

**STATE OF NEW JERSEY
MOTOR VEHICLE COMMISSION
CASE FILE NUMBER: VXXXX XXXXX
56826**

IN THE MATTER OF : **FINAL ADMINISTRATIVE DECISION
AND ORDER OF SUSPENSION**
JENNIFER C. VALENTINO : **(Hearing on the papers)**
SUSPENSION TERM: 90 DAYS
EFFECTIVE DATE: 05/08/22

This is the Motor Vehicle Commission's (Commission) Final Administrative Decision in the matter of Jennifer C. Valentino (Valentino).

This matter arises out of an Interstate Driver License Compact (N.J.S.A. 39:5D-1 to 5D-14) state notification sent by the New York Department of Motor Vehicles to the Commission, reporting that Valentino had been convicted of driving while ability impaired (NYDWAI). Valentino does not dispute this conviction. A copy of the Out-of-State Conviction report is attached hereto as Exhibit P-1 (reporting conviction under AAMVA "ACD CODE: A25"; which signifies "driving while impaired"¹).

Pursuant to the Interstate Driver License Compact (N.J.S.A. 39:5D-4), the Commission issued a Scheduled Suspension Notice informing Valentino that her New Jersey driving privilege was subject to suspension for a period of 90 days pursuant to N.J.S.A. 39:4-50, N.J.S.A. 39:5-30, N.J.S.A. 39:5D-4, and N.J.A.C. 13:19-11.1 to -11.2. A copy of the Scheduled Suspension Notice is attached hereto as Exhibit P-2.

¹ "ACD" is the AAMVA (American Association of Motor Vehicle Administrators) Code Dictionary which states use to translate traffic offense convictions and withdrawals into a uniform format, for transmitting under the National Driver Register/Problem Driver Pointer System (NDR/PDPS) and also the Commercial Driver License Information System (CDLIS). See generally, 49 U.S.C.S. §30304; 23 C.F.R. Ch. III, Pt. 1327 and App. A.

In response to the Scheduled Suspension Notice, Valentino (through her attorney Phillip J. Murphy, Esq.), requested a hearing, arguing: that she was “convicted of ‘driving while ability impaired’ **based on a B.A.C. less than 0.08%**. The conviction had in the Piermont, New York Justice Court, based on a B.A.C. less than 0.08% cannot serve as a basis to suspend Ms. Valentino’s New Jersey driving privileges.” (emphasis in original).² Valentino also argued that “under the Interstate Driver License Compact, the alcohol-related offense in the foreign jurisdiction must be of a substantially similar nature to **N.J.S.A. 39:4-50(a)** . . . [and] . . . Ms. Valentino’s New York State conviction was based on a B.A.C. level of less than 0.08%. Accordingly, the conviction lacks an essential element of a violation of **N.J.S.A. 39:4-50(a)** . . . is not an offense of a substantially similar nature . . . [to this statute] . . . and cannot serve as the basis to support an administrative suspension.” In support, Valentino cites N.J.S.A. 39:4-50(a)(3) and contends through select choice of text that an out-of-state DWI conviction shall not be a prior conviction if based upon a BAC of less than 0.08%. Finally, to justify the hearing request, Valentino cites and provides a copy of “MAXINE L. BASCH, APPELLANT v. NEW JERSEY MOTOR VEHICLE COMMISSION, RESPONDENT (A-6009-11T1)” (emphasis deleted). A copy of Valentino’s June 13, 2019, hearing request with enclosed New Jersey Motor Vehicle Commission Scheduled Suspension Notice³, and referenced Basch decision, is attached

² Valentino stated that the Scheduled Suspension Notice “incorrectly reflects a Court conviction in Connecticut. The conviction occurred in New York.” In a letter dated July 31, 2019, the Commission reviewed the out of state conviction information, and the violation dated 02/03/2019 for “Operating While Impaired” from Connecticut was deleted from Valentino’s record. The correct violation “was reposted correctly as ‘Operating While Impaired’ from New York.” The 05/29/2019 scheduled suspension related to the Connecticut violation was canceled. The 07/30/2019 scheduled suspension for “Operating While Impaired” was “stayed pending a final decision.”

³ The Scheduled Suspension Notice enclosed with Valentino’s hearing request is the prior 05/29/19 Notice (with date prepared: 05/30/19) which was canceled per the Commission’s July 31, 2019 letter and was corrected by the issuance of the subject 07/30/19 Scheduled Suspension Notice (with date prepared: 07/31/19), which indicates

hereto collectively as Exhibit R-1.

The Commission issued a letter to Valentino acknowledging Valentino's hearing request, further advising Valentino that she was being afforded an opportunity for a hearing on the papers, and that it was her burden to demonstrate, "by clear and convincing evidence, that the State of New York conviction was based **exclusively** upon a violation of a proscribed blood alcohol concentration (BAC) of less than .08%." The Commission further stated that this was not "an opportunity to re-litigate [the New York] matter or to collaterally attack the New York court conviction in this administrative forum." The Commission also instructed Valentino to "provide a notarized affidavit setting forth all facts in support of [her] position and provide copies of any supporting documents or other evidence (including, but not limited to, the official plea transcript from the State of New York proceeding and/or official court order signed by the New York judge indicating specific findings made in connection with [her] conviction)." A copy of the Commission's August 9, 2019, letter is attached hereto as Exhibit P-3.

Valentino responded with two (2) Certifications signed by Jennifer C. Valentino and Phillip J. Murphy, respectively. Jennifer C. Valentino's Certification expressed her concurrence with the arguments made in Phillip J. Murphy's Certification. Murphy argues there is a difference between the required levels of intoxication to sustain a conviction in the respective New York and New Jersey statutes, consequently rendering the offenses not substantially similar, and an administrative suspension by the Commission is not warranted. A copy of Valentino's August 27, 2019 Certifications are attached hereto collectively as Exhibit R-2. Notably, Valentino did not present any argument or documentation supporting an argument that the New York DWAI conviction

New York as the state of conviction.

was based exclusively upon a violation of a proscribed blood alcohol concentration (BAC) of less than .08%.

