

17-1119

TAX TYPE: SALESPERSON LICENSE

TAX YEAR: 2017

DATE SIGNED: 10-6-2017

COMMISSIONERS: J. VALENTINE, M. CRAGUM, R. PERO, R. ROCKWELL

GUIDING DECISION

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BEFORE THE UTAH STATE TAX COMMISSION

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<p>PETITIONER,</p> <p>Petitioner,</p> <p>v.</p> <p>MOTOR VEHICLE ENFORCEMENT DIVISION OF THE UTAH STATE TAX COMMISSION,</p> <p>Respondent.</p>	<p><b>FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL DECISION</b></p> <p>Appeal No. 17-1119</p> <p>Tax Type: Motor Vehicle Salesperson's License</p> <p>Judge: Chapman</p>
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**Presiding:**

Michael J. Cragun, Commissioner

Kerry R. Chapman, Administrative Law Judge

**Appearances:**

For Petitioner: PETITIONER, Applicant

For Respondent: REPRESENTATIVE FOR RESPONDENT, Assistant Attorney General  
RESPONDENT, from MVED

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for a Formal Hearing on September 27, 2017.

Based upon the evidence and testimony presented at the hearing, the Tax Commission hereby makes its:

FINDINGS OF FACT

1. On or about June 5, 2017, PETITIONER ("Petitioner" or "applicant") submitted a Motor Vehicle Salesperson Application ("Application"), in which he applied for a license to sell motor vehicles at BUSINESS-1 in CITY-1, Utah.<sup>1</sup>

2. On June 9, 2017, Motor Vehicle Enforcement Division ("Respondent" or "Division") issued a letter in which it denied PETITIONER Application. In this letter, the Division indicated that it could not

issue a license to PETITIONER because “[o]ur review shows violation of state or federal law regarding registerable sex offense(s).”<sup>2</sup>

3. PETITIONER timely appealed the Division’s denial of his Application.

4. The Commission previously held an Initial Hearing in this matter. On July 31, 2017, the Commission issued its Initial Hearing Order, after which PETITIONER timely submitted a request to proceed to a Formal Hearing.<sup>3</sup>

5. Question #2 of the Application asks an applicant: “During the past 10 years, have you been charged with, found in violation of, or convicted of any misdemeanors or felonies in Utah or in any other state?” In response to this question, PETITIONER checked the “Yes” box and listed “Sexual Abuse 4-2007.”<sup>4</sup>

6. Question #3 of the Application asks an applicant: “Are you currently on probation or parole, court supervision of any kind, or in a ‘plea in abeyance’?” In response to this question, PETITIONER checked the “Yes” box and explained that he was on “parole for sexual abuse.”<sup>5</sup>

7. The Division submitted information from the Utah Fifth District Court (Iron County) showing that PETITIONER was charged with Sex Abuse of a Child (as described in Utah Code Ann. §76-5-404.1) on or around July 12, 2007, for an offense that occurred on April 11, 2007. This evidence also shows that on November 7, 2007, PETITIONER pleaded guilty to a 2<sup>nd</sup> degree felony for this Section 76-5-404.1 offense, which resulted in his being sentenced to prison for a term of 1 to 15 years.<sup>6</sup>

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1 Respondent’s Exhibit 2.

2 Respondent’s Exhibit 1.

3 Petitioner’s Exhibit 2.

4 Respondent’s Exhibit 2.

5 Respondent’s Exhibit 2. Question #3 of the Application also asks an applicant: “Do you still owe restitution?” In response to this question, PETITIONER checked the “No” box.

6 Respondent’s Exhibit 3. Because the offense occurred in STATE-1, PETITIONER was also charged with a crime in STATE-1. In 2007, PETITIONER pleaded guilty to the STATE-1 crime, which is described as “Attempted Lewdness With A Child Under the Age of 14.” Respondent’s Exhibit 4. PETITIONER stated that he was placed on probation for five years for the STATE-1 offense. As a result, the probation for the

8. PETITIONER was imprisoned in Utah from 2007 until his release in 2010. Upon his release from prison, PETITIONER was placed on parole until 2022 (i.e., for approximately 12 years). As of the date of the Formal Hearing, PETITIONER is still on parole. In addition, PETITIONER was required to register on the Utah Sex and Kidnap Offender Registry (“Sex Offender Registry”).<sup>7</sup> PETITIONER explained that he will remain on the Sex Offender Registry for 10 years after the termination of his parole, regardless of whether that occurs in 2022 or at a different time. PETITIONER also testified that he is not allowed to go where children congregate and that he is to have no contact with children.

