

17-626
TAX TYPE: MOTOR VEHICLE SALES PERSON'S LICENSE
TAX YEAR: 2017
DATE SIGNED: 5-24-2017
COMMISSIONERS: M. CRAGUN, R. PERO, R. ROCKWELL
EXCUSED: J. VALENTINE
GUIDING DECISION

BEFORE THE UTAH STATE TAX COMMISSION

<p>PETITIONER,</p> <p style="text-align: center;">Petitioner,</p> <p>v.</p> <p>MOTOR VEHICLE ENFORCEMENT DIVISION OF THE UTAH STATE TAX COMMISSION,</p> <p style="text-align: center;">Respondent.</p>	<p style="text-align: center;">INITIAL HEARING ORDER</p> <p>Appeal No. 17-626</p> <p>Tax Type: Motor Vehicle Salesperson's License</p> <p>Judge: Chapman</p>
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Presiding:
Kerry R. Chapman, Administrative Law Judge

Appearances:
For Petitioner: REPRESENTATIVE FOR PETITIONER, Representative (by telephone)
For Respondent: RESPONDENT, from 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 May 8, 2017.

PETITIONER (the "Petitioner" or "licensee") filed an application to receive a motor vehicle salesperson's license on March 8, 2017, which the Motor Vehicle Enforcement Division ("MVED" or "Division") granted. In a letter dated April 3, 2017, the Division suspended PETITIONER license for 60 days (specifically from May 3, 2017 until July 2, 2017). In the letter, the Division informed PETITIONER that it was taking this action because it "found discrepancies on your application[,] specifically that "information from the Utah Bureau of Criminal Identification shows your response to [the Criminal History] question was

not correct.” The Division further informed PETITIONER that after the 60-day suspension period is completed, he could “re-submit a new TC-303 application with Proof you are no longer on probation.”¹

PETITIONER appealed the Division’s action by filing a Petition for Expedited Hearing (“Petition”). On the Petition, PETITIONER indicated that he needs to keep being employed, that he has proof that he has completed his parole, that he is not sure what he answered wrong, in part, because of his “limited English,” and that he would like to rectify the incorrect response. As a result, PETITIONER may be asking the Commission not to suspend his license at all. However, such an assumption may be incorrect because PETITIONER did not appear at the Initial Hearing to clarify his intent.² REPRESENTATIVE FOR PETITIONER did not specifically ask the Commission to reduce the 60-day suspension period for PETITIONER. However, he did ask the Commission to consider that PETITIONER might “not last” a 60-day suspension.

APPLICABLE LAW

Utah Code Ann. §41-3-209 provides statutory guidance concerning the issuance of motor vehicle salesperson’s licenses, 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)

1 PETITIONER license remains in effect while the suspension is under appeal.

2 REPRESENTATIVE FOR PETITIONER, the Petitioner’s representative and owner of the dealership at which PETITIONER is employed, explained that PETITIONER called in sick for work the day of the hearing and may have been afraid to attend the hearing because he is an immigrant to the United States (the Division confirmed that PETITIONER has an employment authorization card that allows him to work in the United States). Because PETITIONER did not attend the hearing in person, some of the information proffered by REPRESENTATIVE FOR PETITIONER may be considered hearsay.

Utah Code Ann. §63G-4-206(1)(c) provides that in proceedings such as those held by the Tax Commission, evidence may not be excluded solely because it is hearsay. However, Utah Code Ann. §63G-4-208(3) provides that “[a] finding of fact that was contested may not be based solely on hearsay evidence unless that evidence is admissible under the Utah Rules of Evidence.” Utah Admin. Rule R861-1A-28(2)(b) provides that hearsay evidence may be admitted at Tax Commission proceedings, but that no decision of the Commission will be based solely on hearsay evidence. For purposes of the Initial Hearing decision, the Commission will consider any hearsay evidence proffered by REPRESENTATIVE FOR PETITIONER, under the assumption that PETITIONER would provide this evidence himself if there were a Formal Hearing.

(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, 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.

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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.

Utah Code Ann. §76-6-1105 provides information concerning the criminal offense of "unlawful possession of another's identification documents," as follows in pertinent part:

(1) For purposes of this section "identifying document" means:

(a) a government issued identifying document;

(b) a vehicle registration certificate; or

(c) any other document containing personal identifying information as defined in Subsections 76-6-1102(1)(d) through (k).

