

AFFIRMED RECEIVED
MOTOR VEHICLE COMMISSION

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

Date 3-30-15

FEB 17 2015

BOARD OF PUBLIC UTILITIES
MAIL ROOM

INITIAL DECISION

OAL DKT. NO. MVH 00242-14

AGENCY DKT. NO. A 06952

**NEW JERSEY MOTOR VEHICLE
COMMISSION,**

Petitioner,

v.

DANIEL O. AGIDI,

Respondent.

Anthony J. Apicelli, Jr., Esq., for petitioner

George R. Saponaro, Esq., for respondent

Record Closed: November 17, 2014

Decided: February 12, 2015

BEFORE JOSEPH A. ASCIONE, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On August 13, 2013, pursuant to N.J.S.A. 39:5-30, petitioner, Motor Vehicle Commission (MVC), proposed to suspend the New Jersey driving privileges of respondent, Daniel O. Agidi, for 660 days/twenty-two months. The MVC administratively alleged that a violation of N.J.S.A. 39:4-97 Careless Driving, and N.J.S.A. 39:3-76.2(f) Seat Belts Usage resulted in respondent's actions on March 22, 2013; and contributed to the death of Dejour K. Benson. Respondent contends that the

fatal accident occurred as a result of the respondent's attempting to flee from a mob attack. No criminal or municipal citations were issued to respondent. The MVC transmitted the contested case to the Office of Administrative Law. It filed the contested case on December 30, 2013, pursuant to N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. On June 8, 2014, I heard the applications of petitioner and respondent to submit a factual stipulation in regard to the matter. The parties were afforded to July 9, 2014, to submit the stipulation of fact, a requested extension was granted to July 17, 2014. Upon receipt of the stipulation, the tribunal requested further briefing regarding the respondent's defense. This was granted until November 17, 2014, the record closed that date.

FACTUAL STIPULATION AND FINDINGS

The parties have agreed to a stipulation of facts, a copy of which is attached as J-1. The MVC file is attached as P-1, its entry into evidence is limited to the reliable documentation of the respondent's blood test and driving history, and the determination not to prosecute criminally or under Title 39 New Jersey Statutes. The investigatory report contains numerous eyewitness accounts of the incident, all of which are hearsay. Based upon the residuum rule cannot support a factual finding. Accordingly, I **FIND** as **FACT** the following:

1. On March 22, 2013, a high school dance party for a group of Willingboro High School students was held at the East Ridge Plaza, a small strip mall located in Willingboro Township, Burlington County. Approximately sixty individuals attended the party, which was "open invite" for a group of students in Willingboro.
2. Daniel Agidi, the respondent, age seventeen at the time of the accident, was a senior at Willingboro High School. He attended the party, along with his brother, Samuel Agidi, who is from Willingboro and attends Burlington County College.

3. The majority of attendees were from Willingboro High School. It is estimated that there were ten to fifteen individuals from another neighboring community. Several witnesses interviewed by the Willingboro Township Police Department (WTPD) indicated that the other attendees appeared to consume alcoholic beverages.
4. At approximately 10:30 p.m., respondent and his brother, Samuel, were at the party. They went outside the building into the parking lot area. At that time, respondent and his brother heard someone speaking on a cell phone calling for more friends from the other community to come assist a fight or brawl at the strip mall.
5. Respondent returned inside the party to advise other friends to depart the party to avoid the fight.
6. When respondent left the building, a fight had started. Respondent and his brother attempted to break up the fight, and pull a friend from a group of individuals who were attacking him.
7. Respondent and his brother then went to their respective cars. Respondent's vehicle, was a 2005 Chevrolet Malibu four-door white vehicle, License Plate A89-AKJ, and was parked adjacent to his brother's vehicle.
8. Respondent vision requires him to wears eyeglasses while driving.
9. Respondent's vehicle's position required him to back out and perform a one-half "k" turn to exit the strip mall parking lot.
10. Many individuals followed respondent back to his vehicle continuing to attack him. He did not recognize these individuals. Witnesses'

statements to the WTPD verified that approximately fifteen individuals were running over toward respondent's vehicle.