Valentino was convicted of a violation of N.Y. Veh. & Traf. Law §1192(1) (NYDWAI) on April 3, 2019. Valentino has not submitted any evidence, such as an official plea transcript from the State of New York proceeding or official court order signed by the New York judge, indicating any specific court findings as to a BAC of less than .08% forming the exclusive basis of her conviction, nor has Valentino argued that the DWAI conviction was based exclusively on a BAC of less than .08%.⁴

Based on the documentary exhibits in the record, I find the following:

1. On April 3, 2019, Valentino was convicted of a violation of N.Y. Veh. & Traf. Law §1192(1) (“NYDWAI”), arising from an incident which occurred on February 3, 2019.
2. None of the documents submitted by Valentino reflect a BAC whatsoever, or any findings showing that the New York conviction was based exclusively upon a violation of a proscribed BAC of less than .08%.⁵

⁴ Noting that it was because Valentino had raised the issue of her BAC level in her hearing request and made numerous statements that the New York conviction was based on a BAC of less than 0.08%, that the Commission had afforded Valentino this opportunity to come forward with evidentiary proof to try to support such potential argument concerning an exclusive basis for her NYDWAI conviction as this is set out in the New Jersey DWI statute.

⁵ Typically, in these types of New York cases, there would be documents supporting the original charges. Such documents would include the law enforcement officer’s indications of the various indicia supporting the arrest, which may include admissions, the officer’s observations, the results of field testing, and the results of chemical tests, if any. As the Commission has seen in numerous other NYDWAI cases it has reviewed, the document typically used by New York is a “DWI Bill of Particulars and Supporting Deposition,” which the officer uses to record information regarding the basis for the charges, including the observations of the driver, performance of field tests, driver admissions, chemical test information, and other evidence. Valentino is in the best position to have such official documentation. New York law requires that the supporting deposition and Bill of Particulars prepared by the state in support of the charges be made available to the defendant upon request, if not already provided to the defendant. NY CPL §100.25 and

3. The New York DWAI statute, N.Y. Veh. & Traf. Law §1192(1), is not a per se offense as constructed and enacted by the New York legislature.

Analysis

There is no dispute that Valentino was convicted of NYDWAI. Thus, the sole issue to be determined here is whether Valentino has met her burden to prove, with clear and convincing evidence, that her New York conviction was for an offense “based **exclusively** upon a violation of a proscribed BAC of less than .08%.” In re: Maxine Basch, (unreported) (App. Div. 2013), Dkt. No. A-6009-11T1, 2013 N.J. Super. Unpub. LEXIS 1764 at 1, 6-7, and N.J.S.A. 39:4-50(a)(3). In the absence of such proof, Valentino is subject to the mandatory minimum 90-day suspension of her New Jersey driving privileges, pursuant to N.J.S.A. 39:4-50⁶, New Jersey’s driving while intoxicated (DWI) statute and N.J.A.C. 13:19-11.1 et seq.

Despite the requirement noted in the Commission’s response to Valentino’s hearing request that Valentino demonstrate, “by clear and convincing evidence, that the State of New York conviction was based **exclusively** upon a violation of a proscribed blood alcohol concentration of less than .08%,” Valentino failed to submit any proof whatsoever regarding a BAC. Moreover, Valentino did not submit any proof showing that her NYDWAI conviction was based exclusively on a BAC of less than .08%, that is: without any other observational evidence or admission as to the element of impaired driving ability. The simple fact that Valentino was convicted in New York of driving while ability impaired and not driving while intoxicated does not demonstrate, by clear and convincing

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⁶ The version of N.J.S.A. 39:4-50 that was in effect on the date of the offense, February 3, 2019.

evidence, that the New York conviction for driving while ability impaired was based exclusively upon a violation of a proscribed BAC of less than .08%.

The controlling New Jersey case law has well established that the Commission has the authority to suspend a New Jersey licensee's driving privilege for an out-of-state conviction, pursuant to N.J.S.A. 39:5D-4, and that N.Y. Veh. & Traf. Law §1192(1) is substantially similar to N.J.S.A. 39:4-50. State v. Zeikel, 423 N.J. Super. 34, 44-49 (App. Div. 2011); New Jersey Div. of Motor Veh. v. Lawrence, 194 N.J. Super. 1, 2-3 (App. Div. 1983). See Mize v. NJMVC, (unreported) (App. Div. 2018), Dkt. No. A-0781-17T1, 2018 N.J. Super. Unpub. LEXIS 2542; Markowiec v. NJMVC, (unreported) (App. Div. 2018), Dkt. No. A-2492-15T1, 2018 N.J. Super. Unpub. LEXIS 257 (the driver's argument based on there being no BAC evidence for his NYDWAI conviction was rejected by the Appellate Division and the court affirmed the NJMVC's suspension of the home state New Jersey driver license); Ford v. NJMVC, (unreported) (App. Div. 2014), Dkt. No. A-3117-12T1, 2014 N.J. Super. Unpub. LEXIS 304, at 5, certif. denied, 217 N.J. 587 (2014); Xheraj v. NJMVC, (unreported) (App. Div. 2013), Dkt. No. A-2125-12T1, 2013 N.J. Super. Unpub. LEXIS 2893; Wayne v. NJMVC, (unreported) (App. Div. 2013), Dkt. No. A-3008-12T1, 2013 N.J. Super. Unpub. LEXIS 1827, at 8-9; New Jersey Motor Veh. Comm'n v. Gethard, (unreported) (App. Div. 2012), Dkt. No. A-4657-10T3, 2012 N.J. Super. Unpub. LEXIS 287, at 5; In re: Alan D. Weissman, (unreported) (App. Div. 2009), Dkt. No. A-2154-07T3, 2009 N.J. Super. Unpub. LEXIS 1303, at 2 (the court specifically notes that "[n]either N.Y. Veh. & Traf. Law §1192(1) nor N.J.S.A. 39:4-50(a), require a minimum blood alcohol reading for a conviction"). See also State v. McCauley, (unreported) (App. Div. 2006), Dkt. No. A-4622-04T2, 2006 N.J. Super. Unpub. LEXIS 2422 (the court rejected McCauley's argument that he fit within the "very limited exception" in the statute, N.J.S.A. 39:4-50(a)(3), even assuming that his BAC was 0.06%, since New York's driving

