

STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS  
PROVIDENCE, Sc.  
SIXTH DIVISION

DISTRICT COURT

Barbara Ciccone :  
v. : A.A. No. 11 - 111  
Division of Motor Vehicles, :  
Operator Control :

JUDGMENT

This cause came on before Houlihan J. on Administrative Appeal, and upon review of the record and a decision having been rendered, it is

ORDERED AND ADJUDGED

The decision of the Medical Board is affirmed.

Dated at Providence, Rhode Island, this 14<sup>th</sup> day of November, 2012.

Enter:

By Order:

\_\_\_\_\_/s/\_\_\_\_\_

\_\_\_\_\_/s/\_\_\_\_\_

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PROVIDENCE, Sc.  
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**DISTRICT COURT**

**Barbara Ciccone** :  
 :  
v. : **A.A. No. 6AA-2011-00111**  
 :  
**Division of Motor Vehicles,** :  
**Operator Control** :

**DECISION**

**Houlihan, J.** This matter is before the Court on the complaint of Barbara Ciccone (“Appellant”) seeking judicial review of a final decision rendered by the respondent, Operator Control of the Division of Motor Vehicles (“DMV”), which held Ms. Ciccone unfit for restoration of her privilege to operate a motor vehicle. For the reasons that follow, this Court finds that the decision rendered by the DMV in this case is supported by the facts of the record and applicable law and is therefore upheld.

**FACTS & TRAVEL OF THE CASE**

On August 10, 2011, the Appellant appeared before the Medical Board requesting reinstatement of her privilege to operate a motor vehicle. The Appellant’s privilege had originally been suspended due to repeated alcohol related offenses. On August 11, 2011, the DMV issued a letter to the Appellant

indicating that her request to reinstate her privilege to operate a motor vehicle was “disapproved.”

In support of her request to reinstate her privilege to operate, Appellant had submitted a letter from Mary Mercurio, a counselor, as well as a psychiatric evaluation prepared by Dr. Thomas Paolino.

Ms. Mercurio’s letter was in response to a standard letter entitled “Infirmity,”<sup>1</sup> which the DMV issues to elicit information it is seeking to determine eligibility for reinstatement. Ms. Mercurio responded in kind, in a letter dated August 10, 2010, addressing each requested item and indicating Appellant was no danger to herself or others while driving.<sup>2</sup> On November 4, 2010, the DMV issued a letter to the Appellant’s attorney requesting confirmation her psychiatrist was aware of her five prior convictions for alcohol related incidents. On November 22, 2010, Ms. Mercurio issued a letter indicating she was unaware the Appellant had five alcohol related convictions. Further, Ms. Mercurio indicated she would not have agreed to provide Appellant with counseling had she been aware of this fact and would have insisted on counseling with an agency that could monitor Appellant more closely.<sup>3</sup> On December 20, 2010, the DMV issued a letter to Appellant’s attorney indicating her license remained suspended. This letter also indicated a new medical form was included.<sup>4</sup>

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<sup>1</sup> See “Infirmity” letter, dated July 22, 2010.

<sup>2</sup> See Mercurio letter, dated August 10, 2010, sec. 9.

<sup>3</sup> See Mercurio letter, dated November 22, 2010.

<sup>4</sup> Assumedly, this would be the same “Infirmity” letter as cited in footnote 1.

A March 9, 2011, “Infirmity” letter was issued by the DMV. In response, Dr. Thomas Paolino submitted a lengthy and detailed “Psychiatric Evaluation” addressing Appellant’s capacity to drive, ultimately concluding she is “capable of adequately and safely operating a motor vehicle.”

In response to Dr. Paolino’s evaluation, Dennis Gerstmeyer, Chief of Operator Control, issued an August 11, 2011, letter. In his letter, Mr. Gerstmeyer raised concerns about the Appellant’s compliance with her medications and indicated Appellant’s driving privilege was disapproved. He simultaneously issued an August 11, 2011, letter to Dr. Paolino noting inconsistencies in Appellant’s factual assertions to the doctor and compliance with medication. This letter also indicated Appellant had had seven alcohol related offenses, including three prior to an event that the Appellant herself indicated caused her to drink. In short, this letter indicated Appellant had been inconsistent in her reporting and treatment.

