

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Anthony R. Cesare,	:	
Petitioner	:	
	:	
v.	:	No. 84 C.D. 2008
	:	Submitted: August 15, 2008
Department of Transportation,	:	
Respondent	:	

BEFORE: HONORABLE DORIS A. SMITH-RIBNER, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY JUDGE SIMPSON**

FILED: December 23, 2008

A central issue in this fact-sensitive statutory appeal concerns the proper calculation of suspension and revocation periods of a licensee's operating privilege under the Act of December 12, 1994, P.L. 1048 (Act 143). Act 143 deleted violations of 75 Pa. C.S. §1543 (relating to driving while operating privilege is suspended or revoked (DUS)) from the list of enumerated offenses which may result in habitual offender status.

Anthony R. Cesare (Licensee) petitions for review of an order of the Secretary of Transportation (Secretary) modifying the proposed report of a Department of Transportation (Department) hearing officer and denying Licensee's request for correction of his driving record and recalculation of the total period of his suspensions and revocations. Licensee argues the Secretary erred in failing to remove certain entries from his driving record and in failing to correctly update his driving record. He also contends the Department unreasonably delayed

issuing its proposed report. In addition, Licensee asserts the Secretary erred by failing to remand this matter for a new hearing. Discerning no error, we affirm.

I. Background

Since 1975, Licensee accumulated no less than 28 violations of the Vehicle Code (Code).¹ With exceptions, Licensee's operating privilege has been suspended or revoked since 1975. Important here, Licensee accumulated 13 violations of 75 Pa. C.S. §1543 (DUS) between 1977 and 1991. In 1978, the Department first designated Licensee a habitual offender after his third 75 Pa. C.S. §1543 conviction. See 75 Pa. C.S. §1542.²

¹ 75 Pa. C.S. §§101-9805. In particular, Licensee's driving record shows the following violations: one violation of former 75 Pa. C.S. §1027(B) (duty to give information and render aid) (a similar provision now appears in 75 Pa. C.S. §3744(a)); two violations of former 75 Pa. C.S. §1001 (reckless driving) (a similar provision now appears in 75 Pa. C.S. §3736); 13 violations of 75 Pa. C.S. §1543 (DUS); five violations of former 75 Pa. C.S. §3731 (driving under the influence of alcohol or a controlled substance) (a similar provision now appears in 75 Pa. C.S. §3802); two violations of 75 Pa. C.S. §3714 (careless driving); two violations of 75 Pa. C.S. §1547 (refusal of chemical testing to determine amount of alcohol or controlled substance); two violations of Section 13(a)(16) of The Controlled Substance, Drug, Device and Cosmetic Act (Drug Act), Act of April 14, 1972, P.L. 233, as amended, 35 P.S. §§780-113(a)(16) (possession of a controlled substance); and one violation of 75 Pa. C.S. §1533 (failure to respond to citation).

² Prior to the Act of December 12, 1994, P.L. 1048, No. 143 (Act 143), Section 1542(b) provided in part, with emphasis added:

(b) Offenses enumerated. – Three convictions arising from separate acts of any one or more of the following offenses committed either singularly or in combination by any person shall result in such person being designated as a habitual offender:

(1) Any offense set forth in section 1532 (relating to revocation or suspension of operating privilege).

In February 2006, Licensee applied to the Department for an occupational limited license. The Department denied Licensee's application because his operating privilege was revoked at that time. Licensee timely appealed the denial of his application and requested an administrative hearing. He also sought review of his driving record. In particular, Licensee asserted the Department failed to accurately update his driving record in accord with Act 143.³

The Department held an administrative hearing on Licensee's appeal on June 21, 2006. Before Hearing Officer Robert Bazdar (first hearing officer), the Department presented Darlene Savercool (Manager), a manager in the Bureau of Driver Licensing. Starting with April 1995, Manager reviewed Licensee's driving record and periods of operating privilege restoration. Important here, Manager testified the Department recalculated Licensee's driving record in accord with Act 143 and, as a result, restored Licensee's operating privilege on November 19, 1999. When a driving record is recalculated, Manager explained, the original charges remain on the licensee's record but the suspension periods are modified.