while ability impaired statute, N.Y. Veh. & Traf. Law §1192(1), “on its face” is not a “per se” offense and his conviction under that provision “must have been based on other evidence”) and In re: Maxine Basch, MVC Chief Administrator Supplemental Final Decision and Final Order on Remand, issued January 8, 2016, found at http://www.nj.gov/mvc/pdf/about/jab_final_decisions16.pdf (suspension imposed for NYDWAI conviction in accord with Appellate Division remand instruction where a “plea bargain” had been entered to the lesser-included offense, also noting other potential evidence of impairment included officer observations, field sobriety tests and/or admissions, as well as a BAC result of .17%).⁷

As constructed and enacted by the New York legislature, N.Y. Veh. & Traf. Law §1192(1) is specifically, on its face, not a per se type of offense; instead, it is the impairment of a person’s ability to operate a motor vehicle that is the critical statutory element established by Valentino’s conviction. Compare, New Jersey Div. of Motor Veh.

⁷ For context only, the Commission notes that in its experience handling the many out-of-state New York reported “driving while ability impaired” convictions, in those instances where the supporting documents are submitted, it is frequently the case that the NYDWAI conviction was the result of a “plea bargain” to this lesser-included offense and that the police reports and chemical test documents reveal potential evidence of BAC levels of .08 and above as well as observational-type evidence including field sobriety tests, officer observations, driving behavior, and/or driver admissions.

In a typical year, the Commission receives approximately 200 such driving while ability impaired reported convictions, for which it receives a significant number of hearing requests as to the proposed administrative suspension action. Such hearing requests are among the approximate 8,000 to 9,000 hearing requests the Commission handles for the various proposed administrative suspension actions issued each year, not including those involving the medical and fatal accident type cases. These arise from the enormous volume of both in-state and out-of-state reported convictions that are sent to the Commission on a daily basis, amounting to more than 1 million convictions yearly coming from the in-state court matters alone. The Commission recognizes that each of these DWAI case matters must be assessed on a case-by-case basis in accordance with the particular submissions made by the driver in an effort to meet the clear and convincing evidence standard for fitting within the limited affirmative defense in the New Jersey DWI statute.

v. Ripley, 364 N.J. Super. 343, 349-50 (App. Div. 2003) (in which the court specifically discusses the NYDWAI offense and the fact that NYDWAI contains the element of impaired driving ability, thus distinguishing it from a statute like the former Utah “alcohol-related reckless driving” statute that was at issue in that case, which Utah statute did not have impaired driving ability as an element of the offense); accord Zeikel, supra, 423 N.J. Super. at 46, 47 (the court “viewed ‘impaired driving ability’ as the crucial element necessary to apply the statute of another jurisdiction as substantially similar to New Jersey’s DWI statute.”).

In Zeikel, supra, the court determined that a conviction under New York’s DWAI statute was “substantially similar” to a conviction under New Jersey’s DWI statute to qualify as a prior conviction for sentencing purposes under N.J.S.A. 39:4-50(a)(3). Zeikel, supra, 423 N.J. Super. at 45-49. The court rejected the defendant’s argument that New Jersey sets a higher threshold than New York by requiring a finding of “intoxication,” reasoning that “[i]ntoxication not only includes obvious manifestations of drunkenness but any degree of impairment that affects a person’s ability to operate a motor vehicle”. Id. at 48. See also, State v. Aziz, (unreported) (App. Div. 2020), Dkt. No. A-1268-18T4, 2020 N.J. Super. Unpub. LEXIS 757, in which the Appellate Division affirmed the lower court’s holding that the appellant’s prior conviction for New York DWAI constituted a prior conviction under New Jersey law. In relying on Zeikel, the court stated: “[In Zeikel,] We held that absent proof that a New York DWAI conviction was based exclusively on a blood alcohol reading of less than .08, a DWAI conviction is ‘substantially similar [in] nature’ to driving under the influence under New Jersey law, and shall be treated as a prior conviction for sentencing enhancement purposes.” Aziz, supra, at 2, quoting Zeikel, supra, at 48. The Aziz court further noted that, “[f]irst, a New York defendant conceivably may be prosecuted for DWAI, instead of DWI, simply because there is no BAC evidence

at all” and “[s]econdly, a DWAI offender with less than .08 B.A.C. still commits an offense substantially similar in nature to a New Jersey DUI under N.J.S.A. 39:4-50(a), so long as the less-than-.08 reading is not the exclusive basis for the New York conviction.” Id. at 2-3. With the Aziz court further explaining that the totality of the circumstances in that case, if proved, concerning the field sobriety tests, the officer’s observations and the defendant’s driving behavior, as well as the driver’s refusal to submit to a “binding” chemical test, would be sufficient to “establish an observational DUI violation under [New Jersey] law.” Id. at 3-4.

Contrary to Valentino’s argument, governing New Jersey case law repeatedly recognizes that “observational” evidence is by itself sufficient in New Jersey to support a conviction under New Jersey’s unified DWI statute, N.J.S.A. 39:4-50, even without a BAC result. See, e.g., State v. Sorenson, 439 N.J. Super. 471, 479-82 (App. Div. 2015) (noting distinction between the “per se violation” and the “observation violation” both under New Jersey’s DWI statute, N.J.S.A. 39:4-50); State v. Campbell, 436 N.J. Super. 264, 267-68 (App. Div.), certif. denied, 220 N.J. 208 (2014) (noting that New Jersey DWI prosecutions under N.J.S.A. 39:4-50(a) may be pursued on “four distinct alternative grounds” one type of which is the “so-called ‘observation’ cases based on other non-BAC. evidence of a defendant’s impairment while driving”); State v. Kent, 391 N.J. Super. 352, 384 (App. Div. 2007) (affirming a defendant’s DWI conviction based upon his erratic driving in causing a single-car accident and a police officer’s field observations of his multiple signs of inebriation, despite the inadmissibility of hearsay laboratory reports measuring the BAC level in defendant’s blood sample); see also State v. Howard, 383 N.J. Super. 538, 548 (App. Div.) (quoting State v. Kashi, 360 N.J. Super. 538, 545 (App. Div. 2003), aff’d, 180 N.J. 45 (2004)), certif. denied, 187 N.J. 80 (2006) (instructing that a violation of N.J.S.A. 39:4-50 can be proven “through either of two alternative evidential methods:

proof of a defendant's physical condition or proof of a defendant's blood alcohol level.").

