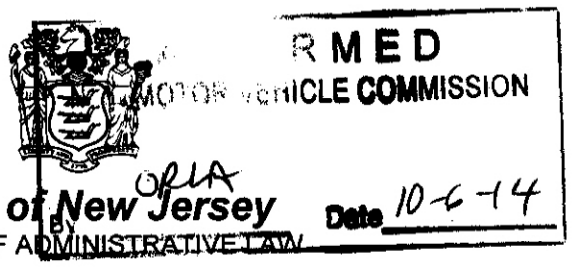


INITIAL DECISION

OAL DKT. NO. MVH 6222-14

AGENCY DKT. NO. DXXXXXXXXX

09782

MOTOR VEHICLE COMMISSION,

Petitioner,

v.

CARLOS A. DURANTE,

Respondent.

Motor Vehicle Commission, petitioner, appearing pursuant to N.J.A.C. 1:1-5.6(a)

Carlos A. Durante, respondent, pro se

Record Closed: July 24, 2014 Decided: August 20, 2014

BEFORE **BRUCE M. GORMAN,** ALJ:

STATEMENT OF THE CASE

Respondent appealed Motor Vehicle Commission's (Commission) suspending his New Jersey passenger endorsement indefinitely because he has a disqualifying criminal arrest and/or conviction record.

PROCEDURAL HISTORY

The respondent requested a fair hearing and the matter was transmitted to the Office of Administrative Law on May 20, 2014, to be heard as a contested case pursuant to N.J.S.A. 52:14B-1 to 15 and 14F-1 to 13. The matter was heard on July 16, 2014. The hearing proceeded on that date and the record closed on July 24, 2014 allowing for respondent to supply additional documentation.

FACTS

On February 20, 2013, the Commission suspended respondent's New Jersey passenger endorsement. Respondent is employed as a limousine driver, and without his passenger endorsement, he cannot engage in his chosen profession.

The agency submitted documentation from the Superior Court showing that respondent was found guilty of two criminal offenses: (1) Violation of N.J.S.A. 2C:20-3a, theft of removable property; and (2) N.J.S.A. 2C:35-10a(1) possession of a controlled dangerous substance. Petitioner was sentenced to incarceration for a term of 364 days and probation for five years.

Respondent conceded that he had been convicted of the two crimes. He served his jail time and has been on probation for the last two years. At the time of his sentencing, the trial judge did not suspend his driver's license. He now drives a limousine for the Taj Mahal and supports his sixteen-year-old daughter. If his passenger endorsement is suspended, he will be unable to work.

LEGAL DISCUSSION

The agency relied upon N.J.A.C. 13:21-14.5(c)12i(3) and (4). Those regulations state in pertinent part:

> (c) The Chief Administrator of the Motor Vehicle Commission may not issue a passenger endorsement, or

> may revoke or suspend the passenger endorsement of any person when it is determined that the applicant or holder of such passenger endorsement has:
>
> * * *
>
> 12. A criminal record that is disqualifying. The phrase "crime or other offense" as used hereinafter shall include crimes, disorderly persons offenses or petty disorderly persons offenses as defined in the "New Jersey Code of Criminal Justice" and any offenses defined by any other statute of this State. A driver has a disqualifying record if:
>
> * * *
>
> i. He or she has been convicted of, or forfeited bond or collateral upon, any of the following:
>
> * * *
>
> (3) A crime or other offense involving the use of force or the threat of force to or upon a person or property, such as armed robbery, assault and arson;
>
> (4) Any crime or other offense indicative of bad moral character;

In this case, respondent was convicted of theft of removable property and possession of a controlled dangerous substance. Theft of removable of property falls within parameters of a crime or offense involving the use of force or the threat of force; possession of a controlled dangerous substance constitutes a crime indicative of bad moral character.

Accordingly, the agency suspending the respondent's New Jersey passenger endorsement must be **AFFIRMED.**

ORDER

I **ORDER** that the Commission's action suspending respondent'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,** 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.