9. PETITIONER testified that he is currently working on a request to have his parole terminated early. He stated that his parole officer is helping him prepare the request and that he intends to submit it to the Utah Board of Pardons and Parole (“Parole Board”) next week. PETITIONER, however, does not know when the Parole Board might rule on his request and indicated that it could take anywhere from three days to three years for a ruling to occur.

10. PETITIONER explained that if his Application to sell motor vehicles at BUSINESS-1 is granted, he would only be selling “semitrailers” and other motor vehicles that are pulled behind a semi-truck. As a result, PETITIONER asked the Commission to consider that he would only be dealing with and selling motor vehicles to truck drivers. For the Division, RESPONDENT cautioned that truck drivers could have children with them because some truck drivers have “home-schooled” children who travel with them. PETITIONER subsequently explained that he would actually be dealing with owners of trucking companies, not with the truck drivers themselves. PETITIONER contends that he would not “run into” children if the

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STATE-1 offense appears to have terminated around 2012 (i.e. five years after the 2007 conviction). In any case, no evidence was submitted to suggest that PETITIONER is still under court supervision in STATE-1. It is unclear whether the STATE-1 offense to which PETITIONER pleaded guilty was a felony or a misdemeanor. Regardless, the classification of the STATE-1 offense has no effect on the outcome of this decision.

<sup>7</sup> Respondent’s Exhibit 4.

Commission grants him a license to sell motor vehicles at BUSINESS-1.

11. PETITIONER asks the Commission to grant him a salesperson's license because he has had a successful history in sales and because the job would enable him to earn more income through commissions. In addition, because his BUSINESS-1 "sales area" would include not only Utah, but also STATE-2, PETITIONER contends that the job would enable him to better attend to his mother, who lives alone in STATE-2. PETITIONER also asks the Commission to consider a letter dated June 6, 2017, from NAME-1, his Adult Probation and Parole agent. In this letter, NAME-1 indicates that since PETITIONER has been on parole, he "has complied with what is required of him" and that "[h]e is good to work with and keeps a good attitude." NAME-1 also indicates that Adult Probation and Parole has several parolees "that hold professional licensures and they have been successful in a career lifestyle."<sup>8</sup> For these reasons and because the incident for which he was convicted and is on parole occurred more than 10 years ago, PETITIONER asks the Commission to grant his Application for a salesperson's license.

12. The Division, however, asks the Commission to deny PETITIONER Application for a salesperson's license because he has violated a state law involving a registerable sex offense under Utah Code Ann. §77-41-106 and because such a violation constitutes "reasonable cause" to deny, suspend, or revoke a salesperson's license under Utah Code Ann. §41-3-209(2)(c)(xi). The Division contends that Subsection 41-3-209(2)(b) requires it to deny an application if "reasonable cause" exists to deny, suspend, or revoke a license under Subsection 41-3-209(2)(c). In addition, the Division contends that it is not authorized to grant PETITIONER a license under Utah Admin. Rule R877-23V-20 ("Rule 20") because he is still on parole.

13. PETITIONER agrees that under the laws cited by the Division, the Division was required to deny his Application for a salesperson's license. However, he contends that these laws do not specify that the Commission, when reviewing the Division's action, must also deny his Application for a license. As a result,

he asks the Commission to consider his circumstances and to grant him a salesperson's license.

APPLICABLE LAW

1. Utah Code Ann. §41-3-209 provides statutory guidance concerning the issuance of a motor vehicle salesperson's license, as follows in pertinent part:

(1) If the administrator finds that an applicant is not qualified to receive a license, a license may not be granted.

(2) . . . .