Moreover, the court in Zeikel, *supra*, 423 N.J. Super. at 48 (App. Div. 2011), confirmed that a conviction of New Jersey's driving while intoxicated statute is sustainable if it is supported by sufficient evidence of "any degree of impairment that affects a person's ability to operate a motor vehicle" while further highlighting that "[like] New Jersey, New York defines impairment broadly to include any degree of impairment of a person's physical or mental abilities to operate a motor vehicle." *See also*, In re Johnston, 75 N.Y.2d 403, 409-10, 553 N.E.2d 566, 554 N.Y.S.2d 88 (1990) (New York's highest judicial tribunal construes "impairment" under N.Y. Veh. & Traf. Law § 1192(1) as meaning that "the actor by 'voluntarily consuming alcohol . . . has actually impaired, to any extent, the physical and mental abilities which he is expected to possess in order to operate a vehicle as a responsible and prudent driver"; quoting People v. Cruz, 48 N.Y.2d 419, 427, 399 N.E.2d 513, 423 N.Y.S.2d 625 (1979)).

Furthermore, the argument that the caselaw relied upon by the Commission is "misplaced as the level of 'intoxication' or 'impairment' required to sustain a conviction under the respective New York and New Jersey statutes varies to such a degree so as to render the offenses not substantially similar so as to justify a New Jersey suspension under the IDLC," is unpersuasive. The Appellate Division concluded that New York's DWAI, which prohibits operation of a motor vehicle "while a person's ability to operate such motor vehicle is impaired by the consumption of alcohol," is of a "substantially similar nature" to New Jersey's DWI offense. Lawrence, *supra*, 194 N.J. Super. at 2-3. The court reasoned that both alcohol-related offenses are aimed at deterring and punishing drunk drivers. *Id.* at 3. The court further explained that New Jersey's offense of driving under the influence of alcohol prohibits not only intoxication, but also a "general condition, short of intoxication, as a result of which every motor vehicle operator has to be said to be so affected

in judgment as to make it improper for him to drive on the highways.” Ibid. (quoting State v. Johnson, 42 N.J. 146, 165 (1964)). The court, thus, affirmed New Jersey’s imposition of an administrative license suspension of the New Jersey licensee under the Interstate Driver License Compact, N.J.S.A. 39:5D-1 to -14, for that out-of-state DWAI conviction.

Valentino has repeatedly stated that the NYDWAI conviction was based on a BAC less than 0.08% yet has failed to present any documentation supporting an argument that her New York conviction was based exclusively on a BAC of less than .08%. Absent clear and convincing evidence presented by Valentino that a BAC of less than .08% was made the exclusive basis of the NYDWAI conviction, Valentino’s New Jersey driving privilege is subject to suspension. See, e.g. Markowiec v. NJMVC, (unreported) (App. Div. 2018), Dkt. No. A-2492-15T1, 2018 N.J. Super. Unpub. LEXIS 257 (affirming the Commission’s final decision and order suspending Markowiec’s driving privilege based on a NYDWAI where Markowiec argued that there was no chemical test performed and that his BAC was under .08%, but there was no clear and convincing evidence, such as a plea transcript or court order showing that the conviction was based exclusively on a BAC of less than .08%. The court also emphasized that the finding of substantial similarity between a NYDWAI and a New Jersey DWI did not turn on evidence of a BAC level). A conviction for driving while ability impaired need not be based on BAC at all, or it may be based on a BAC below .08 in combination with other observational evidence supporting the element of impaired driving ability.⁸

⁸ Indeed, it is noted that under the New York DUI statute’s “Probative value” section as to “Chemical test evidence”, N.Y. Veh. & Traf. Law § 1195(2)(b), evidence of a BAC of .051 to .069, is considered “relevant evidence, but shall not be given prima facie effect, in determining whether the ability of such person to operate a motor vehicle was impaired by the consumption of alcohol.” Therefore, for a conviction of NYDWAI to be entered there must have been other sufficient observational evidence to support the “impairment of ability to operate a motor vehicle” statutory element, as the NYDWAI provision is specifically not a per se offense. Similarly, if the BAC test result evidence was .05 or below,

Given these factors, Valentino has failed to show, by clear and convincing evidence, that her NYDWAI conviction was based exclusively on a BAC of less than .08%, as is required to meet the very limited exception in New Jersey's DWI statute.⁹

It remains undisputed that Valentino was convicted by the State of New York of N.Y. Veh. & Traf. Law § 1192(1), "driving while ability impaired," while holding and presenting a New Jersey driver's license. Accordingly, the State of New Jersey is required to suspend her New Jersey driving privilege in accordance with the Interstate Driver License Compact Agreement (N.J.S.A. 39:5D-1 to -14) and the New Jersey Administrative Code (N.J.A.C. 13:19-11.1).

The governing regulation, N.J.A.C. 13:19-11.1(a) and (b), provides that out-of-state convictions shall be given the same effect as if such convictions had occurred in the State of New Jersey. Indeed, N.J.A.C. 13:19-11.1(b) explicitly states that New Jersey driving privileges shall be suspended pursuant to New Jersey law. See, e.g., Martinez v.

that range is considered "prima facie evidence that the ability of such person to operate a motor vehicle was not impaired by the consumption of alcohol", and thus again, this means that there must have been sufficient other observational evidence despite that BAC result to establish beyond a reasonable doubt the element of "impairment of ability to operate a motor vehicle" for such NYDWAI conviction. N.Y. Veh. & Traf. Law § 1195(2)(a).

