

11-1178
SALESPERSON LICENSE
SIGNED: 11-04-2011
COMMISSIONERS: R. JOHNSON, M. CRAGUN
EXCUSED: M. JOHNSON
CONCURRENCE: D. DIXON

BEFORE THE UTAH STATE TAX COMMISSION

<p>PETITIONER, Petitioner, v. MOTOR VEHICLE ENFORCEMENT DIVISION, UTAH STATE TAX COMMISSION, Respondent.</p>	<p>FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL DECISION</p> <p>Appeal No. 11-1178 Tax Type: Salesperson License</p> <p>Judge: Phan</p>
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Presiding:

Bruce Johnson, Commissioner
Jane Phan, Administrative Law Judge

Appearances:

For Petitioner: PETITIONER REP., Attorney at Law
PETITIONER
For Respondent: RESPONDENT REP. 1, Assistant Attorney General
RESPONDENT REP. 2, Sergeant, Motor Vehicle Enforcement Division

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for a Formal Hearing pursuant to Utah Code Sec. 63G-4-206, on September 20, 2011. Based upon the evidence and testimony presented at the hearing, the Tax Commission hereby makes its:

FINDINGS OF FACT

1. Petitioner (the "Applicant") is appealing Respondent's (the "Division's") decision to suspend his Motor Vehicle Salesperson License.
2. The Applicant's Motor Vehicle Salesperson Application was suspended by letter dated March 14, 2011, which stated that the suspension was, "due to a discrepancy in your salesperson application

concerning criminal convictions during the last 10 years.”

3. The Applicant timely appealed the denial of the licenses and the matter proceeded to the Formal Hearing before the Commission.

4. Question 2 of the Motor Vehicle Salesperson Application form asks, “During the past 10 years, have you been convicted of any misdemeanors or felonies in Utah or in any other state?” The Applicant had checked the box for “No.” The Application was submitted to the Division on August 23, 2010.

5. Based on this representation, the Division issued the Applicant a Motor Vehicle Salesperson license.

6. When the Division received and reviewed the Applicant’s Criminal History Record from the Bureau of Criminal Identification it showed that there had been drug related convictions. The Applicant had been arrested on April 30, 2010 and charged with possession of a controlled substance and possession of drug paraphernalia. He had entered a plea in abeyance on both charges on May 6, 2010. However, after the Applicant had complied with the terms of the plea, these charges were dismissed on July 6, 2011.

7. Then a second incident indicated an arrest on June 16, 2010, and charges for distribution of marijuana and possession of marijuana. He was convicted on September 1, 2010 of Attempt to Commit Distribution of a dangerous drug. He was sentenced to twenty-four months of probation and is currently on probation for this conviction.

8. There were no other charges or convictions listed on the Applicant’s BCI report.

9. At the hearing the Applicant explained his side of these convictions. However, it is not the Commission’s position to retry the criminal cases, but instead the Commission starts with the fact that the Applicant had been convicted of the charges as noted above and then applies the provisions of Utah Code Sec. 41-3-209(2).).

10. When the Applicant had filled out his Motor Vehicle Salesperson Application form on or around August 2, 2010, he had already been convicted on the first incident of drug related charges through his plea in abeyance arrangement. The Commission considers a plea in abeyance to be a conviction unless and until it is dismissed.¹ In this case these convictions were dismissed after he had submitted the application in July 2011. Therefore, these were convictions that should have been listed on the application form. When he filled out the form he had been arrested for the second incident, but not yet convicted. The Application at that

¹ See Tax Commission Decisions in Appeal Nos. 05-1502, 05-1439 and 06-1399.

time asked only for convictions.²

11. The Applicant explained the reason for not disclosing the first conviction on his application was that he went over the application fast and he did not understand that he had a criminal conviction because he had not gone to jail.

12. The Applicant had stopped selling motor vehicles after receiving the Division's March 14, 2011, letter suspending his license. He was unaware that when he filed an appeal of the suspension that the suspension would be stayed until a decision was issued on the appeal.

APPLICABLE LAW

(2)(b) If the administrator finds that there is a reasonable cause to deny, suspend, or revoke a license issued under this chapter, the administrator shall deny, suspend, or revoke the license. (c) Reasonable cause for denial, suspension, or revocation of a license includes . . . (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 motor vehicles; (viii) a violation of any state or federal law regarding 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 Sec. 41-3-209(2)).

CONCLUSIONS OF LAW

1. The applicant has violated two express provisions of Utah Code Sec. 41-3-209(2). He made a false statement on the application form and he had a conviction involving a controlled substance. In the past, and based on the facts in each individual case, the Commission has suspended licenses for periods of months, where the applicant failed to fully disclose convictions on the application form and then granted the license after that period when the applicant reapplied, fully disclosing convictions and new charges. In this matter, due to the amount of time that has passed since the suspension that the Applicant had not been selling motor vehicles, and the additional time that the Applicant is on probation, once he had been released from probation, the license should not be denied on the basis of the failure to disclose on the August 2010 application form.

² The current version of the application form asks for charges and convictions.

2. In determining whether to reinstate a license, factors given significant consideration are whether the criminal justice system has released the Applicant from incarceration and parole or probation. Additionally, the Commission may consider the amount of time that has elapsed since the latest conviction. Both of these factors weigh against granting the Applicant a license at this time. He is currently on probation and the latest conviction was in September 2010. However, since at this time there is only one standing conviction, should the Applicant be released early from probation by the court, the Commission would grant a license to the applicant at that time, assuming there are no further charges or convictions and the Applicant makes a full disclosure on the new application form.

Jane Phan
Administrative Law Judge

DECISION AND ORDER

Based upon the foregoing, the Tax Commission denies the Applicant's appeal at this time. However, the Commission orders the Division to comply with the above provisions once the Applicant is released from probation. It is so ordered.

DATED this ____ day of _____, 2011.

R. Bruce Johnson
Commission Chair

Marc B. Johnson
Commissioner

Michael J. Cragun
Commissioner

Commissioner Dixon Concur

I concur in denying the license, not because the Petitioner is on probation, but because the testimony

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given did not clearly demonstrate a marked change in the Petitioner's choices and actions. While there was testimony the Petitioner had been through treatment at two different counseling centers since the offences, I would like to have seen certificates of completion from certified programs. In addition, I would like to have seen letters from individuals in a position to testify to the Petitioner's personal progress in making good choices. Finally, I would like to know the Petitioner has support networks either through family and friends or a religious or community group to assist him in making good choices. Had this evidence been provided at the formal hearing I may have considered a probationary license.

D'Arcy Dixon Pignanelli
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 Sec. 63G-4-302. 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 Sec. 59-1-601 et seq. and 63G-4-401 et seq.