(b) 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.

(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:

. . . .

(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 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;

(xi) a violation of any state or federal law involving a registerable sex offense under Section 77-41-106; or

(xii) having had a license issued under this chapter revoked within five years from the date of application.

. . . .

2. Utah Admin. Rule R877-23V-20 ("Rule 20") provides, as follows:

(1) Subject to Subsection (2), there is a rebuttable presumption that reasonable cause to deny, suspend, or revoke a license under Title 41, Chapter 3 does not include a violation of a state or federal law that otherwise constitutes reasonable cause under Subsection 41-3-209(2) if the licensee or license applicant who has been charged with, found in violation of, or convicted of a state or federal law that constitutes reasonable cause to deny, suspend, or revoke a license under Subsection 41-3-209(2), has

(a) (i) completed any court-ordered probation or parole; or

(ii) met any conditions of a plea in abeyance; and

(b) paid any required criminal restitution and fines.

(2) The division may rebut the presumption under Subsection (1) by presenting evidence to the commission establishing that the license should be denied, suspended, or revoked.

3. For the instant matter, UCA §59-1-1417(1) provides guidance concerning which party has the burden of proof, as follows:

(1) In a proceeding before the commission, the burden of proof is on the petitioner except for determining the following, in which the burden of proof is on the commission:

- (a) whether the petitioner committed fraud with intent to evade a tax, fee, or charge;
- (b) whether the petitioner is obligated as the transferee of property of the person that originally owes a liability or a preceding transferee, but not to show that the person that originally owes a liability is obligated for the liability; and
- (c) whether the petitioner is liable for an increase in a deficiency if the increase is asserted initially after a notice of deficiency is mailed in accordance with Section 59-1-1405 and a petition under Part 5, Petitions for Redetermination of Deficiencies, is filed, unless the increase in the deficiency is the result of a change or correction of federal taxable income:
  - (i) required to be reported; and
  - (ii) of which the commission has no notice at the time the commission mails the notice of deficiency.

#### CONCLUSIONS OF LAW

1. Pursuant to Subsection 59-1-1417(1), the Petitioner has the burden of proof in this matter.
2. Subsection 41-3-209(2)(c)(xi) provides that reasonable cause exists to deny an application for a salesperson's license if an applicant has "a violation of any state or federal law involving a registerable sex offense under Section 77-41-106[.]" PETITIONER has been convicted of a 2<sup>nd</sup> degree felony under Section 76-5-404.1 (sexual abuse of a child). For purposes of the Utah Sex Offender Registry, Subsection 77-41-106(6) provides that a conviction for "Section 76-5-404.1, sexual abuse of a child" is a "registerable offense." Accordingly, PETITIONER has a violation of a Utah law involving a registerable sex offense under Section 77-41-106, which constitutes "reasonable cause" to deny his application under Subsection 41-3-209(2)(c)(xi).

3. Subsection 41-3-209(2)(b) provides that the administrator (i.e., the Division) *shall* deny, suspend, or revoke a license if it finds that “reasonable cause” to deny, suspend, or revoke a license exists.<sup>9</sup> Accordingly, where “reasonable cause” exists to deny, suspend, or revoke a license, as in this case, the Division is required to deny an application for a license unless another statute or rule authorizes an exception and does not require the Division to deny the application.

4. Rule 20 is the only statute or rule that authorizes an exception for the Division not to deny, suspend, or revoke a license when “reasonable cause,” as set forth in Subsection 41-3-209(2), exists. Rule 20 provides that “[t]here is a rebuttable presumption that reasonable cause to deny, suspend, or revoke a license . . . does not include a violation of a state or federal law that otherwise constitutes reasonable cause under Subsection 41-3-209(2) if the . . . license applicant” satisfies certain specified requirements. These requirements include completing court-ordered probation or parole. Because PETITIONER is still on parole, the Division was not authorized to apply the Rule 20 exception in this case.<sup>10</sup> As a result, the Division was required to deny PETITIONER application for a license pursuant to Subsection 41-3-209(2).