11. One of the witnesses, a Jalen Davis (Davis), observed some unknown individuals arrive at the party and appeared drunk. He overheard these same individuals say, "We're going to F--- everybody up." He also overheard the same individuals talking about bringing guns to the party. Davis attempted to get his friends to leave as well. He saw respondent run to his vehicle, followed by other boys who began hitting the car. Davis heard someone yell to respondent, "reverse it". Respondent drove forward and struck someone.
12. Respondent, a juvenile, provided a voluntary statement to the WTPD. Respondent stated that after attempting to break up a fight, he intended to leave in his car. Multiple individuals attacked respondent, punching his hood and trunk, and his body. His eyeglasses were knocked from his face while he had his car in reverse. He switched to forward, while he was still being attacked and stepped on the gas. It is at this time that the vehicle struck someone.
13. Respondent got out of the car and recognized the individual that he hit as Deejour Benson.
14. After the incident, Davis observed respondent mill around the parking lot upset and crying. Davis said respondent never left the area.
15. WTPD arrived at the scene. Mr. Benson was in critical condition and was transported by air to Cooper University Hospital. The next day, Mr. Benson died from the injuries.
16. The NMS Labs April 2, 2013, Toxicology Report reflected a .102 Blood Alcohol Level of the deceased Mr. Benson.

17. On March 22, 2013, respondent did not consume any alcoholic beverages, or take any illegal drugs, or any prescription medications. This is supported by the New Jersey State Police Laboratory Report's negative alcohol and drug findings of April 24, 2013.
18. The WTPD confirmed and corroborated respondent's statement that he was under attack at the time of the incident.
19. The WTPD and the Burlington County Prosecutor's office investigated the incident. Neither the WTPD nor the Burlington County Prosecutor's office charged respondent with any criminal offense. The WTPD did not charge any motor vehicle offense under Title 39 New Jersey Statutes.
20. The Burlington County Prosecutor's office did charge one individual, Kevin Fentress, with assault out of the incidents related herein. The victim of that assault is respondent.
21. Respondent's certified Motor Vehicle Commission Driving Abstract shows no entries other than the fatal accident conference, which is the subject of this hearing.
22. The circumstances placed respondent in the situation of an emergency, which he did not contribute to creating.
23. The emergency was imminent and compelling; and a reasonable person would anticipate the emergency to result in further harm to the respondent.
24. The emergency presented no reasonable opportunity for respondent to avoid the injury without the actions respondent took.

25. The injury impending to the respondent from the emergency is sufficiently serious to out measure the wrongdoing perpetrated by the respondent. The wrongdoing is an administrative determination that respondent committed careless driving.

26. Since the time of the incident on March 22, 2013, the MVC records of respondent reflect no further negative actions by the respondent. See P-2.

FACTUAL DISCUSSION

The events related are a tragedy. The WTPD performed an extensive investigation. The Burlington County Prosecutor's Office reviewed that investigation and determined to take no criminal action. The WTPD issued no motor vehicle violation. The Chairman and Chief Administrator of the Motor Vehicle Commission has the authority to seek a suspension if a motor vehicle violation occurs and it results in the death of another. The events immediately prior to the fatal accident occurred within a minute or two. The eyewitness accounts are unreliable, not only from an evidentiary analysis of hearsay, but also from the limited visibility afforded by the night viewing. Respondent arrived in his vehicle being chased by individuals intent on inflicting injury to him. Respondent's version of events, confirmed by the WTPD is more likely than not the events which transpired. Respondent's glasses were knocked from his face, he proceeded forward in the dark with limited vision and a fatal accident resulted. No showing has been made by a preponderance of the evidence that the accident resulted from a violation of N.J.S.A. 39:4-76⁹⁷.

The respondent raises the common law defense of necessity to take the action he took to avoid injury to himself.

LEGAL ANALYSIS AND CONCLUSION

N.J.S.A. 39:5-30 provides authority to the director (now Chairman and Chief Administrator) of the MVC, in his discretion, to suspend the driving privileges of a motorist when it is shown that a driver has operated a vehicle in violation of any of the provisions of the Title and it results in the death of another. Here, after notice on August 13, 2013, the MVC proposed a suspension of respondent's driving privileges for twenty-two months or 660 days on the grounds of careless driving and failure to wear a seatbelt.

