AFFIRMED
N. J. MOTOR VEHICLE COMMISSION
By ORLA Date 9-2-21

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. MVH 02725-21
AGENCY REF. NO. HXXX XXX 08882

NEW JERSEY MOTOR VEHICLE COMMISSION,
Petitioner,
v.

LAWRENCE C. HOLUB.
Respondent.

Cassandra Berry, Regulatory Officer, for petitioner, appearing under N.J.A.C. 1:1-5.4(a)(2)

Lawrence Holub, appearing pro se

Record Closed: July 12, 2021 Decided: July 19, 2021

BEFORE **NANCI G. STOKES,** ALJ:

STATEMENT OF THE CASE

Lawrence Holub has four prior convictions for possession of marijuana, a controlled dangerous substance (CDS), spanning from 2009 until 2018. After that, Holub possessed a medical marijuana card and maintains he remains permitted to utilize

marijuana, now legalized. Is the Motor Vehicle Commission (Commission) empowered to suspend Holub's passenger endorsement to his commercial driver's license (CDL) indefinitely? Yes. Prior CDS convictions without sufficient demonstration of rehabilitation do not justify a suspension waiver under N.J.A.C. 13:21-14.5(d).

PROCEDURAL HISTORY

On February 9, 2020, the Commission issued a Suspension Notice to Holub proposing to suspend his passenger endorsement indefinitely because he failed to satisfy the requirements for the endorsement on his CDL since Holub had disqualifying criminal charges or convictions.

On February 22, 2020, Holub requested a hearing.

On March 8, 2021, the Commission transmitted the case to the Office of Administrative Law (OAL) under N.J.A.C 6A.-28-10.7(c)2, the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -15, and the act establishing the OAL, N.J.S.A. 52:14F-1 to -23, for a hearing under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6. This transmittal included the Commission's exhibits for the hearing in this case. On that same date, the Commission mailed Holub the same materials.

The OAL scheduled a hearing for May 25, 2021. On that date, the parties indicated a desire to resolve the case and needed time to formalize a settlement. I scheduled an opportunity to place the settlement on the record for June 25, 2021. However, a settlement was unsuccessful, and Holub indicated a desire to obtain an attorney. Thus, I rescheduled the hearing for June 25, 2021, conducted via telephone due to COVID restrictions.

Holub did not obtain an attorney. Holub refused to swear or affirm that he would tell the truth during the hearing. Holub also stated he did not receive the exhibits relied upon by the Commission. I kept the case open to allow Holub to review these records and respond.

On June 28, 2021, the Commission forwarded the March 8, 2021, exhibits to the OAL and Holub via email. In addition, the Commission sent Holub the materials via UPS and identified the tracking number.

Holub did not reply, and on July 12, 2021, I closed the record.

FINDINGS OF FACT

Based upon the testimony provided, and my assessment of its credibility, together with the documents submitted, and my assessment of their sufficiency, I make the following **FINDINGS** of **FACT**:

Holub is 33 years old and financially supports himself and his nine-year-old son. Although Holub obtained a bus driver position, he lost this job due to COVID-19. Holub's current job does not require the passenger endorsement to his CDL.

Holub applied for and was issued a CDL with a passenger endorsement.

In reviewing Holub's CDL license application and fingerprint submission on December 9, 2019, the Commission learned that Holub had a criminal record.

Holub's criminal record consists of multiple convictions for possession of controlled dangerous substances (CDS), less than 50 grams of marijuana, under N.J.S.A. 2C:35-10a(4) (CDS charge), a fourth-degree crime at those times:

- On February 4, 2009, the Paramus Municipal Court found Holub guilty of the CDS charge and imposed seven days jail time, a six-month suspension of his driver's license, and a fine.

- On March 18, 2009, the Prospect Park Municipal Court found Holub guilty of the CDS charge, and imposed a six-month suspension of his driver's license, and a fine.
- On July 22, 2009, the Ringwood Municipal Court, found Holub guilty of the CDS charge, and ordered thirty days jail confinement with a four-day credit.
- On August 19, 2009, the Maywood Municipal Court found Holub guilty of the CDS charge and ordered incarceration instead of fees and fines.
- On May 2, 2018, the Ringwood Municipal Court, found Holub guilty of the CDS charge, and ordered one-year probation and fine.

