

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

Gary T. Howard,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 1027 C.D. 2007
	:	Argued: February 11, 2008
State Board of Vehicle Manufacturers,	:	
Dealers and Salespersons,	:	
Respondent	:	

**BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge  
HONORABLE DAN PELLEGRINI, Judge  
HONORABLE JIM FLAHERTY, Senior Judge**

**OPINION NOT REPORTED**

**MEMORANDUM OPINION BY  
PRESIDENT JUDGE LEADBETTER**

**FILED: February 29, 2008**

Gary T. Howard petitions this court for review of an order of the State Board of Vehicle Manufacturers, Dealers and Salespersons (Board) that revoked his license to sell vehicles and levied a civil penalty against him in the amount of \$1,000.00. We affirm.

It is undisputed that while working as a licensed vehicle salesman, Howard fraudulently obtained vehicle financing loans in the names of some of his customers in order to raise funds for himself to purchase the dealership from his employer. As a result of these actions, Howard pled guilty on March 31, 2000, to four felony counts of Theft by Deception and five felony counts of Deceptive Device Business Practices. He served a term of imprisonment (work release), and

paid the assessed fines as well as restitution in the amount of \$255,216.47.<sup>1</sup> In June 2006, Howard filed an application seeking to reactivate his license in order to work as a salesman at his brother's dealership. In that application, he disclosed, as required, information regarding his convictions. Apparently, Howard's license was automatically reinstated upon filing a completed application and payment of the requisite fee.

Thereafter, the Department of State issued an order to show cause why the Board should not revoke his salesperson's license. Specifically, Howard was charged with committing the following acts, enumerated in Section 19 of the Board of Vehicles Act (Act):<sup>2</sup>

(2) Make any substantial misrepresentation of material facts.

(3) Make any false promise of a character likely to influence, persuade or induce the sale of a vehicle.

(4) Being a vehicle dealer or salesperson, having within five years prior to the application for or issuance of a license or while his current license is in force pleaded guilty . . . in a court of competent jurisdiction in this or any other state or Federal jurisdiction of forgery, embezzlement, obtaining money under false pretenses, extortion, conspiracy to defraud, bribery, odometer tampering or any other crime involving moral turpitude.

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<sup>1</sup> While serving time on work release, Howard suffered a heart attack and stroke, requiring hospitalization. During his hospital stay, Howard failed to return to detention or inform the authorities of his location. As a result, Howard was convicted in July 2005 on one count of Escape. Howard's period of parole was scheduled to end in November of 2007.

<sup>2</sup> Act of December 22, 1983, P.L. 306, *as amended*. Section 19, which was formerly Section 10, was renumbered and amended by the Act of April 19, 1996, P.L. 104.

(5) Having failed or refused to account for moneys or other valuables belonging to others which have come into his possession arising out of the sale of vehicles.

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(7) Having committed any act or engaged in conduct in connection with the sale of vehicles which clearly demonstrates unprofessional conduct or incompetency to operate as a licensee under this act.

63 P.S. § 818.19.<sup>3</sup> A hearing followed.

At the hearing, Howard admitted that he “started making loans off people that bought cars off of [him and that some] knew about it [and some] didn’t.” Hearing of March 6, 2007, Notes of Testimony (N.T.) at 15. He also testified that he thought that his prior license expired in 2001 or 2002. In addition, Howard expressed his remorse and his commitment to avoid similar behavior in the future. According to Howard, he is not involved in any paperwork or financing at his brother’s dealership. In his post-hearing brief, Howard raised the affirmative defense of laches, contending that he was prejudiced by the Commonwealth’s delay in seeking to discipline him under the Act.

While the Board focused primarily on Howard’s convictions and its authority to discipline under Section 19(4) of the Act, 63 P.S. § 818.19(4), it concluded that the Commonwealth met its burden of proof on all counts charged.

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<sup>3</sup> Notably, in the order to show cause, the Department averred that while Howard’s license was “in force,” he pleaded guilty to “forgery, embezzlement, obtaining money under false pretenses, extortion, conspiracy to defraud . . . or any other crime involving moral turpitude.” *See* Order to show cause at 7, ¶ 37. In response, Howard asserted a general denial of all averments set forth in the order to show cause but then specifically averred that his license was “active” when he entered his guilty plea. *See* Answer to order to show cause at 2, ¶ 37 (stating, “To the contrary, respondent’s prior active license was in effect when the respondent entered his plea in March 2000.”). This same averment is repeated throughout Howard’s answer.

Accordingly, the Board revoked Howard's license.<sup>4</sup> In doing so, the Board commented that it was especially concerned that Howard "knowingly misrepresented the financing portions of some vehicle transactions in order to take advantage of unsuspecting customers that placed their trust in him so as to allow [Howard] to make personal financial gains. Specifically, [Howard] made false promises regarding customers' vehicle financing in order to obtain fraudulent bank loans in [his] name so that he could use those funds to purchase his own vehicle dealership." Board's opinion at 18 (footnote omitted). The present appeal followed.<sup>5</sup>

On appeal, Howard asserts for the first time that the Board lacked authority to revoke his license under Section 19(4) because he was convicted more than five years before he sought to renew his license, and, his license was not active when he was convicted of his crimes. To support his assertion that his license was not active in March 2000 when he pled guilty, Howard points to a copy of a letter appended to his appellate brief. The letter, which is dated October 8, 2007 (therefore, written post-hearing and after his appeal to this court), and

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<sup>4</sup> The Board noted that its authority to revoke Howard's license stemmed from both the Act and Section 9124(c) of the Criminal History Record Information Act, 18 Pa. C.S. § 9124(c), which provides:

Boards, commissions or departments of the Commonwealth authorized to license, certify, register or permit the practice of trades, occupations or professions may refuse to grant or renew, or may suspend or revoke any license, certificate, registration or permit for the following causes:

(1) Where the applicant has been convicted of a felony.