Disposing of the issue of violation of N.J.S.A. 39:3-76.2(f), Seat Belts Usage, this tribunal can understand this section as a predicate for suspension when the operator of a vehicle did not compel a passenger to wear a seat belt. The operator's failure to compel could lead to the death of the passenger during the course of an accident. The statute has no logical application to our present factual circumstances. Respondent's failure to wear his seat belt did not result in the death of Deejour Benson.

The respondent argues that petitioner has not met its burden of proof by a preponderance of the evidence that the respondent violated any provision of the Title. No one from the WTPD issued any motor vehicle violation to the respondent. The respondent raises the affirmative defense of necessity as codified in N.J.S. A. 2C:3-2. This is not a criminal matter but an administrative matter. The above statute is not directly applicable to violations of the motor vehicle statutes. Accordingly, the statute does not prevent the Chairman and Chief Administrator's ability to administratively find that careless driving occurred.

Cresse v. Parsekian, 43 N.J. 326 (1964), affirming, 81 N.J. Super. 536 (1964), is the controlling case of the authority of the Chairman and Chief Administrator. In Cresse, the New Jersey Supreme Court affirmed the Appellate Division's decision remanding the matter to the director of the Division of Motor Vehicles to review his determination of the length of the suspension taking into account the factors expressed by the Appellate Division. The Appellate Division at Page 549, suggests that

consideration should be given to the facts which ". . . constitute the particular violation, whether the motorist was willful or reckless, or merely negligent, and, if merely negligent, how negligent; how long the motorist has been driving; whether this is his first offense; whether he has been involved in any accidents; his age and physical condition; whether there were any aggravating circumstance, such as drinking, or, on the other hand, whether there were extenuating circumstances."

There is no evidence of any willful or reckless action on the part of respondent, nor is there any evidence of alcohol or drug influence. Respondent here is a new driver. The evidence points to the extenuating circumstances of a driver being assaulted by numerous individuals, and his desire to remove himself from the situation. In State v. Romano, 355 N.J. Super 21 (App. Div. 2002), the Appellate Division reversed both a municipal court and subsequent trial court finding of violation of the driving under the influence statute, based upon the defendant's affirmative defense of necessity. The court there said that a defendant in a motor vehicle violation matter does not give up his common law rights to raise the defense of necessity.

The elements of the common law defense of necessity are: (1) There must be a situation of emergency arising without fault on the part of the actor concerned; (2) This emergency must be so imminent and compelling as to raise a reasonable expectation of harm, either directly to the actor or upon those he was protecting; (3) This emergency must present no reasonable opportunity to avoid the injury without doing the criminal act; and (4) The injury impending from the emergency must be of sufficient seriousness to out measure the criminal wrong.

When the MVC seeks to suspend a driver's license it is done to foster public safety on the highway, not to be punitive or to vindicate public justice. See Atkinson v. Parsekian, 37 N.J. 143, 155 (1962); David v. Strelecki, 51 N.J. 563, 566 (1968).

In Division of Motor Vehicles v. Hantsoulis, 95 N.J.A.R. 2d. (MVH) 42 (1994) WL 841278, the Administrative Law Judge found a suspension of 120 days appropriate. The director in the final decision provided for no suspension. The factual circumstances

were slightly different but the actions of the deceased were the primary cause of the fatality.

This respondent's driving record is unblemished. This is his first notation on his driver's history abstract. Since the incident, through November 13, 2014, respondent has committed no motor vehicle infractions.

I **CONCLUDE** that the MVC has not proved by a preponderance of the evidence that respondent violated N.J.S.A. 39:4-⁹⁷67, nor N.J.S.A. 39:3-76.2(f).

I further **CONCLUDE** that the respondent has properly and successfully raised the common law defense of necessity, which resulted in his actions to drive his vehicle to avoid further injury to himself.

ORDER

For the reasons stated above, I hereby **ORDER** that petitioner's application is **DISMISSED**.