On October 10, 2018, Holub applied to the Medicinal Marijuana Program and received a card through the New Jersey Department of Health permitting him to obtain medicinal marijuana. The identification card notes an expiration date of October 31, 2020. Holub submitted documentation to the Commission indicating that he received the medical marijuana card due to anxiety. The status of his anxiety condition is unclear.

On October 21, 2020, Holub attended a conference with the Commission and signed the Commission's Passenger Endorsement Warning acknowledging that convictions under the Comprehensive Drug Reform Act will suspend his passenger endorsement privilege.

Effective July 1, 2021, the State of New Jersey decriminalized specific offenses involving marijuana.[1] Indeed, New Jersey decriminalized the charges leading to Holub's convictions.

Holub refused to take an oath to tell the truth at the hearing, which lessens the credibility of any testimony he provided. Holub's antagonistic attitude and demeanor during this proceeding further diminish his credibility.

[1] P.L. 2021, c.19, Feb. 22, 2021. Yet, under N.J.S.A. 2C:35-2, marijuana is still defined as a "controlled dangerous substance."

Holub maintains that he passed Department of Transportation (DOT) urine drug tests but supplied no evidence that he did so. Nonetheless, his driver's abstract through August 2020 notes a CDL medical certification qualification and clearance in 2019, supporting that he previously passed drug test. Should Holub fail a urine drug test, the DOT has a procedure in place to address that failure.

Although asked to provide evidence of mitigating factors or evidence of rehabilitation, Holub stated that he was not required to undergo drug rehabilitation and completed his probation. Holub maintains that he has meaningful employment that benefits society but would not disclose the nature of his work.

Holub also financially cares for his son and son's mother. Holub's appeal states that his father was in jail most of his life, and Holub desires to do better. Holub was unable to work as a bus driver during the COVID pandemic but wants his passenger endorsement to obtain work in the future.

Holub showed no remorse concerning his convictions. Instead, Holub blames the archaic anti-marijuana laws and diminishes his obligation to follow the laws in effect at the time.

Holub stated he understands that he cannot drive a bus or other commercial vehicle with passengers while under the influence of drugs. Still, Holub holds that because marijuana is now legal and not a "gateway drug," the Commission cannot tell him not to use marijuana.

DISCUSSION AND CONCLUSIONS OF LAW

The Chief Administrator of the Commission (Commission Administrator) has the right to impose reasonable restrictions on licenses for various occupations to protect public health and safety. Sanders v. Division of Motor Vehicles, 131 N.J. Super. 95, 97 (App. Div. 1974). The primary objective of administrative proceedings by the Commission

is "to foster safety on the highway." Atkinson v. Parsekian, 37 N.J. 143, 155 (1962). Where the agency claims that a license endorsement should be suspended, the agency bears the burden of proof, by a preponderance of the competent and credible evidence, of facts essential to its claim. Id. at 149; Cumberland Farms, Inc., v. Moffett, 218 N.J. Super. 331 (App. Div. 1987).

In 1986, the Congress enacted the Commercial Motor Vehicle Safety Act (CMVSA), 49 U.S.C. §2701 to 2718.[2] Section 2708 of the CMVSA required States to adopt commercial driver licensing laws in compliance with federal standards or lose federal highway funding. See 49 U.S.C.§ 31311(a) (setting forth the current standards States must follow to avoid having federal funding withheld). In response, the Legislature enacted the New Jersey Commercial Driver License Act in 1990, N.J.S.A. 39:3-10.9 to 10.31.

N.J.S.A. 39:3-10.1 creates a special license for bus drivers and others, commonly called a passenger endorsement, to a commercial driver's license, and directs that an applicant for such a license present satisfactory evidence of their "previous experience," "good character" and "physical fitness." Ibid.; Mernick v. Division of Motor Vehicles, 328 N.J. Super. 512 (App. Div. 2000). The statute authorizes the Commission Administrator to suspend or revoke such a license for a violation of the motor vehicle laws "or on other reasonable grounds, or where, in his opinion, the licensee is either physically or morally unfit to retain the same." N.J.S.A. 39:3-10.1.

In addition, other passenger endorsement requirements apply: "Applicants shall be at least 21 years of age, have a minimum of three years driving experience, be of good character and physically fit and possess a valid New Jersey driver license." N.J.A.C. 13:21-14.5(a).

[2] Now embodied in 49 USC, Subtit. VI, Pt. B, Ch. 311, enacted on July 5, 1994, 103 P.L. 272,108 Stat. 745.