Licensee testified that he has not operated a motor vehicle since the last time the Department suspended or revoked his operating privilege. He submitted affidavits from four individuals attesting that they transport Licensee. Licensee also submitted a letter from the District Attorney of Indiana County, Robert S. Bell, recommending restoration of his operating privilege.

³ Licensee also challenged the Department's imposition of two consecutive suspensions resulting from a single episode of activity, and he asserted the Department failed to immediately credit his license suspension upon his release from incarceration. Licensee later abandoned these claims.

At the conclusion of the hearing, first hearing officer established a briefing schedule. The parties complied. From August 2006 to September 2007, however, no activity occurred. In September 2007, Licensee filed a motion seeking an order removing two convictions from his driving record, recalculating the periods of revocation and suspension, and restoring his operating privileges.

A day after Licensee filed his motion, a second hearing officer issued a proposed report disposing of Licensee's appeal. Of import, the second hearing officer found the Department failed to recalculate Licensee's suspension and revocation periods pursuant to Act 143. As a result, the second hearing officer recommended reducing two of Licensee's suspension periods from two years to one year. These suspensions result from Licensee's violation of 75 Pa. C.S. §1543(b) (DUS during drug or alcohol related suspensions) on September 2 and 3, 1998. The second hearing officer further recommended removing the revocation status from Licensee's driving record.

Both parties filed exceptions to the second hearing officer's proposed report. On review, the Secretary denied all but one of Licensee's exceptions, which is not relevant here. In addition, he struck those portions of the second hearing officer's report recommending Licensee's September 1998 suspension periods be reduced to one year per violation. The Secretary also found second hearing officer erred by concluding the Department did not perform an Act 143 recalculation because the Department had, in fact, recalculated Licensee's driving record. Therefore, a reduction in the suspension periods was not warranted. Licensee appeals.

II. Issues on Appeal

Licensee raises numerous issues on appeal. He asserts the Secretary erred in failing to: remove two code violations from his driving record; correctly update his driving record in accord with Act 143; restore his operating privilege where the Department unreasonably and unnecessarily delayed issuing its proposed report; and remand this matter for a new hearing where the Department failed to provide notice of the change in hearing officers. Our review of the Secretary's order is limited to determining whether the necessary findings of fact were supported by substantial evidence, whether errors of law were made, or whether constitutional rights were violated. Highway News, Inc. v. Pa. Dep't of Transp., 789 A.2d 803 (Pa. Cmwlth. 2002).

A. Failure to Remove Code Violations from Driving Record

Licensee assigns error in the Secretary's refusal to remove two violations from his driving record. The first violation is as follows:

Violation Date:	Jan 24, 1975
Violation:	Vehicle Code: 1027B
Description:	Fail to Identify-Accident
Conviction Date:	<u>Feb 14 1975</u>
Action:	Driving Priv Revoked for 1 Year(s) Effective <u>Jan 24 1977</u> Official Notice Mailed <u>Apr 01 1992</u>

Dep't Ex. 1, at 2 (emphasis added).

Licensee complains the Department's record fails to explain why the effective date of the revocation was two years after the conviction date and why the Department mailed the official notice more than 15 years after the effective

date of revocation. He claims the Department's record is obviously inaccurate and should be removed pursuant to 75 Pa. C.S. §1516(d), below.

Building on this argument, Licensee also challenges the following violation appearing on his driving record:

Violation Date:	Feb 10 1977
Violation:	Vehicle Code: 1543
Description:	Driving While Susp/Revoke
Conviction Date:	Mar 25 1977
Action:	Driving Priv Revoked for 1 Year(s) Effective <u>Jan 24 1978</u> Official Notice Mailed <u>Mar 03 1978</u>

Dep't Ex. 1, at 2 (emphasis added).

Licensee argues the second violation should be also removed because the Department mailed the notice of revocation five weeks after the revocation's effective date. Licensee therefore had no opportunity to challenge the second revocation period. Additionally, Licensee urges if the first violation is removed, the second violation must also be removed because it is dependent on the first violation. That is, Licensee's operating privilege could not be revoked for driving without a license if the first violation, which imposed the revocation, is removed from his record. We reject Licensee's arguments.