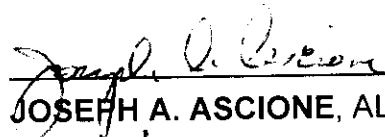
I hereby **FILE** my initial decision with the **CHIEF ADMINISTRATOR OF THE MOTOR VEHICLE COMMISSION** for consideration.

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.

February 12, 2015 _____

DATE:



JOSEPH A. ASCIONE, ALJ

Date Received at Agency:

2/12/15

Date Mailed to Parties:

2/12/15

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APPENDIX
LIST OF WITNESSES

For Petitioner:

None

For Respondent:

None

LIST OF EXHIBITS

Joint:

J-1 Factual Stipulation (7 pgs.)

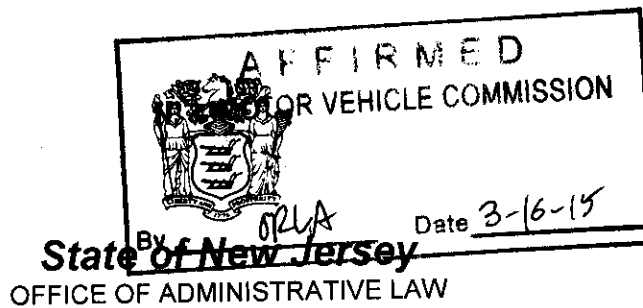
For Petitioner:

P-1 MVC transmittal package

P-2 Driving Abstract, dated November 13, 2014

For Respondent:

None



INITIAL DECISION

OAL DKT. NO. MVH 06223-14

AGENCY DKT. NO. 11642

NEW JERSEY MOTOR VEHICLE COMMISSION,

Petitioner,

v.

KEVIN W. JEFFERSON,

Respondent.

New Jersey Motor Vehicle Commission, petitioner, appeared on the papers pursuant to N.J.A.C. 1:1-5.6(a)

Mark Iaconelli, Jr., Esq., for respondent (Scott H. Marcus and Associates, attorneys)

Record Closed: September 30, 2014

Decided: January 29, 2015

BEFORE **JOSEPH A. ASCIONE, ALJ:**

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On July 2, 2013, pursuant to N.J.S.A. 39:3-10 et seq., N.J.S.A. 39:5-30 and N.J.A.C. 13:21-14.5(a) and (c), petitioner, Motor Vehicle Commission (MVC), proposed the indefinite suspension of the commercial driver's license passenger endorsement of respondent, Kevin W. Jefferson, effective July 31, 2013. The MVC administratively

alleged that respondent has a disqualifying criminal arrest and/or conviction record. By letter dated July 29, 2013, respondent requested a hearing. The MVC transmitted the contested case to the Office of Administrative Law (OAL), where it was filed on May 20, 2014, pursuant to N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. I heard the case on August 21, 2014, at the conclusion of which respondent's counsel requested and was granted time to submit additional documents. The record closed on September 30, 2014, with the receipt of those documents. Orders were entered extending the time for filing this decision.

ISSUES PRESENTED

The issues in this matter are whether the MVC properly exercised its police power to seek the indefinite suspension of respondent's commercial driver's license (CDL) passenger endorsement, whether respondent has submitted clear and convincing proof of his rehabilitation, and whether respondent retaining his passenger endorsement is a safety risk to the public.

FACTUAL DISCUSSION

Testimony

Kevin Jefferson, respondent, testified that he has been employed at Cardinal Village Senior Living, an assisted-living and independent retirement community, for six years, initially as a maintenance worker and for the last year and a half as a bus driver. His reviews have been favorable, and his hourly salary has risen from \$8 per hour to \$13.54 per hour. His counsel has been provided by Ms. Weist, the executive director of Cardinal Village.

Respondent testified regarding the two offenses cited by the MVC as disqualifying criminal arrests and/or convictions. In May 2010 he was convicted in Camden of an assault on police. Respondent testified that the alleged assault occurred when he witnessed a police officer bust his daughter's lip and shove her against a wall. He was being restrained by another officer at the time. It was alleged that he kicked the

officer while he was restrained. He spent two nights in jail, and pled guilty in a plea deal. His sentence included 180 days of work with the Camden County Correctional Facility, County Supplemental Labor Service (CCCF-CSLS), to be served on Sundays and Mondays; five years' probation; and anger-management counseling. (P-1.) He completed all requirements of probation early, by April 17, 2013. (R-4.)