⁹ That very limited exception in the New Jersey statute most specifically would apply where there was a conviction under a per se law in another state, for which the other state's per se threshold was lower, at the time of the offense, than the per se prong contained within the New Jersey "unified" DWI statute, N.J.S.A. 39:4-50 (which contains a per se prong as well as an observational prong). An example of this would be a New York DWI- per se .08 conviction, under N.Y. Veh. & Traf. Law § 1192(2) ("driving while intoxicated; per se"), that specifically occurred during the timeframe in which the New York per se statutory threshold had been lowered to .08 prior to the effective date of the New Jersey law changing its per se threshold from .10 to .08; namely between July 1, 2003 and January 19, 2004. See, New Jersey Div. of Motor Veh. v. Pepe, 379 N.J. Super. 411, 414, footnote 1 (App. Div. 2005) (in which the court points out the different effective dates for New York's and New Jersey's lowering of the statutory BAC per se threshold to .08); also, it is noted that currently the State of Utah has lowered its statutory per se threshold to a BAC of .05, thus specific Utah convictions under its DWI- per se provision would meet this limited exception.) This is not the case for Valentino's conviction under the NYDWAI statutory provision, N.Y. Veh. & Traf. Law §1192(1).

NJMVC, (unreported) (App. Div. 2010), Dkt. No. A-0147-09T3, 2010 N.J. Super. Unpub. LEXIS 597 at 4-5; see also New Jersey Div. of Motor Vehicles v. Egan, 103 N.J. 350, 357 (1986) (the New Jersey Supreme Court reviewed and upheld the policy of the Director of the Division of Motor Vehicles to exercise the discretion granted by N.J.S.A. 39:5D-4 to “uniformly impos[e] New Jersey’s more stringent penalty instead of being reduced to ‘the least common denominator of other States[.]’”); DiGioia v. NJMVC, (unreported) (App. Div. 2021), Dkt. No. A-3587-19, 2021 N.J. Super. Unpub. LEXIS 533 (the court declared, in affirming the Commission’s imposition of suspension of the New Jersey home state license for a New York conviction, that “the Compact simply requires that New Jersey consider appellant’s New York conviction as if the offense occurred in New Jersey, which the Commission indisputably did”); State v. Luzhak, 445 N.J. Super. 241, 248 (App. Div. 2016) (the court again emphasized that New Jersey has a "strong public policy against drunk driving"); and State v. Thompson, 462 N.J. Super. 370, 375 (App. Div. 2020) (in which the Appellate Division reiterated the New Jersey Supreme Court’s declaration regarding the construction of the DWI laws: “As the Supreme Court held in [State v. Tischio, 107 N.J. 504 (1987)] – and it apparently bears repeating – ‘[w]e are thus strongly impelled to construe [the statute] flexibly, pragmatically and purposefully to effectuate the legislative goals of the drunk-driving laws,’ [Id. at 514] which, of course, are to rid our roadways of the scourge of drunk drivers [Id. at 512]. See also [State v. Mulcahy, 107 N.J. 467, 479 (1987)] (recognizing, in quoting [State v. Grant, 196 N.J. Super. 470, 476 (App. Div. 1984)], that the drunk driver remains ‘one of the chief instrumentalities of human catastrophe’).”

Furthermore, it is also well-established by New Jersey case law that it is proper under the doctrine of dual sovereignty, and specifically is not a violation of double jeopardy, for the "home state" which issued the driver license to impose the statutorily

mandated suspension after receiving a report of such out-of-state alcohol-related driving conviction under the Interstate Compact. See Pepe, supra, 379 N.J. Super. at 418-419; In re Johnson, 226 N.J. Super. 1 (App. Div. 1988); and Lawrence, supra, 194 N.J. Super. at 2-3.

The court in Pepe, supra, 379 N.J. Super. at 416, specifically held that the “suspension imposed by NJDMV is in accordance with the statute, N.J.S.A. 39:4-50, and not redundant to the penalty imposed in New York, which involved only defendant’s driving privileges within that state.” (citing Boyd v. Div. of Motor Vehicles, 307 N.J. Super. 356, 360 (App Div.), certif. denied, 154 N.J. 608 (1998), emphasis added). The Pepe court further instructed that “under the doctrine of dual sovereignty, the double jeopardy clause does not bar two states from prosecuting a defendant for the same offense.” Id. at 418. The Pepe court also considered Pepe’s constitutional equal protection, res judicata/collateral estoppel and laches-type arguments in the context of that Compact case and found those to be without merit.

It remains undisputed, and I therefore find, that Valentino was convicted of an alcohol-related driving offense that occurred on February 3, 2019, in the State of New York (for which she was convicted on April 3, 2019). As such, pursuant to N.J.S.A. 39:5D-4, 39:5-30, 39:4-50 and N.J.A.C. 13:19-11.1 et seq., I order her New Jersey driving privilege to be suspended for 90 days. The suspension period imposed here is the minimum mandated by New Jersey statute for this alcohol-related driving offense, which was committed before December 1, 2019¹⁰; there is no discretion to impose a reduced suspension term.

¹⁰ The NJ DWI statutory penalties were amended effective December 1, 2019 for offenses committed on or after that date. Thus, the amended penalties do not apply here. State v. Scudieri, No. A-0352-20, 2021 N.J. Super. LEXIS 136 (App. Div. Nov. 1, 2021)

Conclusion and Final Order

Based on the foregoing, I conclude that the Commission's proposed suspension is proper. I specifically conclude that Valentino's submissions to the Commission are insufficient to meet her affirmative burden to show, by clear and convincing evidence, that her NYDWAI conviction was based exclusively on a BAC below .08%. The New Jersey legislature, in N.J.S.A. 39:4-50, explicitly required that the submitted evidence meet this high standard of proof. The New Jersey Supreme Court has stated:

The clear and convincing evidence standard is not a hollow one, as

[c]lear-and-convincing evidence is that which produces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable the factfinder to come to a clear conviction, without hesitancy, of the precise facts in issue.