Under N.J.A.C. 13:21-14.5(c)12, the Commission Administrator "may not issue a bus driver license, or may revoke or suspend the bus driver license of any person when it is determined that the applicant or holder of such license has . . . [a] criminal record which is disqualifying." Notably, the applicant will be deemed to have a disqualifying record if he has been convicted of a crime or other offense involving the manufacture, transportation, possession, sale, or habitual use of a "controlled dangerous substance" as defined in the New Jersey Controlled Substance Act. N.J.A.C. 13:21-14.5(c)12(i)(1).

Although New Jersey decriminalized certain marijuana offenses, Federal Department of Transportation (DOT) regulations require that no driver be on duty and possess, be under the influence of, or use, any substance outlined in Schedule I of the DOT regulations, including marijuana and synthetic equivalents.49 C.F.R. § 392.4; 21 C.F.R. § 1308.11. Moreover, DOT drug testing regulations preclude medical reviewers from verifying a drug test as "negative based on information that a physician recommended that the employee use a drug listed in Schedule I of the Controlled Substances Act. (e.g., under a state law that purports to authorize such recommendations, such as the "medical marijuana" laws that some states have adopted)." 49 C.F.R. § 40.151(e). In other words, despite New Jersey's determination to allow medicinal marijuana and decriminalization of marijuana usage and possession, the DOT laws still preclude commercial driver's licensees from using or possessing any Schedule I controlled substance of which marijuana remains. Significantly, New Jersey's laws are unchanged as to passenger endorsements to commercial driver's licenses.

Holub maintains that marijuana should never have been considered dangerous compared to other drugs with a more significant physical impact on the body. Yet, at the time committed, Holub's actions were a disqualifying crime and involved possession of a CDS. Therefore, I **CONCLUDE** that the four convictions constitute a disqualifying conviction record under N.J.A.C. 13:21-14.5(c)12(i)(1).

However, the existence of one or more elements of N.J.A.C. 13:21-14.5(c) does not require a per se disqualification. Indeed, the Commission Administrator reserved the right to waive any portion of the regulation "[i]f sufficient and reasonable grounds are

established at a hearing . . . ." N.J.A.C. 13:21-14.5(d). Proof of rehabilitation establishes grounds to waive the regulation. Sanders, 31 N.J. Super. at 98.

The Rehabilitated Convicted Offenders Act (RCOA), N.J.S.A. 2A:168A-1 to -3, guides in assessing whether the proofs sufficiently justify a waiver of a disqualifying condition. As a matter of policy, "it is in the public interest to assist the rehabilitation of convicted offenders by removing impediments and restrictions upon their ability to obtain employment or to participate in vocational or educational rehabilitation programs based solely on the existence of a criminal record." N.J.S.A. 2A:168A-1.

The RCOA also provides that "a person shall not be disqualified or discriminated against by any licensing authority because of any conviction for a crime . . . unless the conviction relates adversely to the occupation . . . for which the license or certificate is sought." Ibid. Factors to consider in determining if a conviction relates adversely to a given occupation include: (1) the nature and duties of the occupation; (2) the nature and seriousness of the crime; (3) the circumstances under which the crime occurred; (4) the date of the crime; (5) the age of the person at the crime's commission; (6) whether the crime was an isolated or repeated incident; (7) social conditions which may have contributed to the crime; and (8) any evidence of rehabilitation, including good conduct in the community, counseling or psychiatric treatment received, acquisition of additional academic or vocational schooling, or the recommendation of persons who have or have had the person under their supervision. N.J.S.A. 2A:168A-2.

Here, the offenses involved possession of a CDS, and the line of work Holub seeks to obtain through a CDL passenger endorsement is safety-sensitive because the public is concerned. Indeed, a bus driver is entrusted with the duty to transport members of the public safely. A commercial driver with a passenger endorsement cannot use a CDS while operating a bus as the safety risk is inherent. Many of Holub's convictions were remote in time, but a pattern of marijuana use is evident.

Holub struggled in his family life with an absent father. To his credit, Holub completed probation related to his convictions and negatively tested for drugs with the

DOT in at least 2019 as required for his CDL. Holub's medical marijuana card expired in 2020. Yet, it is unclear whether Holub's anxiety condition persists or if he treats the ailment in other ways.