Respondent stated that a 1993 armed-robbery offense, as well as other earlier offenses, occurred at a time when he suffered from alcoholism. In fact, the money stolen during the armed robbery in 1993 was used to purchase alcohol.

Respondent testified that he has had knee surgery and suffers from back-pain issues. He testified that losing his passenger endorsement would result in a loss of income and medical benefits, and consequent loss of a house he just purchased.

Keirston Shoemaker is the activities director for Cardinal Village. As an employment character reference, she testified that respondent takes the time the residents need with him, he is a good role model for other employees, and he helps the staff. He goes above and beyond being a good employee. She wrote a character-reference statement (R-2), and she confirmed the signatures of Susan E. Wiest, LNHA, and Patricia Bronsky, RN, on character-reference statements purported to have been signed by them (R-1; R-3).

Shoemaker testified that there have been more compliments about respondent than any other employee. She noted in her statement that it is not only the usual compliments one would expect of a driver, but compliments related to his listening to residents' stories of losses, and their fears. Shoemaker described respondent's value to the residents as making the residents feel understood, appreciated, important and useful. Shoemaker stressed that a decision to suspend respondent's passenger endorsement would affect some 200 residents of Cardinal Village.

Regarding respondent's employment at Cardinal Village, Shoemaker testified that if respondent were to lose his passenger endorsement he likely would be terminated from his employment, as the nature of the facility's funding would not allow a

different position to be created for him. She opined that he likely would have to seek unemployment benefits, and possibly eventually welfare assistance.

Documentary evidence

Respondent submitted a character reference prepared on his behalf by Patricia Bronsky, R.N., the director of nursing for Cardinal Village. She wrote that she had worked with respondent for five years, and claimed that he is the best bus driver she has had the pleasure to work with. She added:

As a bus driver for the frail and elderly, one must possess certain skills necessary to physically care for elderly residents. Due to their frail condition, you must be able to handle them in a safe and gentle manner. Kevin has consistently rendered the safe quality care we expect from our bus drivers.

I have evaluated Kevin over the years in several positions within our community, and I have complete confidence and trust in his abilities with our residents. Kevin is willing to jump in and take on tasks, and assume responsibility.

[R-3.]

Susan E. Wiest, LNHA, executive director of Cardinal Village, prepared a written character reference on October 15, 2013, which is included in the MVC's documentary submission, P-1. She updated this character reference in August 2014. (R-1.) She relates that respondent has been an exemplary bus driver, and that the loss of his passenger endorsement would unjustly affect the residents of Cardinal Village, as well as respondent. In Wiest's October 2013 letter she had acknowledged hiring respondent prior to the 2009 criminal incident. The facility knew of the incident and continued his employment, working within the sentencing requirements.

A September 8, 2014, letter from the Camden Vicinage of the Superior Court of New Jersey documents that respondent satisfied all the requirements of his probation

on April 17, 2013, less than three years after the sentencing, and the case was closed early. (R-4.)

The MVC's transmittal package, P-1, includes those documents identified on the third page of P-1, all of which were accepted into evidence.

A September 3, 2013, document entitled Supplemental Specifications identified criminal incidents of March 16, 2010 (sic), and March 8, 1993, as part of the basis for the proposed indefinite suspension of respondent's commercial driving privilege passenger endorsement.

The Statement of Reasons and Sentence regarding the August 21, 2009, incident, issued on May 7, 2010, by Judge Thomas A. Brown, Jr., P.J.Cr., reflects respondent's eight prior Municipal Court convictions and one prior Superior Court conviction. The sentence also reflects Judge Brown's determination of aggravating and mitigating factors. The judge found two aggravating factors: the risk that respondent would commit another crime, and the need to deter respondent and others from violating the law. The judge also found a mitigating factor, which was that respondent was particularly likely to respond affirmatively to probationary treatment. The sentence included five years' probation; 180 days of CCCF–CSLS participation to be served two days per week, on Sundays and Mondays; and successful completion of anger-management counseling. Respondent was forty-five years old at the time of the sentencing.