At the June 2006 administrative hearing, the Department moved into evidence without objection Licensee's certified driving record. Reproduced Record (R.R.) at 46. The Secretary and Director of the Bureau of Driver Licensing attested to the record's accuracy. Dep't Ex. 1, at 11. This created a rebuttable

presumption the Department's records accurately reflect Licensee's driving history, including Departmental actions. Cf. 75 Pa. C.S. §1516(b) (Department records shall constitute prima facie proof of the facts and information contained in the court abstract or certification of conviction or accident report); Richards v. Dep't of Transp., Bureau of Driver Licensing, 767 A.2d 1133 (Pa. Cmwlth. 2001) (once Department entered certified driving record into evidence, it created a rebuttable presumption the licensee was convicted of an offense); Kovalcin v. Dep't of Transp., Bureau of Driver Licensing, 781 A.2d 273 (Pa. Cmwlth. 2001) (same).

Once the Department moved Licensee's driving record into evidence, Licensee was at liberty to introduce evidence refuting the information contained in the certified driving record. Dep't of Transp., Bureau of Driver Licensing v. Diamond, 616 A.2d 1105 (Pa. Cmwlth. 1992). Licensee, however, failed to offer evidence that the Department's record is inaccurate with regard to the two violations he seeks to remove. As a result, the presumption of accuracy stands, and Licensee is not entitled to have the violations removed from his driving record.⁴

⁴ Licensee also claims the delay in notification of revocations of his operating privilege mandates removal of the violations from his driving record. However, Licensee does not assert the Department failed to notify him of the revocations at issue. If Licensee believed the delay in notification barred the Department from imposing the revocations, he should have appealed the revocation notices upon receipt. See Freedman v. Dep't of Transp., Bureau of Driving Licensing, 842 A.2d 494 (Pa. Cmwlth. 2004) (proper procedure to challenge imposition of ignition interlock device requirement is to file an appeal from the notice of suspension); Dep't of Transp., Bureau of Driver Licensing v. Stollsteimer, 626 A.2d 1255 (Pa. Cmwlth. 1993) (licensee waived right to challenge lack of notice regarding suspension of operating privilege where he failed to appeal within 30 days of suspension).

B. Failure to Update Driving Record in Accord with Act 143

Licensee asserts further error in the Secretary's failure to properly calculate the total suspension and revocation periods in accord with Act 143. Effective September 1995, Act 143 provided:

(a) For drivers who were designated as habitual offenders prior to the effective date of this amendatory act solely as a result of convictions of 75 Pa. C.S. §1501 or 1543, and for whom departmental records show that the suspensions for convictions of 75 Pa. C.S. §1543 occurred only as a result of a suspension imposed under the authority of 75 Pa. C.S. §1533, 1538(a) or (b) or 6146, the [Department] may remove these drivers from habitual offender status and require only that they complete the other sanctions associated with the 75 Pa. C.S. §1543 convictions. Such persons may petition the [D]epartment for removal from habitual offender status and, if they are eligible for removal, shall no longer be designated as habitual offenders.

(b) For drivers who were designated as habitual offenders prior to the effective date of this amendatory act and who would no longer be designated as habitual offenders under the provisions of this act, the [D]epartment may remove these drivers from habitual offender status and require only that they complete the other sanctions associated with those convictions. Such persons may petition the [D]epartment for removal from habitual offender status and, if they are eligible for removal, shall no longer be designated as habitual offenders.

See 75 Pa. C.S. §1542, Historical and Statutory Notes. In essence, Act 143 deleted violations of 75 Pa. C.S. §1543 from the list of enumerated offenses for which multiple violations may result in habitual offender status. Act 143 also authorized the Department to retroactively apply Act 143 to drivers previously designated as habitual offenders, but who, under the provisions of Act 143, would no longer be

designated habitual offenders. Ladd v. Dep't of Transp., Bureau of Driver Licensing, 753 A.2d 318 (Pa. Cmwlth. 2000).

Using the violation dates for reference, Licensee proposes the revocation periods resulting from the following violations of the Vehicle Code should be reduced to one year: May 21, 1977; August 24, 1978; June 29, 1979; January 7, 1980; September 23, 1984; October 22, 1986; October 16, 1987 (75 Pa. C.S. §1543); October 16, 1987 (former 75 Pa. C.S. §3731); June 30, 1991; September 27, 1995; September 2, 1998; and September 3, 1998. Licensee's Br. at 15-16.