[New Jersey Div. of Youth & Family Servs. v. I.S., 202 N.J. 145, 168 (2010), quoting In re Seaman, 133 N.J. 67, 74 (1993) (citation, internal quotation and editing marks omitted).]

Valentino's submissions to the Commission fall far short of this standard and cannot be said to constitute "evidence so clear, direct and weighty and convincing as to enable the factfinder to come to a clear conviction, without hesitancy, of the precise facts in issue."

The effective date of suspension of Valentino's driving privilege is May 8, 2022. (Suspension term: 90 days).

Also, pursuant to the governing statutory and regulatory requirements under N.J.S.A. 39:4-50(b) and N.J.A.C. 13:19-11.2, Valentino must successfully complete or show satisfactory proof of completion of an alcohol/drug education and highway safety program. It is noted that with respect to any alcohol education classes/program already completed pursuant to the New York conviction, Valentino may present any official

documentation as to such classes/program to the Intoxicated Driver Program (IDP)/Intoxicated Driver Resource Center (IDRC), which will determine whether these can be accepted in partial or full satisfaction of the IDP alcohol/drug education program required pursuant to N.J.S.A. 39:4-50(b) and N.J.A.C. 13:19-11.2.

This constitutes the Commission's final decision in this matter.¹¹ Any appeal from this decision must be made to the Appellate Division of the Superior Court by filing a Notice of Appeal with the Appellate Division within 45 days from the date of this decision. If an appeal is filed with the court, pursuant to Court Rule, R. 2:5-1(e), service of copies of all papers must be made on both the New Jersey Motor Vehicle Commission, Chief Administrator, as well as the Attorney General. The Appellate Division may be contacted by calling (609) 815-2950.

Note: Due to the novel coronavirus (COVID-19) emergency, the Superior Court, Appellate Division has provided specific instructions for the filing of papers. Please visit the Judiciary's website at www.njcourts.gov/courts/appellate.html.

If you file an appeal with the court and you are seeking a stay of this Order while your appeal is pending, your request for stay, made pursuant to New Jersey Court Rule 2:9-7, must be in writing and submitted to the NJMVC with proof that a notice of appeal has been filed with the Appellate Division. Your request for stay and proof of filing should be submitted to the

¹¹ Although this matter had been considered among those that were being processed for transmission to the Office of Administrative Law for a plenary hearing, upon further review by the Commission it was noted that there are no factual issues requiring an evidentiary hearing and therefore this final administrative decision and order was issued. See Frank v. Ivy Club, 120 N.J. 73, 98 (1990), cert. denied, 498 U.S. 1073, 111 S. Ct. 799, 112 L. Ed.2d 860 (1991); Pepe, supra, 379 N.J. Super. 411 (App. Div. 2005).

**Office of Legal and Regulatory Affairs, NJMVC (attention: STAY REQUEST/
APP. DIV. PROOF OF FILING) either by fax to (609) 984-1528, or by email
to: StayrequestAppDivcase@mvc.nj.gov. *Please include a fax number or an
email address where the determination as to your stay request will be sent.**

[Further Note: A stay of this Order is not automatically granted upon filing a Notice of Appeal with the Appellate Division. In requesting that a stay be granted in conjunction with the filing of your appeal, you have the burden to show that your case meets each of the factors set out in New Jersey case law to warrant the issuance of that type of injunctive relief. See, Garden State Equality v. Dow, 216 N.J. 314, 320 (2013).]



B. Sue Fulton
Chair and Chief Administrator

BSF: kw/mn

c: Phillip J. Murphy, Esq.

EXHIBIT LIST

*copies redacted of other drivers' personal identifying information

Commission Exhibits

- P-1 Copy of NYDMV Out-of-State Conviction report dated April 6, 2019, received by the Commission on April 12, 2019 (1 page, redacted)
- P-2 Copy of New Jersey Motor Vehicle Commission, Scheduled Suspension Notice, date prepared July 31, 2019 (2 pages, front and back of notice)
- P-3 Copy of Commission letter to Valentino advising her of the opportunity to submit clear and convincing evidence of the conviction being exclusively based on a BAC of less than 0.08% (affording a hearing on the papers), dated August 9, 2019 (2 pages)

Valentino's Exhibits

- R-1 Copy of hearing request letter dated June 13, 2019 (2 pages), with enclosed New Jersey Motor Vehicle Commission, Scheduled Suspension Notice (date prepared: 05/30/19) (2 pages); and copy of MAXINE L. BASCH, APPELLANT v. NEW JERSEY MOTOR VEHICLE COMMISSION, RESPONDENT (A-6009-11T1) (8 pages)
- R-2 Copy of cover letter to the Commission from Phillip J. Murphy, dated August 27, 2019 (1 page) with enclosures: Certification signed by Jennifer C. Valentino (2 pages); and Certification signed by Phillip J. Murphy (3 pages)



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. MVH 01029-22

AGCY DKT. NO. NXXXX XXXXX 08592

NEW JERSEY MOTOR VEHICLE COMMISSION,

Petitioner,

v.

DAVIT LEVI,

Respondent.

Courtney Davison, Legal Specialist, appearing for petitioner Motor Vehicle Commission pursuant to N.J.A.C. 1:1-5.6

Christopher J. Cifrodello, Esq., for respondent

Record Closed: March 8, 2022

Decided: March 15, 2022

BEFORE JULIO C. MOREJON, ALJ:

STATEMENT OF THE CASE

Petitioner, New Jersey Motor Vehicle Commission (MVC), seeks to suspend respondent, Davit Levi's (Levi) motor vehicle driver's license pursuant to N.J.S.A. 39:5-30, N.J.S.A. 39:5-30.8, and N.J.A.C. 13:19-10.1, et seq., due to an accumulation of twelve or more points.

PROCEDURAL HISTORY

The MVC transmitted the case to the Office of Administrative Law (OAL) on February 1, 2022, as a contested case and the case was filed with the OAL on February 9, 2022, pursuant to N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13.

