

11-1762
MOTOR VEHICLE SALESPERSON LICENSE
SIGNED: 08-18-2011
COMMISSIONERS: R. JOHNSON, D. DIXON, M. CRAGUN
EXCUSED: M. JOHNSON
GUIDING DECISION

BEFORE THE UTAH STATE TAX COMMISSION

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| PETITIONER, | INITIAL HEARING ORDER |
| Petitioner, | Appeal No. 11-1762 |
| v. | Tax Type: Motor Vehicle Dealer License |
| MOTOR VEHICLE ENFORCEMENT DIVISION OF THE UTAH STATE TAX COMMISSION, | Judge: Phan |
| Respondent. | |

Presiding:

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 Division

RESPONDENT REP. 3, Motor Vehicle Division

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission on August 1, 2011 for an Initial Hearing in accordance with Utah Code Ann. §59-1-502.5. Petitioner (“Applicant”) is appealing the suspension by the Respondent (“Division”) of his motor vehicle dealer license and his motor vehicle no-fee owner license.

APPLICABLE LAW

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

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

- (c) 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:

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- (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

DISCUSSION

The Applicant has originally submitted an application for a motor vehicle dealer’s license on or around October 2002. The license was issued to the Applicant and the Applicant has been operating the business since that time. At the time of the application and granting a license the Applicant had no criminal convictions. Subsequent to the issuance of the license, the Applicant in February 2005 entered a plea in abeyance to two felony charges involving the sale of unregistered securities. From the information provided, the date of the actual offense had been in 1998, years earlier. Information proffered by the Applicant and his representative, which was un-refuted, indicated that the case was complicated. They stated that the primary defendant was convicted on federal securities violation counts and sentenced to federal prison, in part due to the cooperation of the Applicant. Court records support the Applicant’s contention that the plea arrangement was for the felony convictions to be held in abeyance for a period of 36 months, after which, if certain terms were met involving the payment of restitution and no additional offenses, the convictions would be amended to two Class A misdemeanors. The records indicate that, in fact, in April 2008, the convictions were amended to Class A misdemeanors of Attempted Sale of Unregistered Security. The Applicant was placed on Informal Court Probation and was required to continue making restitution payments. The applicant currently remains on Informal Court Probation and continues to make payments of \$\$\$\$\$ per month.

In 2011 the Division re-ran the Applicant through the Bureau of Criminal Identification and obtained the Applicant’s Criminal History Report. The Division represents that the report indicated the convictions noted above. Because of the conviction the Division suspended the Applicant’s dealer license effective June 25, 2011. The Division argues that Utah Code Ann. §41-3-209 mandates that a license “shall” be denied, revoked, or suspended for reasonable cause. The statute specifically identifies as “reasonable cause” violations of a state law involving fraud among other crimes.

In this matter, the Applicant argues his convictions did not involve fraud. The Applicant's representative argued the conviction was under Utah Code Sec. 61-1-7, which is in the Utah Uniform Securities Act and prohibits the sale of unregistered securities. The Division argued the criminal conviction relating to securities could be under Part 5. Fraud, of the Utah Criminal Code. The Applicant's representative also argues that it was anticipated that the Applicant would be able to continue to operate his business when the parties entered into the plea arrangement, so that the applicant could make restitution payments. Additionally, although the Applicant was still on probation, it was his representative's position that the probation should have been terminated in April 2011 and he was going to file a pleading with the court to request termination.

The Division also originally argued that the Applicant should not receive a license because he was still making restitution payments. However, upon further review of Utah Code Sec. 41-3-201(7) which does prohibit the issuance of license until full restitution has been paid to someone who has been convicted of any law relating to motor vehicle commerce or motor vehicle fraud. There was no indication in this case that the Applicant had ever been convicted of any crimes other than the sale of unregistered security offenses listed above. Therefore, this provision would not prevent the Applicant from receiving a license.

As noted by the Division, for purposes of Utah Code Sec. 41-3-209(2)(c)(x), the Commission has previously determined that "violations of state and federal law involving fraud" are not necessarily limited to fraud crimes listed under Part 5. Fraud of the Utah Criminal Code, but instead encompass a broader range of crimes that involve fraud. In Appeal No. 09-0771 the Commission concluded that "a conviction for the illegal use of a credit card is 'violation of any state or federal law involving fraud.'" In this appeal the convictions were for Attempted Sale of Unregistered Security. The court docket information does not specify under which code section this conviction had been made, but it is not clear that fraud would be an element of the crime.

After reviewing the applicable law and the evidence submitted in this matter, the license should be reinstated to the Applicant. Generally, the Commission does not grant a license to someone who is still on probation. In this case, the Applicant is still on informal court probation and paying restitution, which may continue for some time. However, the facts in this appeal are significantly dissimilar to the typical appeals that come before the Commission. In this case the Applicant's only convictions are two misdemeanors and the actual offenses occurred more than 12 years ago. The Applicant has been operating the motor vehicle dealership since 2002 and there is no indication of any charges or complaints relating to the business. For these reasons the

Appeal No. 11-1762

Commission should make a departure from its general policy and reissue the license to the Applicant.

Jane Phan
Administrative Law Judge

DECISION AND ORDER

Based on the foregoing the Commission reinstates the Applicant's motor vehicle dealer license and motor vehicle no-fee owner license. 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 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 _____, 2011.

R. Bruce Johnson
Commission Chair

Marc B. Johnson
Commissioner

D'Arcy Dixon Pignanelli
Commissioner

Michael J. Cragun
Commissioner