The Statement of Reasons regarding the March 8, 1993, incident, issued on September 10, 1993, by Judge Joseph F. Lisa, J.S.C., reflects Judge Lisa's determination of aggravating and mitigating factors. The judge found three aggravating factors: the risk that respondent would commit another crime—here the judge specified respondent's admitted alcohol abuse and acknowledgment that the cash obtained from the offense in question was used to purchase alcohol; the extent of respondent's prior criminal history and the seriousness of the offenses; and the need to deter respondent and others from violating the law. The judge found as a mitigating factor the fact that respondent agreed to restitution in the amount of \$95. The Judgment of Conviction and

Order for Commitment sentenced respondent to a five-year period of incarceration, restitution, and costs. Respondent was twenty-nine years old at the time of the sentencing.

An MVC Conference Report dated October 28, 2013, documents that subsequent to review of submissions made by respondent's counsel, including a recommendation letter from Wiest, the MVC analyst determined that respondent is a threat to the community. He offered respondent a three-year suspension of his passenger endorsement, which respondent rejected, and the matter was referred to the OAL.

While the MVC analyst was not explicit in the analysis that led to his determination, the sentencings of Judge Brown and Judge Lisa, as well as the various municipal violations noted, reflect respondent as an individual who has anger-management issues. His previous alcohol abuse and drug addiction is identified in Judge Lisa's analysis. In addition to the armed robbery in 1993 through which respondent obtained \$95, which he promptly used to purchase alcohol, there are municipal assault charges. These factors support the proposed indefinite suspension of respondent's passenger endorsement. The MVC's analyst's determination that the respondent is a danger to the community is not stated in the 2009 sentencing reasoning, though Judge Brown believed that one of respondent's aggravating factors included the concern that the offense could be committed again. The absence of further documentation from respondent as to his rehabilitation at the time of the MVC conference further supports the MVC's proposed indefinite suspension of his CDL passenger endorsement.

The hearing in this matter allowed respondent the opportunity to submit additional evidence of his rehabilitation and satisfaction of all his probation requirements from the sentence in May 2010.

FACTUAL FINDINGS

As most of the material facts are undisputed, I **FIND** the following **FACTS**:

1. Respondent pled guilty to armed robbery in 1993, and pled guilty to aggravated assault of a police officer in 2010, crimes of the first and third degree, respectively.
2. Respondent possesses a commercial driver's license with a bus/passenger endorsement. He uses this license in connection with his employment at Cardinal Village, transporting senior residents to doctors' appointments and activities.
3. On July 2, 2013, petitioner proposed an indefinite suspension of respondent's passenger endorsement based upon disqualifying criminal records. On September 3, 2013, petitioner provided to respondent Supplemental Specifications identifying the 1993 and 2010 criminal pleas as the basis for the proposed suspension.
4. Both sentencing reports found as an aggravating factor the likelihood that the respondent would commit another crime.
5. The October 28, 2013, conference report issued by the MVC noted that respondent claimed rehabilitation, but at that time the only documentary evidence submitted as to respondent's character was the October 15, 2013, letter from Wiest. The conference report noted that respondent's work driving history had only started a few months before the conference. The proposed action by the MVC is based upon the determination that the sentencing report from 2009 evidences that respondent is a "threat to the community."

As a result of unrefuted testimony and materials provided at the hearing and a determination of favorable credibility of the witnesses, I **FIND** the following additional **FACTS**:

6. Respondent's 2010 conviction in Camden related to his viewing a police officer bust his daughter's lip and shove her against a wall. He was restrained by

another officer at the time. It is alleged that respondent kicked the officer while restrained. He spent two nights in jail, and pled guilty in a plea deal. He was sentenced to 180 days of CCCF-CSLS participation, to be served on Sundays and Mondays; five years' probation; and compelled attendance at anger-management counseling. He completed all requirements of probation early, by April 17, 2013.