The within matter was scheduled for a telephone hearing on March 8, 2022, at which time a hearing was held and the record closed on said date.

FINDINGS OF FACT

Based upon the testimony provided, and my assessment of its credibility, together with the documents, which the parties stipulated in evidence, I **FIND** the following as **FACT**:

1. The submission of the MVC file in evidence, as Exhibits P-1 through P-7 (MVC file).
2. Levi is the holder of a New Jersey Motor Vehicle Driver's license ending in numbers 08592 (P-1).
3. Levi's basic driving and commercial privileges were suspended once from June 7 2000 to July 22, 2000. Levi has no other suspension of his driving privileges in New Jersey. (Id.).
4. Between January 31, 1998 and May 18, 2018, MVC assessed Levi points for moving violations that occurred in New Jersey and other jurisdictions (Id.).
5. Pursuant to a scheduled Suspension Notice dated February 27, 2020, MVC sought to suspend Levi's driving privileges on March 22, 2020, for sixty-days, due to an accumulation of twelve or more points through May 12, 2016 (P-1 and P-2).
6. Pursuant to a scheduled Suspension Notice dated September 11, 2020, MVC sought to suspend Levi's driving privileges on October 10, 2020, for sixty-days, due to an accumulation of twelve or more points through August 2, 2017 (P-1 and P-3).

7. Pursuant to a scheduled Suspension Notice dated March 18, 2021, MVC sought to suspend Levi's driving privileges on April 11, 2021, for ninety-days, due to an accumulation of twelve or more points through May 12, 2016 (P-1 and P-4).
8. Levi submitted timely hearing requests for each proposed scheduled Suspension Notice (P-5, P-6).
9. Levi currently has eleven points on his motor vehicle driver's license (P-1).
10. Levi does not dispute the moving violations contained in the Certified Motor Vehicle Abstract (certified abstract) (P-1).
11. Levi testified that he immigrated to the United States twenty-six years ago; he is sixty-one years old; has been an Uber and Lyft driver for over ten years and his wife and three daughters rely exclusively on the income he earns from his car service profession.
12. Levi testified that he has taken the steps necessary to become a good driver as he has not committed a moving violation since May 2018, and he has participated in the Driver Improvement Program (DIP) (P-1).

LEGAL ANALYSIS AND CONCLUSION

Petitioner is empowered to suspend a motorist's driving privileges for a violation of any provision of the motor vehicle statutes or for any other "reasonable grounds." N.J.S.A. 39:5-30. Apart from any sanction imposed by a court, the MVC may suspend or revoke the driving privileges of any person who violates a provision of Title 39 of the Motor Vehicle Code. N.J.S.A. 39:5-30. The implementing regulations state that whenever an individual's driving privileges have been suspended or revoked, the period of the sanction shall be extended for an additional six months, or for some other period determined by the MVC, should the individual operate a motor vehicle during the period of suspension or revocation. N.J.A.C. 13:19-10.8.

The MVC may suspend or revoke driving privileges ". . . after due notice in writing of such proposed suspension" N.J.S.A. 39:5-30. Mailed notice has been found adequate for this purpose, and the courts have held it unnecessary for the licensee to have actual notice of the suspension as long as the Commission has issued due notice.

State v. Wenof, 102 N.J. Super. 370 (Law Div. 1968). However, in the absence of sufficient notice, a revocation is ineffective. Beckler v. Parsekian, 36 N.J. 242 (1962).

Where the Commission proposes suspension of driving privileges under N.J.S.A. 39:5-30 as an administrative enforcement of the motor vehicle regulations, it bears the burden of proof by the preponderance of the competent and credible evidence of facts essential to such suspension. Atkinson v. Parsekian, 37 N.J. 143, 149 (1962).

The primary object of a suspension or revocation of a driver's license "is to foster safety on the highway and not to impose criminal punishment to vindicate public justice." Atkinson, 37 N.J. at 155; see also David v. Strelecki, 51 N.J. 563 (1968). The determination rests on a finding that "a law of the highway has been violated and that the highway would be a safer place for the public if the violator were removed as a driver for some period of time." Ibid. Suspensions must be imposed only for the purpose of reforming the particular motorist and are not to be imposed administratively for the purpose of deterring others.

The authorizing statutory provision on point suspensions provides:

Except for good cause, the director shall suspend for a period of no less than 30 days and no more than 180 days, except as provided in section 6 of this act, the license to operate a motor vehicle of any person who accumulates

- a. 12 or more points in a period of 2 years or less, or
- b. 15 or more points in a period greater than 2 years, or
- c. at least 12 points but fewer than 15 points in a period greater than 2 years, unless the licensee notifies the division in writing within 10 days of the date of mailing of the proposed notice of suspension of his intention to attend a driver improvement course that is approved by the director, and satisfactorily completes such course.

* * *

The administrative law judge presiding at a hearing held pursuant to this section shall only consider evidence of the

actual number of points assessed and the period of time during which such points were accumulated, taking into consideration any point reduction credits earned by the licensee, in issuing a suspension. He may consider other relevant evidence in considering the appropriateness of any portion of a suspension issued in excess of 30 days.

[N.J.S.A. 39:5-30.8.]

Pursuant to the statutory authority, regulations were adopted that implemented suspensions based upon the accumulation of points thusly:

The Chief Administrator shall, except for good cause, suspend a person's license to operate a motor vehicle and/or motorized bicycle in accordance with the following schedule:

<u>Points Accumulated</u>	<u>Period of Suspension</u>
1. 12 to 15 points in a period of two years or less	30 days
2. 16 to 18 points in a period of two years or less	60 days
3. 19 to 21 points in a period of two years or less	90 days
4. 22 to 24 points in a period of two years or less	120 days
5. 25 to 27 points in a period of two years or less	150 days
6. 28 or more points in a period of two years or less	not less than 180 days
7. 15 to 18 points in a period greater than two years	30 days
8. 19 to 22 points in a period greater than two years	60 days
9. 23 to 26 points in a period greater than two years	90 days
10. 27 to 30 points in a period greater than two years	120 days
11. 31 to 35 points in a period greater than two years	150 days
12. 36 points in a period greater than two years	not less than 180 days

13.12 to 14 points in a period greater than two years	30 days
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[N.J.A.C. 13:19-10.2.]