(2) (a) Notwithstanding the provisions of Subsection 76-6-1102(3), a person is guilty of a class A misdemeanor if he:

- (i) obtains or possesses an identifying document with knowledge that he is not entitled to obtain or possess the identifying document; or
 - (ii) assists another person in obtaining or possessing an identifying document with knowledge that the person is not entitled to obtain or possess the identifying document.
- (b) A person is guilty of a third degree felony if he:
- (i) obtains or possesses multiple identifying documents with knowledge that he is not entitled to obtain or possess the multiple identifying documents; or
 - (ii) assists another person in obtaining or possessing multiple identifying documents with knowledge that the person is not entitled to obtain or possess the multiple identifying documents.

....

Utah Code Ann. §76-6-1102 provides information concerning the criminal offense of “identity fraud,”

as follows in pertinent part:

- (1) As used in this part, "personal identifying information" may include:
 - (a) name;
 - (b) birth date;
 - (c) address;
 - (d) telephone number;
 - (e) drivers license number;
 - (f) Social Security number;
 - (g) place of employment;
 - (h) employee identification numbers or other personal identification numbers;
 - (i) mother's maiden name;
 - (j) electronic identification numbers;
 - (k) electronic signatures under Title 46, Chapter 4, Uniform Electronic Transactions Act;
 - (l) any other numbers or information that can be used to access a person's financial resources or medical information, except for numbers or information that can be prosecuted as financial transaction card offenses under Sections 76-6-506 through 76-6-506.6; or
 - (m) a photograph or any other realistic likeness.
- (2) (a) A person is guilty of identity fraud when that person knowingly or intentionally uses, or attempts to use, the personal identifying information of another person, whether that person is alive or deceased, with fraudulent intent, including to obtain, or attempt to obtain, credit, goods, services, employment, any other thing of value, or medical information.
 - (b) It is not a defense to a violation of Subsection (2)(a) that the person did not know that the personal information belonged to another person.
- (3) Identity fraud is:
 - (a) except as provided in Subsection (3)(b)(ii), a third degree felony if the value of the credit, goods, services, employment, or any other thing of value is less than \$5,000; or
 - (b) a second degree felony if:

- (i) the value of the credit, goods, services, employment, or any other thing of value is or exceeds \$5,000; or
- (ii) the use described in Subsection (2)(a) of personal identifying information results, directly or indirectly, in bodily injury to another person.

....

For the instant matter, UCA §59-1-1417(1) provides guidance on 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.

DISCUSSION

Pursuant to Subsection 59-1-1417(1), PETITIONER has the burden of proof in this matter. Question #2 of the Motor Vehicle Salesperson Application (“application”) asks an applicant to answer “yes” or “no” to the following question: “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?” PETITIONER answered “no” to this question. The Division has provided information to show that this answer was a false statement.

The Division provided PETITIONER Criminal History Report and court records from the Utah First District Court - Cache, which shows that PETITIONER was charged with two 3rd degree felonies in July 2014. One of the charges was for “Possession of Another’s Identifying Document(s)” (as described under Utah Code Ann. §76-6-1105), while the other charge was for Identify Fraud (as described under Utah Code Ann. §76-6-1102). These records also show that on November 3, 2014, the Identity Fraud charge was dismissed, and

PETITIONER pleaded guilty to an amended Class A Misdemeanor for the Possession of Another's Identifying Document(s) offense.³ Because the two charges and the one misdemeanor conviction occurred within 10 years of the date that PETITIONER completed his application, his answer to Question #2 of the application is a false statement.

It is noted that PETITIONER correctly answered Question #3 on his application, which asks an applicant to answer "yes" or "no" to the following question: "Are you currently on probation or parole, court supervision of any kind, or in a 'plea in abeyance'?" PETITIONER answered "no" to this question. The records the Division provided show that for his Class A Misdemeanor for Possession of Another's Identifying Document(s) conviction, PETITIONER was sentenced to 108 days in jail and placed on probation for 36 months. However, the court records also show that PETITIONER criminal case was "closed" on September 23, 2015 (almost 1½ years prior to the March 8, 2017 date that he submitted his application). RESPONDENT, the Division's representative, explained that the criminal case would not have been closed had PETITIONER probation not been terminated. As a result, RESPONDENT contends the court records show that PETITIONER was no longer on probation when he submitted his application and, as a result, that he properly answered "no" to Question #3.⁴

RESPONDENT stated that had PETITIONER completed his application correctly (i.e., had he listed his two charges and one conviction that had occurred within the past 10 years), the Division still would have

3 The court records show that a Spanish interpreter was present at the Utah First District Court – Cache proceedings. REPRESENTATIVE FOR PETITIONER explained that PETITIONER does not speak "good English" and does not read or write English at all.