7. Respondent's 1993 conviction occurred at a time when he suffered from alcoholism and drug addiction.
8. Other than the 2010 conviction, there is an absence of any criminal record from 2002 through October 28, 2013. The 2009 incident resulting in the 2010 conviction is an isolated event.
9. Respondent began employment with Cardinal Village in 2008 prior to the 2009 criminal activity. He started in the maintenance department, earning \$8 an hour, and worked up to the position of driver, earning more than \$13 an hour.
10. When respondent informed Cardinal Village of the 2009 incident and 2010 conviction, Cardinal Village worked with him so that he could serve his time and continue his employment.
11. Respondent takes the time the Cardinal Village residents need with him, he is a good role model for other employees, and he helps staff. He goes above and beyond being a good employee.
12. Respondent is known to make the residents of Cardinal Village feel understood, appreciated, important and useful. A suspension of his passenger endorsement would affect some 200 senior residents of Cardinal Village.
13. The loss of respondent's passenger endorsement would likely result in the loss of his employment at Cardinal Village, as the nature of the facility's funding would not allow a different position to be created for him.

14. Patricia Bronsky, R.N., head of nursing for Cardinal Village, in providing a character reference for respondent's five years of employment with Cardinal Village stated, "Kevin has consistently rendered the safe quality care we expect from our bus drivers. I have evaluated Kevin over the years in several positions within our community, and I have complete confidence and trust in his abilities with our residents. Kevin is willing to jump in and take on tasks, and assume responsibility."

15. Susan Wiest, the executive director of Cardinal Village, in providing a character reference for respondent acknowledged that Cardinal Village provided counsel for respondent in the defense of the proposed suspension. She also advised that the loss of respondent's passenger endorsement would affect the senior residents of Cardinal Village. She stated, "Removing Mr. Jefferson from his position will significantly disrupt the lives of our seniors who depend on him to get to their medical appointments, the bank, post office and grocery stores. This disruption will be devastating to many of our residents."

16. Respondent is a productive citizen earning a living.

17. Respondent's actions and reputation during the period from 2008 to the present reflect that he is rehabilitated, and no longer represents a risk to the safety of the public.

LEGAL ANALYSIS AND CONCLUSION

N.J.S.A. 39:5-30 and N.J.S.A. 39:3-10.1 provide authority to the chairman and chief administrator of the MVC, in his discretion, to suspend the driving privileges of a motorist, or in this case indefinitely suspend the CDL passenger endorsement, when it is shown that a driver is either physically or morally unfit to retain same. N.J.A.C. 13:21-14.5(c)(12)(i)(3) provides that when a licensee or potential licensee is convicted of certain enumerated criminal offenses, a basis exists to suspend the license or endorsement of that individual. This is not to say that the mere existence of the

violations is a sufficient basis to warrant disqualification or suspension. Div. of Motor Vehicles v. Argese, 95 N.J.A.R.2d (MVH) 28. The chief administrator is required to determine whether the licensee is a safety risk to the public. The chief administrator must also look at whether the licensee is rehabilitated. See N.J.S.A. 2A:168A-2(a) to (h), the Rehabilitated Convicted Offenders Act (RCOA). The MVC acknowledged this requirement in its September 3, 2013, Supplemental Specifications by including the notice regarding Mitigating Factors and Evidence of Rehabilitation.

Respondent argues that petitioner has not met its burden of proof by a preponderance of the evidence that there is sufficient reason to indefinitely suspend his CDL passenger endorsement. This tribunal does not accept that argument. At the time of the MVC conference, respondent had not put forward sufficient evidentiary information for the MVC analyst to conclude other than he did, which was that respondent was a threat to the community. The respondent's criminal record clearly fell in the language of N.J.A.C. 13:21-14.5(c)(12)(i)(3), and his criminal history presented the likelihood that respondent would commit another offense, which was sufficient to justify proposing the indefinite suspension of his CDL passenger endorsement. While Susan Wiest's character reference supported that respondent was a good worker for the last five years, no evidentiary proof appeared in the MVC's record that probation had been satisfied. Respondent referenced Sanders v. Division of Motor Vehicles, 131 N.J. Super. 95 (App. Div. 1974), in support of his position that the MVC did not have the unfettered right to suspend solely on the basis of the criminal convictions. However, the court there recognized that the director of the Division of Motor Vehicles was "hard pressed to arrive at any equitable decision that [the driver had], indeed, been rehabilitated." 131 N.J. Super. at 98. The evidence was held to be sufficient and reasonable to support the suspension. Sanders supports the position of the MVC. Likewise, Argese, supra, 95 N.J.A.R.2d (MVH) 28, involved a commercial driver's license, but did not deal with a passenger endorsement.