Holub maintains that he is a responsible individual who, along with his family, would financially suffer if he were unable to have a passenger endorsement. Holub also states that he understands the risks associated with marijuana use and does not intend to utilize the drug while driving a bus. Yet, I found that Holub holds that he has a legal right to use marijuana and refuses to take steps to demonstrate he no longer qualifies for the medical use of marijuana. This position calls into question his understanding that he must still follow applicable laws precluding drug use by an individual carrying a passenger endorsement. Holub's refusal to participate meaningfully in this proceeding also evidences a lack of rehabilitation as contemplated under the RCOA. Given Holub's inability to demonstrate he will not utilize marijuana, I **CONCLUDE** that a preponderance of evidence does not exist to counter the seriousness of Holub's criminal record or that the public's risk is curtailed. Thus, I further **CONCLUDE** that a preponderance of the evidence does not exist to justify waiver of the indefinite suspension on Holub's passenger endorsement and that the scheduled suspension was appropriate.

ORDER

Given my findings of fact and conclusions of law, **I ORDER** that the Commission's action suspending Holub's New Jersey passenger endorsement indefinitely be **AFFIRMED**.

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,** the designee of the Commissioner of the Department of Human Services, who by law is authorized to make a final decision in this matter. If the Director of the Division of Family Development does

not adopt, modify, or reject this decision within forty-five days, 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.

July 19, 2021

DATE

NANCI G. STOKES, ALJ

Date Received at Agency: July 19, 2021

Date Mailed to Parties: July 19, 2021
ljb

APPENDIX

WITNESSES

For petitioner:

Cassandra Berry

For respondent:

Lawrence Holub

EXHIBITS

For petitioner:

P-1 Certified New Jersey Motor Vehicle Commission Abstract of Driver History Record

P-2 New Jersey State Police Fingerprint Identification System Automated Applicant Record, December 9, 2019

P-3 New Jersey Automated Complaint System, Complaint No. S-2009-000019 and S-2018-000027

P-4 New Jersey Motor Vehicle Commission, Scheduled Suspension Notice, February 9, 2020

P-5 Paramus Certification of Disposition, Maywood Municipal Court Disposition, and Prospect Park Municipal Court Disposition.

P-6 New Jersey Motor Vehicle Commission Notice Re: Mitigating Factors and Evidence of Rehabilitation and Passenger Endorsement Warning, October 21, 2020

P-7 New Jersey Department of Health Medicinal Marijuana Program identification card and New Jersey commercial driver license Number

P-8 New Jersey Motor Vehicle Commission, Conference Report, October 21, 2020

For respondent:

None

*Date of mailing: September 24, 2021

STATE OF NEW JERSEY
MOTOR VEHICLE COMMISSION
CASE FILE NUMBER: MXXXX XXXXX 08582

IN THE MATTER OF	**:**	**FINAL ADMINISTRATIVE DECISION AND ORDER OF SUSPENSION**
PAUL L. MASABA	**:**	**(Hearing on the papers)**
		SUSPENSION TERM: 90 DAYS
		EFFECTIVE DATE: 10/24/21

This is the Motor Vehicle Commission's (Commission) Final Administrative Decision in the matter of Paul L. Masaba (Masaba).

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 Masaba had been convicted of driving while ability impaired (NYDWAI). Masaba 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 Masaba that his 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.

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[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, Masaba (representing himself), requested a hearing, arguing that the New York conviction "did not arise from a violation of a proscribed blood alcohol concentration of more than 0.08% as established by New Jersey statute;" the New York court did not establish that he was operating a motor vehicle "while under the influence of intoxicating liquor and not any other medical treatment related to a chronic medical condition" that Masaba states was "reactivated as an acute attack that night;" and that the New York court did not consider Masaba's medical condition, which affected his eyesight and the results of a Horizontal Gaze Nystagmus test conducted by the police officer in connection with this matter. Masaba also stated that he relies on his driver license for employment. Included with Masaba's hearing request was a copy of the Commission's April 2, 2019, Scheduled Suspension Notice. A copy of Masaba's hearing request and enclosure are attached hereto collectively as Exhibit R-1.

The Commission issued a letter to Masaba acknowledging Masaba's hearing request, further advising Masaba that he was being afforded an opportunity for a hearing on the papers, and that it was his 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 Masaba to "provide a notarized affidavit setting forth all facts in support of [his] 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 [his] conviction)." A copy of the Commission's May 6, 2019, letter is attached hereto as Exhibit P-3.