5. The Commission, however, has historically found that it has discretion to grant a license to a person even if “reasonable cause” to deny, suspend, or revoke a license exists under Subsection 41-3-209(2) and even if all requirements set forth in Rule 20 have not been met. Subsequent to the adoption of Rule 20 (which became effective on February 9, 2012), the Commission used its discretion and granted a license to someone who was still on probation and who had not paid all criminal restitution. Specifically, in *USTC*

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9 Utah Code Ann. §41-3-102(1) defines “administrator” to mean “the motor vehicle enforcement administrator” (i.e., the Division).

10 There may be instances where a license applicant satisfies all of the requirements listed in Rule 20 and where the Division still believes that the license applicant should not be licensed. To accommodate such circumstances, the exception provided in Rule 20 is subject to a “rebuttable presumption.” As a result, the Division may counteract the presumption and not implement the exception where the Division believes that a license should not be issued to a person who, nevertheless, has satisfied all requirements listed in the rule.

*Appeal No. 12-2888* (Initial Hearing Order Jan. 11, 2013),<sup>11</sup> the Commission considered an applicant who, in 2004, had been convicted of six felonies for securities fraud, which constituted “reasonable cause” to deny, suspend, or revoke a license under Subsection 41-3-209(2)(c)(x). The applicant was sentenced to 12 years of probation set to end in 2016.<sup>12</sup> The Commission granted this applicant a license, noting that the arrest date for his crimes was more than a decade earlier and that “[c]urrent law requires the Division of Public Safety to notify the Division of any subsequent convictions for all salespersons should there be any further incidents, which does appear unlikely based on the Applicant’s history.” The Commission, however, is not aware of another case in which it has granted a license to someone who was still on court-supervised probation or parole for a crime that constituted “reasonable cause” to deny, suspend, or revoke a license.

6. In the instant case, the offense for which PETITIONER was convicted and is still on parole occurred approximately 10 years ago, and he does not appear to have been arrested or charged with another crime since then. Otherwise, PETITIONER circumstances are different from those of the *Appeal No. 12-1288* applicant. First, the *Appeal No. 12-1288* applicant was sentenced to probation and did not serve time in prison, unlike PETITIONER, who was sentenced to prison for 1 to 15 years, served 3 years, and was placed on parole. Second, the *Appeal No. 12-1288* applicant’s long probationary period appears to be associated with the large amount of restitution that he or she was required to pay, whereas PETITIONER long parole period may be related more to the crime he committed than to restitution.<sup>13</sup> Third, PETITIONER, unlike the *Appeal No. 12-1288* applicant, is required to be registered on the Utah Sex Offender Registry. Lastly, it has been the Commission’s *general* policy not to issue a license to a person under court supervision, including parole. Such

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11 This and other selected decisions can be reviewed in a redacted format on the Commission’s website at <http://www.tax.utah.gov/commission-office/decisions>.

12 The applicant in *Appeal No. 12-2888* was also ordered to pay restitution (for securities fraud not related to motor vehicle commerce or motor vehicle fraud). The applicant indicated that the lengthy probation period was “geared toward payment of the restitution” and that while he was making monthly restitution payments, he would never be able to pay the entire amount in his lifetime.



Appeal No. 17-1119

a policy is helpful in administering the licensure process. The circumstances of PETITIONER case are different from those in *Appeal No. 12-1288* and do not warrant an exception to the Commission's general policy. For these reasons, the Commission should sustain the Division's action and should not use its discretion to grant PETITIONER a salesperson's license.

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Kerry R. Chapman  
Administrative Law Judge

DECISION AND ORDER

Based upon the foregoing, the Commission sustains the Division's action and denies PETITIONER application for a motor vehicle salesperson's license. Once PETITIONER parole is terminated, he may submit a new application for a salesperson's license, which the Division would review and determine whether it should grant a license at that time. It is so ordered.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2017.

John L. Valentine  
Commission Chair

Michael J. Cragun  
Commissioner

Robert P. Pero  
Commissioner

Rebecca L. Rockwell  
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 Secs. 59-1-601 et seq. and 63G-4-401 et seq.

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13      PETITIONER admitted on his application that he does not owe any restitution.