August 20, 2014
DATE

BRUCE M. GORMAN, ALJ

Date Received at Agency: August 20, 2014

Date Mailed to Parties: August 26, 2014

/jb/lam

WITNESSES AND DOCUMENTS IN EVIDENCE

WITNESSES

For Petitioner:

None

For Respondent:

Carols A. Durante, respondent

EXHIBITS

For Petitioner:

None

For Respondent:

R-1 Judgment of Conviction Document (3 pages)

STATE OF NEW JERSEY
MOTOR VEHICLE COMMISSION
CASE FILE NUMBER: JXXXX XXXXX 09566
OAL DOCKET NUMBER: M.V.H. 15044-13

IN THE MATTER OF :

DAVID JUSINO : FINAL DECISION

The Motor Vehicle Commission ("Commission" or "MVC") hereby determines the matter of the proposed suspension of the New Jersey driving privilege of **DAVID JUSINO**, respondent, because he was charged with making intentional misstatements of material fact in applications for two separate New Jersey motor vehicle registrations, pursuant to N.J.S.A. 39:3-37 and 39:5-30. Respondent's New Jersey driving privilege is subject to suspension for a period of 730 days (two years) in accordance with N.J.S.A. 39:3-37. Prior to this final agency determination, I have reviewed and considered the Initial Decision rendered by the Administrative Law Judge ("ALJ") and the letter of exceptions filed on behalf of respondent in this matter. Based upon a de novo review of the record presented, I shall accept and adopt the ALJ's findings and conclusions in full and incorporate these as part of this Final Decision. Further, I shall affirm the recommendation of the ALJ.

In his Initial Decision, the ALJ clearly indicated his evaluation of the testimony and documentary proofs in the record as well as the arguments offered by respondent and concluded that "respondent was not the true owner of the vehicles, and that he made a misstatement of fact on two registration applications, subjecting him to a driving-privilege suspension." Initial Decision at 6. In arriving at this determination, the ALJ specifically found that "respondent here did not intend to retain possession of the

vehicles in question, or to use the vehicles for himself or his family" and that "both [respondent] Jusino and Torres admitted to the investigator that respondent titled and registered the vehicles for Torres because Torres was unable to do so." Ibid. The ALJ further considered the appropriate sanction to impose based on the facts presented on this record and, based on the mitigating factors delineated on page 6 of the Initial Decision, recommended that the suspension term should be reduced to the statutory minimum sanction of 180 days, while still noting the finding that "respondent's conduct was intentional." Ibid.

Based on an independent de novo review of the record, I agree with the ALJ's analysis, findings and conclusions, as well as the recommended sanction. There are sufficient proofs in the record to establish these findings by a preponderance of the credible evidence. As noted by the ALJ, respondent did not present convincing evidence that the vehicles were at the Torres property to be repaired. Indeed, respondent did not present any convincing evidence of having maintained or intended to maintain any property interest in or control over the vehicles. To the contrary, the credible evidence as found by the ALJ (in the form of respondent's admissions against interest made to the investigator during the investigation which were specifically corroborated and confirmed in all material respects by the admissible hearsay statements of Torres[1]) indicates that Torres supplied the money for the purchase of the

[1] Torres's out-of-court statements, though hearsay, are admissible in this administrative proceeding. See N.J.A.C. 1:1-15.5. Torres's statements to the investigator directly corroborate respondent's own admissions against interest. Thus, the legally competent evidence in the record which supports the ultimate findings of fact as required under the "residuum rule", N.J.A.C. 1:1-15.5(b), are respondent's own admissions.

vehicles with the intention to possess, use and control the ownership rights in both vehicles from the time of purchase. Both individuals confirmed that there was a specific arrangement between Torres and respondent that respondent would carry out the purchase transaction and place his name on the title papers because Torres could not obtain title for the vehicles as an undocumented immigrant with no driver's license. Thus, by first beginning the fraudulent conduct by signing as "buyer" in name only on the title papers, acting as a mere conduit for passing on the payment, and then carrying through with this misrepresentation by signing as the owner and officially submitting registration and title paperwork for the vehicles as the purported "owner" to the Commission for the purpose of obtaining registrations and titles as the owner of the vehicles, respondent made intentional misstatements of fact on those official motor vehicle applications. As did the ALJ, I find that respondent's actions are in violation of N.J.S.A. 39:3-37 and thus require an administrative suspension of his driver's license as mandated by the Legislature in enacting that statutory provision.

Respondent's attorney submitted a letter of exceptions identifying three exceptions to the ALJ's Initial Decision. The first two exceptions raise legal arguments, while the third exception raises an attack as to the weighing of the evidence in the record. Each exception will be taken in turn.