Masaba responded with an affidavit dated May 31, 2019, arguing that New York "did not administer a breath test … to conclusively determine" his BAC; New York did not "offer" a "blood test so as to conclusively determine" his BAC; and, without a breath or chemical test, "there is no indisputable evidence of [his] BAC" "for the Commission to determine conclusively that [he] actually committed a violation of a proscribed blood alcohol concentration of more than 0.08% as established to conform to the New Jersey statute."

Masaba attached two documents to his affidavit: a copy of a Livingston County District Attorney's Office Negotiated Plea Recommendation dated February 6, 2019, signed by Masaba, Masaba's attorney in that matter, the Assistant District Attorney, and the Court; and a copy of a New York State Department of Motor Vehicles Uniform Traffic Ticket issued to him on November 30, 2018, charging Masaba with a violation of N.Y. Veh. & Traf. Law §1194(1)(b) (failure to submit to breath and/or chemical test). Copies of Masaba's affidavit, Livingston County District Attorney's Office Negotiated Plea Recommendation, and New York State Department of Motor Vehicles Uniform Traffic Ticket are attached hereto collectively as Exhibit R-2.

According to the Negotiated Plea Recommendation, Masaba was charged with violations of N.Y. Veh. & Traf. Law §1194(1)(b) (failure to submit to breath and/or chemical test), N.Y. Veh. & Traf. Law §1192(3) (driving while intoxicated), N.Y. Veh. & Traf. Law §1227(1) (drinking alcoholic beverages or consumption of cannabis, or possession of an

open container containing an alcoholic beverage, in a motor vehicle), and N.Y. Veh. & Traf. Law §1126(a) (violation of no-passing zone).

Masaba pled guilty to a violation of N.Y. Veh. & Traf. Law §1192(1) (NYDWAI), "in full satisfaction" of the charges under N.Y. Veh. & Traf. Law §1194(1)(b), §1192(3), §1227(1), and §1126(a)). Masaba signed the Negotiated Plea Recommendation, accepting the agreement and its terms, including the explicit waiver of "any and all rights to an appeal" in the matter. (Exhibit R-2, Negotiated Plea Agreement)

Notably, Masaba 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 his conviction. Indeed, Masaba indicates that there was no specific finding of a BAC at the time of the NYDWAI conviction, much less a finding that a BAC of under .08% was the sole basis of the conviction.

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

1. As a result of the events of November 30, 2018, Masaba was charged with violations of N.Y. Veh. & Traf. Law §1194(1)(b) (failure to submit to breath and/or chemical test), N.Y. Veh. & Traf. Law §1192(3) (driving while intoxicated), as well as N.Y. Veh. & Traf. Law §1227(1) (drinking alcoholic beverages or consumption of cannabis, or possession of an open container containing an alcoholic beverage, in a motor vehicle), and N.Y. Veh. & Traf. Law §1126(a) (violation of no-passing zone). (Exhibit R-2, Livingston County District Attorney's Office Negotiated Plea Recommendation)
2. On February 6, 2019, Masaba pled guilty to, and was convicted of, a violation

of N.Y. Veh. & Traf. Law §1192(1) ("NYDWAI"). The plea to NYDWAI was "in full satisfaction" of the charges under N.Y. Veh. & Traf. Law §1126(a), §1194(1)(b), §1227(1), and §1192(3). (Exhibits P-1, and R-2, Livingston County District Attorney's Office Negotiated Plea Recommendation)

3. None of the documents submitted by Masaba 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%[2].
4. As shown by the New York State Department of Motor Vehicles Uniform Traffic Ticket, Masaba was charged with refusing the breath test, and there has been no evidence submitted by Masaba showing that a BAC was ever obtained. (Exhibit R-2)
5. Masaba affirmatively states that there was no breath or blood test in connection with the events of November 30, 2018. (Exhibit R-2, affidavit)
6. 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.

[2] 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. Masaba 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 200.95.

7. The charge of failing to take a breath/chemical test, Masaba's failure to submit any BAC result, the conviction for a violation of N.Y. Veh. & Traf. Law §1192(1) ("driving while ability impaired"), and Masaba's own statements show that the NYDWAI conviction could not have been based exclusively on a BAC of less than .08%.