(2) Where the applicant has been convicted of a misdemeanor which relates to the trade, occupation or profession for which the license, certificate, registration or permit is sought.

<sup>5</sup> This court granted Howard's application for supersedeas on June 18, 2007.

authored by his attorney and directed to opposing counsel, provides: “This letter will confirm our conversation last week . . . in which you and I stipulated that no action was taken to renew Gary Howard’s vehicle motor salesperson license on or before May 31, 1999 nor was any action taken to renew it at anytime thereafter until on or about September 20, 2006.”<sup>6</sup>

The Commonwealth makes no argument regarding the propriety of offering and relying on evidence that is not a part of the certified record and contrary to the facts established therein. Rather, the Commonwealth argues that, Howard failed to demonstrate that laches applied and, that, even though his license may have expired at the time of conviction, his license was still considered in force because he maintained a property interest in the license and it was subject to renewal upon payment of the requisite fee.<sup>7</sup> We cannot consider the newly offered evidence or the argument based thereon.

It is well settled that this court is bound by the facts certified in the record on appeal and may not consider matters not part of the certified record. *Dwight v. Girard Med. Ctr.*, 623 A.2d 913 (Pa. Cmwlth. 1993). Accordingly, the court cannot consider the stipulation appended to the appellate brief. Moreover, this court is bound on appeal by findings supported by substantial evidence of record. Here, Howard averred in his answer to the rule to show cause that his

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<sup>6</sup> Howard filed an application in this court to supplement the certified record, requesting the court to order the Commonwealth to produce all Board records evidencing reactivation of his license on or before May 31, 1999. In the event that no documents were produced, Howard requested an order precluding the Commonwealth from “taking the position that [he reactivated] his salesperson license on or before May 31, 1999.” The court denied the application “for lack of any averment that the requested supplement . . . was admitted into evidence before the lower tribunal.” Order dated September 24, 2007.

<sup>7</sup> In making this argument, the Commonwealth relies on *Nicoletti v. State Board of Vehicle Manufacturers, Dealers and Salespersons*, 706 A.2d 891 (Pa. Cmwlth. 1998).

license was active when he entered his guilty pleas. In addition, Howard testified before the Board that he believed that his license expired in 2001 or 2002 (after he was convicted in 2000). Thus, the Board's finding that the license was in force at the time of conviction is supported by substantial evidence of record and, therefore, binding on appeal.

Moreover, Howard has failed to preserve for appeal his argument that the Board lacked authority to revoke his license because it had lapsed at the time of his conviction. This argument was not raised before the Board or in Howard's petition for review to this court. Rather, in his post-hearing brief, Howard argued that revocation was precluded by laches. In his petition for review, Howard objected to the revocation solely on the grounds that: (1) the Board abused its discretion in light of the mitigating factors and stipulations offered by his current employer; (2) he pled guilty to the criminal charges more than five years before he sought to renew his license and, therefore, the convictions should not have been considered; and (3) he made full restitution. *See* Petition for review, Reproduced Record (R.R.) at 239-240a. Consequently, the issue must be deemed to be waived. *See Krichmar v. State Bd. of Vehicle Mfrs., Dealers & Salespersons*, 850 A.2d 861 (Pa. Cmwlth. 2004) (holding that issues not raised before the Board are waived); *McDonough v. Unemployment Comp. Bd. of Review*, 670 A.2d 749 (Pa. Cmwlth. 1996) (holding that issues not raised in petition for review are waived). Consequently, since the Board found that Howard pled guilty to crimes involving moral turpitude while his license was in force, it properly revoked his license under Section 19(4).<sup>8</sup>

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<sup>8</sup> Even assuming that the license had lapsed in March 2000, we would still be compelled to affirm the Board's order. First, there is no contention on appeal that the Board erred in **(Footnote continued on next page...)**

Howard also argues that the Board's revocation of his license was improper because he was treated more harshly than an initial applicant. According to Howard, if he were a new applicant for a license, the Board would be precluded from considering his convictions under Section 19(4) because they occurred beyond the five-year look-back period. Without actually developing a constitutional argument, he contends that the harsher treatment afforded to former

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**(continued...)**

concluding that Howard's admitted conduct also constituted acts in violation of Section 19(2) [making any substantial misrepresentation of fact], (3) [making false promises of a character likely to influence, persuade or induce the sale of a vehicle], (5) [failing to account for moneys or other valuables belonging to others, which were obtained out of the sale of vehicles], and (7) [committing acts or conduct in connection with the sale of vehicles, which demonstrate unprofessional conduct or incompetency to operate as a licensee]. Commission of the aforesaid acts also entitles the Board to revoke a license under Section 19. Therefore, numerous other grounds support the revocation of Howard's license.

Second, Howard does not dispute on appeal that the Board was also authorized to revoke his license under Section 9124(c) of the Criminal History Record Information Act, 18 Pa. C.S. § 9124(c) [authorizing Boards to revoke any license where the applicant has been convicted of a felony]. Accordingly, Howard's convictions also served as a basis for revocation under 18 Pa. C.S. § 9124(c).

and current licensees lacks a rational basis. Again, this argument has not been properly preserved in the petition for review and is deemed waived. Even if such argument had not been waived, however, we would conclude that it is lacking in merit. Without engaging in an unnecessary constitutional analysis, it is clear that harsher treatment of licensees who commit misconduct connected with their profession is rationally related to protecting the public.

Based upon the foregoing, the order of the Board is affirmed.

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**BONNIE BRIGANCE LEADBETTER,**  
President Judge