For his first exception, respondent contends that this "prosecution" is barred by the limitations period set forth in N.J.S.A. 39:5-3. This exception is rejected as without merit. The limitations period referenced in N.J.S.A. 39:5-3 does not apply to this administrative license suspension action, which action was issued under the direct authority granted to the Chief Administrator (formerly, Director) under N.J.S.A. 39:3-37

as well as N.J.S.A. 39:5-30. As this is not an action taken by way of a complaint made to a judge for a violation of N.J.S.A. 39:3-37, nor is it in any way a "prosecution" of a criminal or a quasi-criminal matter, the limitations period contained in N.J.S.A. 39:5-3(b) is inapplicable here. See Sylcox v. Dearden, 30 N.J. Super. 325, 330 (App. Div. 1954); In re Haase, (unreported) (App. Div. 2014), Dkt. No. A-4670-12T2, 2014 N.J. Super. Unpub. LEXIS 2256 (rejecting a statute of limitations defense predicated on N.J.S.A. 39:5-3, in the context of an administrative license suspension action, noting that "N.J.S.A. 39:5-30 provides the MVC with independent authority to administratively issue license suspensions for violations of the Motor Vehicle Act or on any other reasonable grounds, and contains no prescribed time limitation within which the MVC must act"; citing Sylcox, supra, 30 N.J. Super. at 330 (App. Div. 1954)).

Respondent's second exception also poses a legal argument. Respondent contends that the ALJ used flawed legal reasoning in determining that respondent made a misstatement of fact when respondent (admittedly) signed the vehicle registration applications as the "owner" as stated on the MVC application forms, in that the ALJ misapplied the concept of "true owner" in assessing respondent's actions in this administrative action. I disagree with respondent's contention that the ALJ misapplied the concept of "true owner" here and do not find that the ALJ's legal reasoning based on the case law and statutes was flawed. I concur with the ALJ's reading of the case law cited in his Initial Decision and its application to the facts as found in this administrative suspension matter, including Verriest v. INA Underwriter Ins. Co., 142 N.J. 401 (1995), Dobrolowski v. R.C. Chevrolet, Inc., 227 N.J. Super. 412 (Law Div. 1988), and American

Hardware Mut. Ins. Co. v. Muller, 98 N.J. Super. 119 (Ch. Div. 1967), aff'd o.b., 103 N.J.Super. 9 (App. Div.), certif. denied, 53 N.J. 85 (1968).

In these cases, the courts explain and confirm that the "true owner of an automobile may be one other than the holder of the legal title to that vehicle." See Verriest, supra, 142 N.J. at 408 (quoting American Hardware, supra, 98 N.J. Super. at 129); Dobrolowski, supra, 227 N.J. Super. at 415. To support this statement, the New Jersey Supreme Court specifically noted in Verriest, supra, 142 N.J. at 409, that the "court reasoned that the Certificate of Ownership Law did not 'change[ ] the common law concept and meaning of the term 'owner.'" A fair reading of these cases supports the ALJ's analysis, which I adopt, that the "true owner" of a vehicle as that is commonly understood is based on the factors indicating who was to maintain ultimate control and authority over the vehicle, and that the MVC's official registration application's signature requirement calls for the "true owner" as that is commonly understood (and not someone who only holds title paperwork in his name but who also knows that he will not have ultimate control and authority over the vehicle) to sign. On this record, the credible evidence clearly establishes that both Torres and respondent, at the time of respondent's submitting the registration applications for both vehicles, had an understanding that Torres (and not respondent) would use, control and maintain ultimate authority over the vehicles from the time of purchase, as Torres provided the payment for the vehicles and it was for Torres that the vehicles were purchased. Respondent was merely the "pass through" who delivered the payment and picked up the vehicles, and his name was placed on the prior title in the name of "buyer" for the

explicit purpose of obtaining the required State title and registration, because the true buyer/owner could not legally obtain such documents in his name.