Analysis

There is no dispute that Masaba was convicted of NYDWAI. Thus, the sole issue to be determined here is whether Masaba has met his burden to prove, with clear and convincing evidence, that his 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, Masaba is subject to the mandatory minimum 90-day suspension of his New Jersey driving privileges, pursuant to N.J.S.A. 39:4-50 [3], 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 Masaba's hearing request that Masaba 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%," Masaba failed to submit any proofs whatsoever regarding a BAC. Moreover, Masaba did not submit any proofs that would show that his NYDWAI conviction by guilty plea was based exclusively on a BAC of less than .08%,

[3] The version of N.J.S.A. 39:4-50 that was in effect on the date of the offense, November 30, 2018.

that is: without any other observational evidence or admission as to the element of impaired driving ability. In fact, Masaba affirmatively states that there was no BAC obtained whatsoever. (Exhibit R-2, affidavit)

Masaba incorrectly argues that the Commission must prove or conclude that he "actually committed a violation of a proscribed alcohol concentration of more than 0.08%." (Exhibit R-2, affidavit) That is not the determining standard here. Rather, it is Masaba's affirmative burden to demonstrate, by clear and convincing evidence, that the NYDWAI conviction was based exclusively on a violation of a proscribed BAC of less than .08%. Masaba cannot meet this burden without a BAC. If there is no BAC, Masaba cannot show that the NYDWAI conviction was based solely on a 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%)[4].

[4] 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.

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 Masaba's conviction. Compare, New Jersey Div. of Motor Veh. 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,

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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.

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 BAC 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.

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)).

Additionally, it is noted that Masaba was charged with failure to submit to breath and chemical testing, in violation of N.Y. Veh. & Traf. Law § 1194(1)(b). Masaba also affirmatively states in his affidavit (Exhibit R-2) that there was no BAC test or determination of BAC. Thus, Masaba has failed to present any documentation that there was a BAC, that his BAC was under .08%, and that his New York conviction was based exclusively on a BAC of less than .08%. Therefore, there had to have been other evidence, aside from BAC evidence, of driving ability impairment to support the NYDWAI conviction. See 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 privileges based on an 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).

Given these factors, Masaba has failed to show, by clear and convincing

evidence, that his 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[5].

It remains undisputed that Masaba 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 his 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. 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.

[5] 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 Masaba's conviction under the NYDWAI statutory provision, N.Y. Veh. & Traf. Law §1192(1).

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.

Finally, Masaba's attack on the New York court for failure to consider his medical condition must be rejected. As the Commission stated in its May 6, 2019, letter, the opportunity for a hearing on the papers is not an opportunity to re-litigate the New York conviction, and this is not the proper action or forum to do so. (Exhibit P-3) Indeed, Masaba does not dispute that he was convicted of NYDWAI.

It remains undisputed, and I therefore find, that Masaba was convicted of an alcohol-related driving offense that occurred on November 30, 2018, in the State of New York (for which he was convicted on February 6, 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 his 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, 2019[6]; there is no discretion to impose a reduced suspension term.

Conclusion and Final Order

Based on the foregoing, I conclude that the Commission's proposed suspension is proper. I specifically conclude that Masaba's submissions to the Commission are insufficient to meet his affirmative burden to show, by clear and convincing evidence, that his 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).]

Masaba'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

[6] 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.

factfinder to come to a clear conviction, without hesitancy, of the precise facts in issue."

The effective date of suspension of Masaba's driving privilege is October 24, 2021. (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, Masaba 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, Masaba 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.[7] 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.

[7] 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).

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 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.

[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:eha/kw

[pro se]

EXHIBIT LIST

*copies redacted of drivers' personal identifying information

Commission Exhibits

P-1 Copy of NYDMV Out-of-State Conviction report dated February 6, 2019, received by NJMVC February 14, 2019 (1 page, redacted)

P-2 Copy of Scheduled Suspension Notice dated April 2, 2019 (2 pages - front and back)

P-3 Copy of Commission letter to Masaba advising him of the opportunity to submit clear and convincing evidence of conviction being exclusively based on a BAC of less than 0.08% (affording a hearing on the papers) , dated May 6, 2019 (2 pages)

Masaba's Exhibits

R-1 Copy of hearing request dated April 24, 2019 (1 page), with enclosed copy of Scheduled Suspension Notice dated April 2, 2019 (2 pages- front and back)

R-2 Copy of Masaba's affidavit dated May 31, 2019 with enclosures: Livingston County District Attorney's Office Negotiated Plea Recommendation and New York Department of Motor Vehicles Uniform Traffic Ticket (total: 4 pages)