On the other hand, the Department maintains the Act 143 recalculations resulted in the following. Revocations imposed for the May 21, 1977 through October 16, 1987 (DUS) Vehicle Code violations were reduced to six-month suspensions. The revocation period for the October 16, 1987 (former 75 Pa. C.S. §3731) violation was reduced to a one-year suspension. The remaining revocation periods for the June 30, 1991 through September 3, 1998 violations of the Vehicle Code remained two-year revocations. Under the Department's calculations, only the last four of the original calculations do not meet or exceed Licensee's recalculation requests. Dept's Br., App. A, at 8.

Licensee is not entitled to recalculation of his suspension periods for violations occurring June 30, 1991, September 27, 1995, and September 2 and 3, 1998. Section 1516(d) provides, with emphasis added:

(d) Updating driving record.--Drivers wishing to have their record reviewed by the [D]epartment may make

such a request in order that the record be brought up to date. In updating records, the [D]epartment shall include recalculation of suspension or revocation segments and the assignment and crediting of any suspension or revocation time previously assigned or credited toward a suspension or revocation which resulted from a conviction which has been vacated, overturned, dismissed or withdrawn. Any fully or partially served suspension or revocation time may only be reassigned or credited toward a suspension or revocation segment processed on the driver's record as of the actual commencement date of the fully or partially served suspension or revocation time.

75 Pa. C.S. §1516(d). Here, Licensee does not contend the convictions for the above violations were vacated, overturned, dismissed or withdrawn.

Moreover, the Department suspended Licensee's operating privilege in accord with Section 1543(c)(2) of the Vehicle Code, which requires an additional two-year revocation period where the Department's records show that the licensee was under a revocation on the date of violation and his operating privilege has not been restored. 75 Pa. C.S. §1543(c)(2). The one-year suspension period Licensee seeks is only applicable where the licensee's operating privilege was under suspension, recall, or cancellation on the date of the violation, and had not been restored. 75 Pa. C.S. §1543(c)(1). An inspection of Licensee's driving record reveals Licensee's operating privilege was revoked and had not been restored when the above violations occurred. Dep't Ex. 1, at 4-5. The two-year suspensions for these violations must therefore stand. Heath-Hazlett v. Dep't of Transp., Bureau of Driver Licensing, 805 A.2d 686 (Pa. Cmwlth. 2002); Drudy v. Dep't of Transp., Bureau of Driver Licensing, 795 A.2d 508 (Pa. Cmwlth. 2002).

Furthermore, Licensee is not entitled to credit against his current revocation period for suspension and revocation periods completely served but reduced by the Act 143 recalculation. There is nothing in Act 143 or Section 1516(d) permitting the Department to reduce a current suspension period by completed suspensions or revocation periods occurring before full restoration of the operating privilege. See 75 Pa. C.S. § 1516(d) (“Any fully or partially served suspension or revocation time may only be ... credited toward a suspension or revocation ... on the driver’s record as of the actual commencement date of the fully or partially served suspension or revocation time.”)

The Act 143 recalculation advanced the date upon which Licensee’s operating privilege could be restored. See 75 Pa. C.S. §1541(b) (“[a]ny person whose operating privilege has been revoked or suspended shall not be eligible for the restoration of the operating privilege until the expiration of the period of revocation or suspension”). Licensee’s driving record shows the Department restored Licensee’s operating privilege on November 19, 1999. Dep’t Ex. 1, at 6. This means Licensee served all suspension or revocation periods effective prior to that date, the exception being those periods of revocation imposed as a result of Licensee’s September 2 and 3, 1998 drug/alcohol-related DUS violations.⁵ Consequently, Licensee’s eligibility for restoration of his current operating privilege is determined by the effective date, length, and number of any suspension

⁵ Licensee appealed the underlying convictions of the September 2 and 3, 1998 violations and, accordingly, the Department restored Licensee’s operating privilege pending the appeals. The Superior Court subsequently affirmed the September 1998 violations of the Vehicle Code; therefore, the Department re-imposed the revocation periods resulting from those violations. See Dep’t Ex. 1 at 8.

or revocation periods imposed or in some cases to be served, after November 19, 1999. Thus, no error is apparent in the Department's recalculation of Licensee's driving history.