The cited case law supports the finding that respondent cannot be viewed as "owner" of the vehicles as that is commonly understood. Even though these cases arose in the context of insurance coverage determinations, I find that the concept of and indicia for determining who is the actual or true owner are similarly applicable in the context of this administrative matter. Where the official registration and title applications require the signature of the "owner" it is reasonable to hold a person responsible for making a false statement when signing such official form to indicate ownership if he does so knowing that he is not the owner as that term is commonly understood. To hold otherwise would be to allow for an individual to institute a fraud in the first instance upon obtaining a vehicle (to falsely indicate on the prior title that he is the "buyer" when he, in actuality, is not), and then be able to be viewed as somehow insulated or immunized from accountability for the continuation of that fraud in obtaining the official registration and title as required by the State. This illogical and absurd result must be rejected. This would be contrary to the legislative intent expressed in N.J.S.A. 39:10-3, which indicates its "general purpose to regulate and control titles to, and possession of, all motor vehicles in this state, so as to prevent the sale, purchase, disposal, possession, use or operation of . . . motor vehicles with fraudulent titles within this state."

The evidence in the record establishes that respondent knew at the time he obtained the vehicles and specifically at the time he submitted the registration applications for those vehicles that he was not the owner of the vehicles, as he was not going to maintain control or authority over the vehicles. Respondent merely created the

fallacy that he was entitled to title "on the papers" by falsely inserting his name on the prior title as "buyer" while at the same time knowing that he was not the true owner based on the common and accepted understanding of the term "owner".

To the extent that respondent's exceptions attack the registration form as somehow deficient in not providing some specific examples of the indicia of ownership, I reject this attack as without merit. The registration application's use of the word "owner" as to who is required to sign and submit such official paperwork to obtain official registration for a vehicle is sufficient to give a reasonable person proper notice of what is meant as it simply requires the common understanding of ownership. Certainly, as here, one who obtains title paperwork with the specific understanding that he is acting merely as a "straw-man" purchaser must reasonably be viewed as able to understand that he is not the owner of that vehicle as it was specifically known to him that he will not maintain control and authority over the vehicle(s) despite his name being inserted on the prior title. In raising this challenge to the ALJ's legal reasoning, respondent's argument seems to run as follows: because he was able to position himself as the holder of the title paperwork (leaving out that he only ended up in this position as a result of his own original misrepresentation as being the buyer "on paper" while knowing he was not the one who would have control and ultimate authority over the vehicles), he must be allowed to ignore that he knows he is not the true owner of the vehicles when signing the official registration applications and submitting them as the "owner" of the vehicles. This cannot be viewed as comporting with the cited cases, nor with the legislative intent of the title or registration statutes or N.J.S.A. 39:3-37. Thus, I reject

respondent's second exception challenging the legal reasoning of the ALJ's Initial Decision.

Respondent's third exception concerns the weighing of the evidence in the record. Respondent asserts that there is "not a scintilla of evidence, not even in the purported admissions, showing payment of the cars, delivery of the cars, driving of the cars, use and possession of the cars or 'any circumstantial evidence that may tend to establish the fact of ownership." (quoting Verriest, supra). This assertion is not correct. The evidence as to the true owner of the two vehicles is found in respondent's own admissions against interest made to the investigator as part of his investigation which were further directly corroborated by the statements of Torres, as credibly testified to during the hearing by Investigator Chatenka, as well as the circumstantial evidence of the investigator's personal observation of both vehicles on Torres's property. Respondent admitted to the investigator that Torres had come to him and asked him to register and title the vehicles in respondent's name because Torres could not do so as an illegal alien. Respondent stated that he was doing a favor for Torres, his neighbor, and admitted that at the time of the title and registration applications to MVC, respondent's intention was to give the authority and control of the vehicles right away to Torres and that he turned the vehicles over to Torres right after he titled and registered them.

The ALJ found that the investigator further credibly testified that respondent admitted that Torres had provided respondent with the money to make the purchase, as part of the agreement, and they had gone together to make the purchase. The investigator also credibly testified that Torres confirmed this arrangement in the

subsequent interview he had with Torres at Torres's home and that the two vehicles in question were both on Torres's property on that date.

With this specific information about the nature of the arrangement admitted to by respondent and confirmed by Torres, and in the absence of convincing evidence to rebut this, the ALJ's finding that respondent was not the true owner of the vehicles is amply supported on this record, and I so find based on an independent review of the record, with due deference accorded to the ALJ's assessment of the credibility of the witnesses. The respondent's testimony, including assertions that he and his family used the vehicles and that they were on the Torres property in 2012 because they were both being repaired, was implicitly not found credible as part of the ALJ's decision and its particular findings of fact.

