fraud; or
- (xi) a violation of any state or federal law involving a registerable sex offense under Section 77-27-21.5

Utah Code Ann. §41-3-209(2) (2008).

DISCUSSION

On or about February 4, 2009 the Applicant submitted a Motor Vehicle Salesperson Application to the Division. The Division issued a letter dated February 11, 2009 that denied the application based on Petitioner's criminal convictions. In response to question number three on the application asking if the Applicant had been convicted of any misdemeanors or felonies in Utah or any other state within the past 10 years, he checked the box indicating "Yes." In the space provided, the Applicant wrote,

2006 F3 - Burglary [*sic*] of Dwelling, F3 - unlawful use of credit card. These charges happened before I was 18 I was charged after I turned 18. Since these charges I have held a salesman licensce [*sic*]. Thank you. These felonies will also drop to misdemeanors in two months. Thanks.

A copy of Applicant's criminal history report was obtained; as well as the Court docket reports for four separate cases; and a copy of the judgment, Restitution Judgment and Sentence for two of the cases. Applicant's criminal history was reviewed, and he has the following violations within the past ten years:

<u>DATE</u>	<u>VIOLATION</u>
4/26/06	Burglary (3 rd Degree Felony)
4/26/06	Unlawful Use of Financial Card/ATM (3 rd Degree Felony)
9/22/06	False Personal Information to Peace Officer (Class A Misdemeanor)
12/12/06	Theft (Class B Misdemeanor)
12/19/08	Issuing a Bad Check (Preliminary Hearing 4/1/09)
12/19/08	Theft by Receiving Stolen Property (Preliminary Hearing 4/1/09)
12/19/08	Criminal Responsibility (Preliminary Hearing 4/1/09)
3/11/09	Issuing a Bad Check (3 rd Degree Felony)
3/11/09	Issuing a Bad Check (2 nd Degree Felony)
3/11/09	Issuing a Bad Check (2 nd Degree Felony)

The Applicant has held a motor vehicle salesperson license in the past. He first applied for a salesperson license in August of 2005. On that application, the Applicant indicated that he had not been convicted of any felonies or misdemeanors in Utah or any other state within the past ten years. The Applicant submitted a second application on June 23, 2006 in order to switch dealerships. Again, the Applicant indicated that he had not been convicted of any felonies or misdemeanors in Utah or any other State within the past ten years. However, at the time of his second application, the applicant had been convicted of burglary and the unlawful use of a financial card. The applicant submitted a third application on June 28, 2006 in order to switch dealerships. On the third application, the Applicant did not disclose any convictions. At the hearing, the Applicant testified that he had disclosed his December 12, 2006 theft conviction on his first application, but did not disclose it on subsequent applications because his employer told him that he did not need to disclose his entire criminal history with each application. The Division's representative acknowledged that the Applicant's August 2005 application was accurate. However, he stated that the Applicant did not properly disclose his criminal history on

any of the subsequent applications, which alone is reasonable cause to deny, revoke or suspend a salesperson license. He further explained that the Applicant's subsequent applications were only to transfer his license to a different dealership, and that the Division does not require fingerprints with transfer applications. The Division's representative stated that had the Applicant disclosed his convictions, or had they run a check of his fingerprints, the Division would have denied the Applicant a salesperson license on the transfer applications.

The Applicant's representative argued that the Applicant's convictions are not identified in Utah Code Ann. §41-3-209 as giving "reasonable cause" for the denial of a salesperson license. He stated that the convictions neither meet the traditional legal definition of "fraud" nor are they specifically identified as crimes of fraud. Applicant's representative asked the Commission to look at the underlying events, and asked that in the event the Commission finds there is reasonable cause to deny the Applicant a license, that the Commission instead issue a conditional license.

The Applicant testified as to the circumstances surrounding his convictions. With regard to the 2006 theft conviction, the Applicant testified that he had purchased an energy drink at a convenience store, but threw it away at a grocery store, and was cited for theft. He stated that he missed the court date, and was convicted without explaining the circumstances to the judge. The Applicant stated that his conviction for unlawful use of a credit card did not involve any fraud or deception. He testified that a friend told him that they had permission to use his mother's credit card; however, the friend had taken his mother's credit card without her knowledge. With regard to the 2006 burglary conviction, the Applicant testified that he was not literally guilty of burglary, but that he entered into a plea agreement to avoid a second degree felony conviction. The Applicant testified that he was with a friend, who told him he needed to stop by a house and pick up some of his belongings. He believed that his friend had permission to be in the house because they did not break-in, they were able to enter the home via the keypad on the garage door.

Recently, the Applicant plead guilty to three separate counts of issuing a bad check. The Applicant's representative stated that all three of the counts had been amended from second degree to third degree felonies. However, the Division's representative provided copies of the Court records which show that only one of the convictions had been reduced from a second to a third degree felony. The Applicant explained the circumstances for the three bad checks. With regard to the first bad check, he testified that he believed the payee would hold the check, but it was processed sooner than agreed, and that within 7-10 days, the Applicant was able to pay the full amount. The second bad check was for parts and labor on a boat. The Applicant testified

that he had verified that he had available funds at the time he wrote the check, but by the time the check was presented to the bank there were insufficient funds. The Applicant testified that the third bad check was actually a post-dated check that he wrote on a personal loan, and that when the loan came due, he did not have sufficient funds. Upon questioning, the Applicant testified that he owed approximately \$\$\$\$ in restitution on the three bad checks.