In determining whether to suspend a driver's passenger endorsement based on a conviction record, the MVC needs to consider whether the crime at issue relates adversely to the driver's occupation, and the effect that the driver's retaining the endorsement may have on the health and safety of the public. See N.J.S.A. 39:3-10.1

et seq.; N.J.S.A. 2A:168A-2; Sanders, supra, 131 N.J. Super. 95; Argese, supra, 95 N.J.A.R.2d (MVH) 28. The RCOA requires the MVC in such a case to place in writing those items identified in N.J.S.A. 2A:168A-2(a) to (h). The notice regarding Mitigating Factors and Evidence of Rehabilitation included in P-1 is designed to address those factors. It appears that the MVC completed that document from the record and sought additional input from respondent, which at the time of the October 28, 2013, conference included only one character reference from Susan Weist.

When a hearing is requested before the OAL, the OAL conducts a full plenary hearing unless the jurisdiction is limited by the transmitting agency. Here, additional materials were submitted that were not considered by the MVC at the time of its October 28, 2013, conference with respondent. N.J.A.C. 1:1-3.2(b) provides that the judge may return the matter for further consideration by the MVC if the judge finds it in the interest of expediency and efficiency. In this case, expediency and efficiency is served if the OAL issues an initial decision and allows the chief administrator to review the record and exercise his discretion in the application of any suspension.

The 1993 conviction is attenuated by the more than twenty years that have elapsed since that occurrence. While not an isolated incident, it is sufficiently distant that it should not be considered in the analysis of respondent's present moral character or risk to the safety of the public. The 2010 conviction is more troubling in the analysis, as it is recent in time and a violent crime, evidencing the respondent's continued difficulties with anger management at that time. However, respondent satisfied a five-year probationary period in less than three years and complied with anger-management counseling under the terms of the probation. The certificate of satisfaction from the probation officer may be deemed to be conclusive proof of rehabilitation. See N.J.S.A. 2A:168A-3.

The respondent has proved by clear and convincing evidence that he has become a productive citizen, has attended an anger-management course, and has complied with the terms of his probation. His supervisors at his place of employment state that respondent is not just reliable, but goes beyond his responsibilities and helps others. These are all positive indications of rehabilitation. The purpose of the RCOA is

to remove impediments to individuals from obtaining employment, unless the conviction relates adversely to the occupation sought.

I **CONCLUDE** that respondent has been rehabilitated, and he no longer poses a threat to the safety of the public. Had the MVC had the benefit, at the October 2013 conference, of the additional evidence provided in the OAL proceeding, it likely would have rescinded the proposed indefinite suspension of respondent's passenger endorsement.

ORDER

For the reasons stated above, I hereby **ORDER** that the indefinite suspension of respondent's passenger endorsement should be **DENIED**.

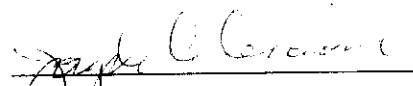
I hereby **FILE** my initial decision with the **CHIEF ADMINISTRATOR OF THE MOTOR VEHICLE COMMISSION** for consideration.

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.

January 29, 2015

DATE



JOSEPH A. ASCIONE, ALJ

Date Received at Agency:

Date Mailed to Parties:

1-30-15

/lam

APPENDIX

LIST OF WITNESSES

For Petitioner:

None

For Respondent:

Kevin Jefferson

Keirston Shoemaker

LIST OF EXHIBITS

For Petitioner:

P-1 Transmittal packet

For Respondent:

R-1 Character reference, Susan E. Wiest, LNHA, dated 8/18/14

R-2 Character reference, Keirston Shoemaker, dated 8/19/14

R-3 Character reference, Patricia Bronsky, RN, dated 8/19/14

R-4 Satisfaction of Probation effective April 17, 2013