As far as my review of the ALJ's initial decision, it is "de novo . . . based on the record" before the ALJ. See In re Parlow, 192 N.J. Super. 247, 248 (App. Div. 1983). However, "[a]n agency head reviewing an ALJ's credibility findings relating to a lay witness may not reject or modify these findings unless the agency head explains why the ALJ's findings are arbitrary or not supported by the record." S.D. v. Div. of Med. Assistance & Health Servs., 349 N.J. Super. 480, 485 (App. Div. 2002); see also N.J.S.A. 52:14B-10(c) (An agency head may only reject the ALJ's credibility findings if he or she determines "from a review of the record that the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent, and credible evidence in the record.")

Indeed, in matters concerning credibility, I am required to give due regard to the person who had an opportunity to judge the credibility of the witnesses. Close v.

Kordulak Bros., 44 N.J. 589 (1965). "[T]rial courts' credibility findings . . . are often influenced by matters such as observations of the character and demeanor of witnesses and common human experience that are not transmitted by the record." In re Taylor, 158 N.J. 644, 660 (1999) (quoting State v. Locurto, 157 N.J. 463, 474 (1999), in the context of an administrative hearing). Moreover, as explained in Locurto, supra, 157 N.J. at 473-474, credibility findings need not be explicitly enunciated if the record as a whole makes the findings clear.

Although the ALJ did not explicitly state his credibility findings as to each of the witness's testimony, it is clear from the record as a whole and his Initial Decision that the ALJ found Investigator Chatenka to have credibly testified as to the interviews that were part of his investigation. Moreover, the ALJ had explored in his questioning of the witness the nature, character and scope of the evidence, and specifically the circumstances with respect to its creation and production. In particular, the ALJ examined the nature of the interviews concerning those for which an interpreter was necessary as well as that which did not require an interpreter, and based on the ALJ's findings of fact it is clear that the ALJ determined that the testimony of Investigator Chatenka was reliable and credible as it related respondent's admissions against interest as well as Torres's confirming statements.

With respect to the well-established criteria guiding the ALJ's role as fact-finder in making credibility determinations, it is noted that he was making a determination which required "an overall assessment of the witness's story in light of its rationality, internal consistency and the manner in which it 'hangs together' with the other evidence." (See Carbro v. United States, 314 F.2d 718, 749 (9th Cir. 1963)). It is further noted that the

ALJ has the ability to "reject the testimony of a witness even though not contradicted when it is contrary to circumstances given in evidence or contains inherent improbabilities or contradictions which alone or in connection with other circumstances in evidence excite suspicion as to its truth." See In re Perrone, 5 N.J. 514, 521-22 (1950)).

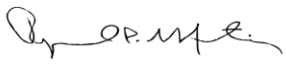
With these criteria guiding his assessment of the testimony, the ALJ set out specific findings of fact which credit the testimony of Investigator Chatenka and implicitly reject the testimony of respondent as to those statements in which respondent now claims to have kept the vehicles for his and his family's use rather than turning the vehicles over to Torres. The ALJ explicitly found unconvincing any assertions made by respondent that not one but both vehicles were at Torres's property to be repaired, while offering no evidence that would be customary (e.g., repair bills showing the items of work done, amounts paid, etc.) if such repair work were the true reason for their location on Torres's property in 2012 when the investigator interviewed Torres.

Thus, in the absence of evidence in the record as a whole which demonstrates that these credibility determinations are unreasonable, arbitrary or capricious or are unsupported by sufficient competent and credible evidence, I shall not disturb the findings of the ALJ based on these credibility determinations. A careful examination of the record as a whole persuades me that the credibility determinations of the ALJ are so supported. In light of the above, it follows that the competent and credible evidence in the record has established that respondent made intentional misrepresentations of material fact on the two vehicle registration applications in question and therefore violated N.J.S.A. 39:3-37.

Finally, in turning to the appropriate term of suspension to be imposed for this violation, I note that the ALJ identified certain mitigating factors as set out on page 6 of the Initial Decision, and in light of these recommended a sanction completely reduced to its minimum term. I find that the statutory minimum term of 180 days suspension is warranted and appropriate for this violation under the totality of the circumstances of this case.

ORDER

It is, therefore, on this 17th day of October, 2014, **ORDERED** that the New Jersey driving privilege of **DAVID JUSINO** be suspended for 180 days. **NOTE:** The **effective date** of this suspension shall be set forth in an "Order of Suspension" which the Commission will send to respondent under separate cover.



Raymond P. Martinez
Chairman and Chief Administrator

c: Ambar Abelar, Esq.