The Applicant was sentenced to 36 months probation for the 2006 convictions, and at the time of the hearing was still on probation. The Applicant has not yet been sentenced for his recent convictions for issuing bad checks. Additionally, a preliminary hearing is scheduled of April 1, 2009 on charges against the Applicant for issuing a bad check, theft by receiving stolen property, and criminal responsibility, all second degree felonies.

The Division's representative stated that the Division received the Applicant's most recent motor vehicle salesperson application on February 4, 2009. He argued that although the Applicant disclosed his 2006 convictions for burglary and unlawful use of a credit card, he failed to disclose the convictions for theft and providing false information to a peace officer. The Division denied the Applicant a salesperson license based on his criminal history. He pointed out that the illegal use of credit cards is classified by the National Crime Information Center ("NCIC") as fraud, which appears on the Applicant's criminal history report. Further, the Division's representative argued that the violations of law identified as reasonable cause in Utah Code Ann. §41-3-209 is not exhaustive, and are only examples of the violations of law that are considered "reasonable cause" to deny, suspend, or revoke a salesperson license.

The Applicant's representative argued that the Applicant's convictions do not fall under Utah Code Ann. §41-3-209. The Commission disagrees. The Commission first looks to the plain language of the relevant provision.¹ At issue is what constitutes "a violation of any state or federal law involving fraud" under Utah Code Ann. §41-3-209(2)(b)(x). Applicant's representative maintains that the conviction for illegal use of a credit card does not constitute fraud under the traditional legal definition. Had the legislature intended to include only certain crimes involving fraud, it certainly would have done so, as it did for violations of law involving sex offenses. In Utah Code Ann. §41-3-209(2)(b)(xi), the legislature specifically identifies as

¹ "When interpreting statutes, our primary goal is to evince the true intent and purpose of the Legislature." The first step of statutory interpretation is to evaluate the best evidence of legislative intent: "the plain language of the statute itself." *Id.* "When examining the statutory language we assume the legislature used each term advisedly and in accordance with its ordinary meaning." *Id.* *In the Interest of Z.C., a person under eighteen years of age*, 165 P.3d 1206 (Utah 2007) quoting *State v. Martinez*, 2002 UT 80, P 8, 52 P.3d 1276.

“reasonable cause” only those sex offenses that are registerable under Utah Code Ann. §77-27-21.5. Thus, while the legislature could have generally identified “sex offenses”, it deliberately chose to specify only registerable sex offenses as violations that would constitute “reasonable cause” for the denial, suspension, or revocation of a salesperson license. The Commission finds that the plain language of the statute indicates the legislature intended something broader than the Applicant’s representative suggests, as indicated by the legislature’s failure to specifically identify crimes of fraud and by using the word “involving” as a modifier. The Commission finds that under the circumstances, a conviction for the illegal use of a credit card is “violation of any state or federal law involving fraud.”

It is the Commission’s position that an applicant is required to disclose all felonies and misdemeanors for which the applicant was convicted within the past 10 years. While the Applicant did list the burglary and unlawful use of a credit card convictions on his application, he failed to disclose the convictions for theft and false information to a peace officer. This alone is reason to deny the Applicant a salesperson license, as Utah Code Ann. §41-3-209 identifies as “reasonable cause” the making of a false statement on a license application. Further, as noted by the Division’s representative, the Applicant failed to disclose any of his convictions on the two transfer applications he submitted in 2006.

The Commission finds that the Division acted properly by denying the Applicant a motor vehicle salesperson license as Utah Code Ann. §41-3-209 mandates that a license be denied, revoked or suspended for “reasonable cause.” The statute then specifically identifies both violations of state or federal law involving fraud as well as making a false statement on an application as “reasonable cause.” As noted above, the Commission finds both that the Applicant has been convicted of a crime involving fraud, and failed to disclose all of his convictions on his application. Although the Division had reasonable cause to deny the Applicant a salesperson license, the Commission may consider other factors, such as such as the passage of time since the most recent conviction, the payment of restitution, and termination of probation or parole. The Applicant is currently on probation, owes approximately \$\$\$\$ in restitution, his most recent conviction was only two weeks prior to the hearing, and he has a hearing pending on three additional felony charges. Under the circumstances, the Commission finds there is not good cause to abate the Division’s denial of a motor vehicle salesperson license to the Applicant.

DECISION AND ORDER

Based on the foregoing, the Commission upholds the Division’s denial of the motor vehicle salesperson license. It is so ordered.

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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 either party to this case files a written request within thirty (30) days of the date of this decision to proceed to a formal decision. Such 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

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

DATED this _____ day of _____, 2009.

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 _____, 2009.

Pam Hendrickson
Commission Chair

R. Bruce Johnson
Commissioner

Marc B. Johnson
Commissioner

D'Arcy Dixon Pignanelli
Commissioner

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