3. Failure to Issue Prompt Report

Licensee urges the lengthy delay in issuance of the proposed report was unreasonable and should not go without an appropriate remedy, that is, restoration of his operating privilege. We disagree.

The first hearing examiner held Licensee's administrative hearing in June 2006 and allowed the parties to submit supporting briefs. The Department submitted its brief in August 2006. The second hearing examiner issued her proposed report disposing of Licensee's appeal in September 2007.

The failure of the hearing examiner to issue a prompt report did not prejudice Licensee because his operating privilege was under suspension for the entire period. In particular, Licensee was convicted in April 2003 of a March 2002 drug violation. As a result, the Department suspended Licensee's operating privilege for one year effective July 7, 2006. Dep't Ex. 1 at 9. Subsequently, Licensee was convicted of driving under the influence. This resulted in an additional one-year suspension, effective July 2007. Id. Thus, Licensee's operating privilege was suspended during the entire period he awaited the hearing examiner's report. As Licensee suffered no prejudice as a result of the delay, he is not entitled to a restoration of his operating privilege. Cf. Adams Outdoor Adver. Ltd. v. Dep't of Transp., 860 A.2d 600 (Pa. Cmwlth. 2004) (failure to show

prejudice resulting from seven-year delay between hearing and proposed report did not violate applicant's due process rights).

4. Failure to Notify Parties of Change in Hearing Officers

In his final assignment of error, Licensee contends the Secretary erred by failing to remand this matter for a new hearing where the Department failed to notify Licensee that first hearing officer was not available to issue a proposed report.⁶ Rejecting Licensee's argument, the Secretary concluded the issues involved questions of law and did not require the exercise of discretion. As such, his de novo review obviated any possible prejudice.

Licensee cites Department of Insurance v. MacFarland, 366 A.2d 957 (Pa. Cmwlth. 1976), to claim the Secretary was required to remand this matter for a new hearing where first hearing officer was not available to issue a report. In MacFarland, the Department of Insurance permanently revoked the appellant's license as an insurance agent after he fraudulently converted insurance premiums for his own use. The appellant subsequently submitted an application for a license, and a department hearing officer conducted a formal hearing. Following an initial order denying the application, appellant sought department review. The Insurance Commissioner reaffirmed his earlier order denying appellant's application. Sometime subsequent to the initial hearing but prior to either of the Commissioner's orders, the hearing officer left the department.

⁶ The General Rules of Administrative Practice and Procedure provide that "[i]f a presiding officer becomes unavailable to the agency, the agency head will either designate another qualified officer to prepare a proposed report or will cause the record to be certified for decision, as may be deemed appropriate, giving notice to the parties." 1 Pa. Code §35.203.

On further appeal, the appellant argued the hearing officer's presumed nonparticipation in the adjudication of his application resulted in a denial of due process. Agreeing with appellant, this Court noted the concepts of due process were particularly important in light of the significant credibility determinations to be made on appellant's rehabilitation in establishing his fitness for a license. Accordingly, we remanded the matter to the department for a new hearing.

Here, the Department provided Licensee with an administrative hearing and opportunity to present evidence. Licensee raised only issues of law on appeal. The only factual question was whether the Department recalculated Licensee's suspension and revocation periods, and Licensee agrees the Department performed an Act 143 recalculation. Moreover, Manager reviewed Licensee's driving record, and Licensee testified that he has not driven since the Department last suspended his license. The testimonial evidence was not conflicting and did not require the hearing officer to make any credibility determinations.

Further, to constitute reversible error, a ruling or procedure must not only be erroneous, but also harmful or prejudicial to the complaining party. Capital BlueCross v. Pennsylvania Ins. Dept., 937 A.2d 552 (Pa. Cmwlth. 2007). Stated differently, the objecting party must offer at least some coherent explanation of how the result was affected by the challenged matter. Id.

Here, Licensee challenges the procedure at the hearing officer stage. However, he does not explain how the procedure affected the subsequent decision

by the Secretary. Nor does he suggest that the Secretary would rule differently upon remand. Accordingly, no reversible error is discernable.

Based on the foregoing, we affirm.

ROBERT SIMPSON, Judge

Senior Judge Kelley concurs in the result only.