4 It appears that PETITIONER 36-month probation must have been terminated early because the September 23, 2015 date on which the criminal case was closed is less than 11 months after the date that PETITIONER was placed on probation. At the hearing, RESPONDENT asks that PETITIONER be required to submit a document from the court expressly showing that the court has terminated his probation before he is allowed to sell motor vehicles again (assuming the Commission suspends PETITIONER license). RESPONDENT explained that the Division wants to put this document in its file for PETITIONER because not all Division employees know that a court's closure of a criminal case means that the probation associated

granted him a salesperson's license.⁵ However, because PETITIONER made a false statement on his application, the Division contends that it is required to deny, suspend, or revoke his license pursuant to Subsection 41-3-209(2)(c)(vi).

RESPONDENT further explained that when a licensee makes a false statement on an application, its policy is to suspend the licensee's license for 60 days if the licensee was convicted of an offense that is listed under Subsection 41-3-209(2)(c) and 30 days if the licensee was convicted of an offense that is not listed under Subsection 41-3-209(2)(c). The Division contends that the Class A Misdemeanor for Possession of Another's Identifying Document(s) for which PETITIONER was convicted is a violation involving fraud and, thus, is an offense listed under Subsection 41-3-209(2)(c)(x).⁶ For these reasons, the Division asks the Commission to sustain its 60-day suspension of PETITIONER license.

REPRESENTATIVE FOR PETITIONER admitted that he did not know that PETITIONER had been convicted of the Class A Misdemeanor for Possession of Another's Identifying Document(s) when he hired him.⁷ REPRESENTATIVE FOR PETITIONER, however, stated that he questioned PETITIONER about his

with that case has been terminated.

5 RESPONDENT explained that the Division would have granted PETITIONER a salesperson's license even had it known that he had been convicted of the Class A Misdemeanor for Possession of Another's Identifying Document(s) within the past 10 years, in part, because he was no longer on probation. The Division explained that it would have granted the license pursuant to Rule 20.

6 The elements of the Misdemeanor for Possession of Another's Identifying Document(s) offense for which PETITIONER was convicted does not specifically include "fraudulent intent" (unlike the elements of the Identity Fraud offense that was dismissed). However, the Commission has previously found "a violation of any state or federal law involving fraud" (for purposes of Subsection 41-3-209(2)(c)(x)) may include certain crimes for which "fraudulent intent" is not listed as an element of that crime. *See USTC Appeal No. 15-1388* (Findings of Fact, Conclusions of Law, and Final Decision Jan. 11, 2016) for a discussion of cases in which the Commission has determined whether or not certain crimes are considered violations involving fraud (this and other selected decisions can be reviewed on the Commission's website at <http://www.tax.utah.gov/commission-office/decisions>). Regardless, for reasons explained later in the decision, the Commission is reducing the 60-day suspension at issue in this case to 30 days. As a result, the Commission need not decide whether the Possession of Another's Identifying Document(s) offense is a crime involving fraud that is listed in Subsection 41-3-209(2)(c).

7 REPRESENTATIVE FOR PETITIONER explained that when PETITIONER filled out his

false statement after the Division suspended his license and that PETITIONER thought that he did not have to list his conviction or charges because he had completed his probation. In addition, REPRESENTATIVE FOR PETITIONER asks the Commission to consider that PETITIONER cannot read English and that someone else translated all of the application questions for PETITIONER. REPRESENTATIVE FOR PETITIONER also asks the Commission to consider that PETITIONER is an outstanding person and a great employee who is vital to his business.