The statutory scheme also provides a means of erasing points off one's record through maintenance of a clean record for an entire year(s) and/or attendance at certain approved courses.

Points recorded against a licensee shall be reduced at the rate of three points for each 12 consecutive months in which the licensee has not committed any violation either resulting in the assessment of points or in the suspension of driving privileges. Points recorded against a licensee shall also be reduced by three points, where the licensee attends and satisfactorily completes an approved license improvement course; provided, however, that no licensee may receive point reduction credits for completion of the same or a similar course within two years of having completed the original course. Points recorded against a licensee shall also be reduced by two points if the licensee attends and satisfactorily completes an approved motor vehicle defensive driving course pursuant to section 55 of P.L. 1990, c. 8 (C.17:33B-45), except that no licensee may receive point reduction credits for completion of an approved motor vehicle defensive driving course within five years of having completed a previously approved motor vehicle defensive driving course. No point totals shall be reduced below zero. Computation of the time periods used in granting point reduction credits shall in all cases be based upon the respective dates of commission of the offenses for which the licensee was convicted and assessed points.

[N.J.S.A. 39:5-30.9]

Here, the MVC seeks to suspend Levi's driving privileges for a collective seven-months as follows:

- 1) Suspension notice dated February 27, 2020, for a proposed sixty-day suspension effective March 22, 2020, corresponding to fifteen accumulated points on May 12, 2016 (P-2) ;
- 2) Suspension notice September 11, 2020, for a proposed sixty-day suspension effective on October 6, 2020, corresponding to seventeen accumulated points on May 18, 2018 (P-3), and

3) Suspension notice dated March 18, 2021, for a proposed ninety-day suspension on April 11, 2021, corresponding to nineteen accumulated points on August 2, 2017 (P-4).

The record reflects that between October 18, 2009 through May 18, 2021, Levi was assessed twenty-three points by MVC (P-1; P-2, P-3 and P-4). The record also reflects that Levi received point credits from MVC as follows: a three-point credit on June 2, 2018, for participating in the DIP program (P-1), and three separate three-point credits on May 18, 2019, May 18, 2020, and May 18, 2021, respectively, for driving a period of twelve-months without receiving a moving violation (P-1).

Levi does not dispute the accumulation of points and the corresponding credits received on his certified abstract, and I therefore **CONCLUDE** that his certified abstract accurately reflects his driving history and accumulation of points and credits under N.J.S.A. 39:5-30.8 and N.J.S.A. 39:5-30.9.

N.J.S.A. 5-30.8, allows an Administrative Law Judge to “consider other relevant evidence in considering the appropriateness of any portion of a suspension issued in excess of 30 days.” In addition, under N.J.A.C. 13:9-10.2(b), the MVC Chief Administrator is provided discretion to consider “aggravating or mitigating factor” in exercising her discretion to impose suspensions. Specifically, N.J.A.C. 13:9-10.2(b), provides: “In exercising his or her discretion, the Chief Administrator shall consider the person's driving record, prior warnings or driver improvement program attendance, maturity and any other aggravating or mitigating factor.”

In the within case, Levi's driving abstract reveals that he has one suspension that occurred between June 7, 2000 and July 22, 2000, and that he obtained his license sometime after arriving in the United States in 1995. Levi's abstract reflects that the bulk of his points were assessed between October 18, 2009 and May 18, 2018, when he was assessed twenty-three points (P-1). Since May 18, 2018, a period of forty-six months, Levi has not been assessed any points, and he participated in the DIP program, and has had twelve points credited on his driver's license during said time. Although Levi did not demonstrate good judgment in having twenty-three points assessed against his driver's

license over a period of six-plus years, he has now demonstrated good faith corrective judgment since May 18, 2018, in driving cautiously and not having points assessed.

I **CONCLUDE** that Levi's accumulation of twenty-three points on his driver's license from October 18, 2009 through May 18, 2018, and his remedial actions taken thereafter, is the very circumstance that the undersigned is allowed to consider in assessing the suspension period to be determined under N.J.S.A. 39-50.8 and N.J.A.C. 13:19-10.1(b), and I therefore **CONCLUDE** that the appropriate cumulative suspension be reduced from seven-months to fifteen-days per notice of suspension for a total of forty-five days, as allowed by N.J.S.A. 39-50.8 and N.J.A.C. 13:19-10.1(b).

ORDER

For the reasons stated above, it is hereby **ORDERED** that the Scheduled Suspension Notices dated February 27, 2020, September 11, 2020, and March 18, 2021, of Levi's New Jersey driver's license shall be **MODIFIED** to fifteen-days per suspension notice for a total suspension of forty-five days.

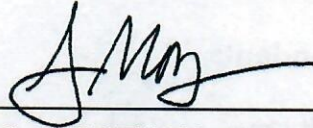
I hereby **FILE** my initial decision with the **CHIEF ADMINISTRATOR OF THE MOTOR VEHICLE COMMISSION** for consideration.

This recommended decision may be adopted, modified or rejected by the **CHIEF ADMINISTRATOR OF THE MOTOR VEHICLE COMMISSION**, who by law is authorized to make a final decision in this matter. If the Chief Administrator of the Motor Vehicle Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **CHIEF ADMINISTRATOR OF THE MOTOR VEHICLE COMMISSION, 225 East State Street, PO Box 160, Trenton, New Jersey 08666-0160**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

March 15, 2022

DATE:



JULIO C. MOREJON, ALJ

Date Received at Agency:

March 15, 2022

Date E-Mailed to Parties:

March 15, 2022

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APPENDIX

LIST OF WITNESSES

For Petitioner:

Courtney Davison

For Respondent:

Davit Levi

LIST OF EXHIBITS

For Petitioner:

P-1 through P-7 MVC transmittal package containing documents stipulated in evidence

For Respondent:

None