### **APPLICABLE LAW**

The Medical Board is an advisory panel established within the DMV. See section 31-10-44(a). This statute establishes the Medical Board to advise upon the physical and mental fitness standards for licensure to operate a motor vehicle. Id. The authority to suspend the license of an operator is contained in section 31-11-7, for, amongst other reasons, when an operator “poses an imminent safety risk to the general public as determined by the application of objectively ascertainable standards.” See section 31-11-7a(1)(iii). When the reason for a suspension is

physical or mental fitness, this statute provides for notice of the basis, opportunity for a hearing and suspension not to exceed one year. See section 31-11-7a(2) and section 31-11-7(b) and (c). Thus, the statutory scheme provides an operator with due process in suspension proceedings.

### **STANDARD OF REVIEW**

The standard of review to be applied in appeals from decisions of the DMV is provided by R.I. Gen. Laws § 42-35-15(g), a section of the state Administrative Procedures Act, which provides as follows:

#### **42-35-15. Judicial review of contested cases.**

(g) The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings, or it may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (1) In violation of constitutional or statutory provisions;
- (2) In excess of the statutory authority of the agency;
- (3) Made upon unlawful procedure;
- (4) Affected by other error of law;
- (5) Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
- (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Thus, on questions of fact, the District Court “\* \* \* may not substitute its judgment for that of the agency and must affirm the decision of the agency unless

its findings are ‘clearly erroneous.’<sup>5</sup> The Court will not substitute its judgment for that of the Board as to the weight of the evidence on questions of fact.<sup>6</sup> Stated differently, the findings of the agency will be upheld even though a reasonable mind might have reached a contrary result.<sup>7</sup>

### **ANALYSIS**

The DMV, through Dennis Gerstmeyer, Chief of Operator Control, suspended the Operator’s privilege to operate a motor vehicle for “Infirmity,” with a subtitle of “alcohol/substance abuse.” This finding of infirmity was based upon the repeated suspension for alcohol related offenses. The Operator incurred seven separate suspensions for alcohol related activity. The nature of the alcohol related suspensions, whether due to a conviction for driving while intoxicated or for refusal to submit to a breathalyzer, makes little difference. This history supports a suspension for the above entitled basis. In fact, the Appellant does not deny that the original suspension was valid.

When made aware of this significant history of abuse, Mary Mercurio, the first healthcare professional to respond to the Infirmity letter on Apellant’s behalf,

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<sup>5</sup> Guarino v. Department of Social Welfare, 122 R.I. 583, 584, 410 A.2d 425 (1980) citing Gen. Laws 1956 § 42-35-15(g)(5).

<sup>6</sup> Cahoone v. Board of Review of Dept. of Employment Security, 104 R.I. 503, 506, 246 A.2d 213 (1968).

<sup>7</sup> Cahoone, supra, fn. 6, 104 R.I. at 506, 246 A.2d at 215. See also D'Ambra v. Board of Review, Department of Employment Security, 517 A.2d 1039, 1041 (R.I. 1986).

indicated she would never have recommended the type of counseling she gave to the Appellant had she been aware of this significant history. In fact, she indicated she did not support reinstatement of Appellant's privilege to operate. It is clear that the Appellant did not fully report her history to this healthcare professional. Based on Ms. Mercurio's letter of November 22, 2010, a continued suspension was warranted.

The same problem with reporting continued with the letter submitted by Dr. Paolino. Appellant minimized her substance abuse history with Dr. Paolino and indicated to the Medical Board she was not taking her prescribed medications.<sup>8</sup> A continued suspension was warranted.

### **CONCLUSION**

Pursuant to Gen. Laws 1956 § 42-35-15(g), the decision of the Medical Board must be upheld unless it was, *inter alia*, contrary to law, clearly erroneous in light of the substantial evidence of record, or arbitrary or capricious. When applying this standard, the Court will not substitute its judgment for that of the Medical Board as to the weight of the evidence on questions of fact, including the question of which witnesses to believe. Stated differently, the findings of the agency will be upheld even though a reasonable mind might have reached a contrary result.

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<sup>8</sup> See Gerstmeyer letter dated August 11, 2011.

Upon careful review of the evidence, this Court finds that the decision of the Medical Board in A.A. No.6AA-2011-00111 was not affected by error of law. Gen. Laws 1956 § 42-35-15(g)(3),(4). Neither was it clearly erroneous in view of the reliable, probative and substantial evidence on the whole record or arbitrary or capricious. Gen. Laws 1956 § 42-35-15(g)(5),(6).

Accordingly, the decision of the Medical Board is hereby AFFIRMED.