Because PETITIONER made a false statement on his application, reasonable cause existed for the Division to deny, suspend, or revoke his license pursuant to Subsection 41-3-209(2)(c)(vi). Where reasonable cause exists to deny, suspend, or revoke a license, Subsection 41-2-209(2)(b) provides that the Division *shall* deny, suspend, or revoke the license. Accordingly, the Division's suspension of PETITIONER license complies with Utah law. Regardless, the Commission may consider all circumstances and determine whether to sustain the Division's 60-day suspension or whether some other action would be appropriate.⁸

Given the circumstances of this case, the Commission finds that it would be appropriate to reduce the 60-day suspension period that the Division imposed to 30 days because: 1) PETITIONER would still have been granted a license if he had answered Question #2 of the application correctly; 2) PETITIONER has only

application, PETITIONER mentioned that he had had a "problem." REPRESENTATIVE FOR PETITIONER stated that he told PETITIONER to complete the application and see if he qualified for a license. REPRESENTATIVE FOR PETITIONER stated that he gave PETITIONER this advice because he, REPRESENTATIVE FOR PETITIONER, does not know what disqualifies a person from receiving a salespersons' license (REPRESENTATIVE FOR PETITIONER explained that he knows of felons who have licenses and non-felons who have been denied licenses). REPRESENTATIVE FOR PETITIONER stated that he will discuss the Class A Misdemeanor for Possession of Another's Identifying Document(s) for which PETITIONER was convicted in more detail. At the hearing, however, REPRESENTATIVE FOR PETITIONER indicated that he still wanted to employ PETITIONER.

⁸ The Commission has reduced the period of suspension in prior decisions where a licensee failed to disclose convictions and/or charges on an application for a salesperson's license. *See, e.g., USTC Appeal No. 12-1258* (Initial Hearing Order Jun. 1, 2012) (in which the Commission reduced a 60-day suspension period to 30 days); and *USTC Appeal No. 12-1317* (Findings of Fact, Conclusions of Law, and Final Decision Sept. 11, 2012) (in which the Commission reduced a suspension until probation ends to 20 days).

been convicted of one crime within the past 10 years and that conviction occurred more than 2½ years ago; 3) PETITIONER completed his probation more than 1½ years ago and has not been arrested or charged with other crimes; and 4) PETITIONER inability to read and write English could have contributed to his answering Question #2 of the application incorrectly. Although the Petitioner appears to be asking that his license not be suspended at all, the Commission declines to reduce the suspension period to less than 30 days under these circumstances present in this case.⁹

Based on the foregoing, the Commission should suspend PETITIONER license for 30 days. In addition, before PETITIONER license is reinstated, PETITIONER should: 1) be required to provide the Division with a court document specifically showing that his probation has been terminated;¹⁰ and 2) submit a new application that provides full disclosure (the new application should be given to the dealership for review and signature and then filed with the Division).

Kerry Chapman
Administrative Law Judge

9 The Commission has previously found it to be a serious matter to make a false statement on an application. Under Utah Code Ann §76-8-504(2), it is a class B misdemeanor to make any written false statement which one does not believe to be true or knowingly create a false impression in a written application, with the intent to deceive a public servant in the performance of his or her official function.

10 For reasons explained earlier, the Division is aware that PETITIONER is no longer on probation. Regardless, it does not seem unduly burdensome for PETITIONER to provide the document the Division requests, especially since PETITIONER stated on his Petition that he has proof that he has completed his probation.

DECISION AND ORDER

Based on the foregoing, the Commission suspends PETITIONER motor vehicle salesperson's license for a period of 30 days, conditioned upon PETITIONER submitting: 1) proof that he has completed his probation; and 2) a new application that discloses all charges and convictions and that his employer has reviewed and signed. The suspension will begin 30 days after the date of this order and continue until 60 days after the date of this order. Once the 30-day suspension period has expired, the Division is to reinstate PETITIONER license once he submits proof that he has completed his probation and a new application that has been properly completed (absent any new reasonable cause to deny, suspend, or revoke a license). However, should PETITIONER fail to submit either of these items, his license is to remain suspended through the remainder of the term of his 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 any party to this case files a written request within thirty (30) days of the date of this decision to proceed to a Formal Hearing. Such a request shall be mailed, or emailed, 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

or emailed to:

taxappeals@utah.gov

Appeal No. 17-626

Failure to request a Formal Hearing will preclude any further appeal rights in this matter. If either party requests a Formal Hearing, this Decision and Order is stayed until the Commission issues its Formal Hearing decision.

DATED this _____ day of _____, 2017.

John L. Valentine
Commission Chair

Michael J. Cragun
Commissioner

Robert P. Pero
Commissioner

Rebecca L. Rockwell
Commissioner