Decision No. R13-0325 – PUBLIC VERSION

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 12M-1221TR

IN THE MATTER OF THE PETITION OF MARIO HERRERA TO REVERSE AN INITIAL DRIVER DISQUALIFICATION DETERMINATION PURSUANT TO RULE 6105 OF CODE OF 4 COLORADO REGULATIONS 723-6.

RECOMMENDED DECISION OF ADMINISTRATIVE LAW JUDGE ROBERT I. GARVEY DENYING PETITION AND CLOSING DOCKET

Mailed Date: March 15, 2013

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I. STATEMENT

1. On November 23, 2012, Petitioner Mario Herrera (Petitioner) filed a Petition to reverse an initial determination of driver disqualification pursuant to § 40-10.1-110, C.R.S., and Rule 6105 of the Rules Regulating Transportation by Motor Vehicle. 4 *Code of Colorado Regulations* (CCR) 723-6.

2. On November 23, 2012, the Petition was assigned Docket No. 12M-1221TR and on December 5, 2012 was referred to an Administrative Law Judge (ALJ) for disposition by minute order of the Commission. It was then assigned to the undersigned ALJ.

3. On December 19, 2012, Trial Staff of the Commission (Staff) filed its Notice of Intervention, Entry of Appearance and Request for Hearing through counsel.

4. Pursuant to Decision No. R12-1453-I issued December 18, 2012, a hearing was scheduled for February 11, 2013.

5. The hearing in this matter was convened as scheduled on February 11, 2013. Petitioner appeared *pro se*. Staff appeared through its counsel. Staff presented the testimony of Mr. Anthony Cummings,[1] and Petitioner testified on his own behalf. Staff offered Exhibits No. 2 and 3 and Confidential Exhibits 1, 4, and 5 which were admitted. Petitioner offered Exhibit 6 which was admitted. At the conclusion of the evidence the ALJ took the matter under advisement.

6. In accordance with § 40-6-109, C.R.S., the Administrative Law Judge now transmits to the Commission, the record in this proceeding along with a written Recommended Decision.

II. FINDINGS OF FACT

7. Mr. Herrera is 66 years-old and is currently employed at a medical warehouse store.

8. Mr. Herrera lives with his wife and has an adult son. Mr. Herrera has some experience working as a limousine driver.

[1] Mr. Cummings is a Criminal Investigator employed by the Commission's Transportation Safety and Enforcement Unit.

9. Mr. Hererra has seen that there are job openings for limousine drivers and was told he would need to submit his fingerprints to the Commission for a background check before he could be hired.

10. In the summer of 2012, Mr. Herrera submitted a set of her fingerprints to the Commission and requested a driver background check in accordance with § 40-10.1-110, C.R.S., and Rule 6105, 4 CCR 723-6. Although he submitted his fingerprints, Mr. Herrera has not, as of the date of the hearing, been offered a position as a limousine driver. *See* Confidential Hearing Exhibit 1.

11. Investigator Cummings performs safety and compliance investigations for the Commission. His duties include processing requests for driver background checks and continued monitoring of driver qualifications pursuant to § 40-10.1-110, C.R.S., and Rule 6105.

12. Investigator Cummings regularly reviews a database of criminal arrest and conviction records maintained by the Colorado Bureau of Investigation. In 2012, these records revealed that Mr. Herrera had two convictions for sexual exploitation of a child § 18-6-403(3), C.R.S. *See* Confidential Hearing Exhibits 4 and 5.

13. On September 25, 2012, Investigator Cummings issued a letter to Mr. Herrera informing him of a Commission determination disqualifying him from driving for a limited regulation passenger carrier and/or taxi carrier. *See* Hearing Exhibit No. 2. The letter explained to Mr. Herrera his ability to petition to reverse the initial determination of disqualification.

14. On November 19, 2012, Mr. Herrera petitioned the Commission requesting reconsideration of his disqualification. *See* Hearing Exhibit No. 3.

[redacted]The following is a summary of evidence presented during a confidential session regarding the conviction: [redacted]

[redacted]

[redacted]

26. Mr. Herrera has not re-offended or had any law enforcement contact while on probation.

III. DISCUSSION AND CONCLUSION

27. "An individual who wishes to drive either a taxicab for a motor carrier that is the holder of a certificate to provide taxicab service issued under part 2 of this article or a motor vehicle for a motor carrier that is the holder of a permit to operate as a charter bus, children's

[2] [redacted].

[3] [redacted].

activity bus, luxury limousine, or off-road scenic charter under part 3 of this article shall submit a set of his or her fingerprints to the commission." § 40-10.1-110(1), C.R.S.

28. The individual:

> whose criminal history record is checked pursuant to this section is disqualified and prohibited from driving motor vehicles for the motor carrier described in subsection (1) of this section if the criminal history record check reflects that:
>
> (a) The individual is not of good moral character, as determined by the commission based on the results of the check;
>
> (b)(I) The individual has been convicted of a felony or misdemeanor involving moral turpitude.
>
> (II) As used in this paragraph (b), "moral turpitude" includes any unlawful sexual offense against a child, as defined in section 18-3-411, C.R.S., or a comparable offense in any other state or in the United States.
>
> (c) Within the two years immediately preceding the date the criminal history record check is completed, the individual was:
>
> (I) Convicted in this state of driving under the influence, as defined in section 42-4-1301 (1) (f), C.R.S.; driving with excessive alcoholic content, as described in section 42-4-1301 (2) (a), C.R.S.; driving while ability impaired, as defined in section 42-4-1301 (1) (g), C.R.S.; or driving while an habitual user of a controlled substance, as described in section 42-4-1301 (1) (c), C.R.S.; or
>
> (II) Convicted of a comparable offense in any other state or in the United States.
>
> § 40-10.1-110(3), C.R.S.

29. The plain language of § 40-10.1-110(3), C.R.S., does not state whether one or all three of the conditions in paragraphs (a), (b), and (c) must be met for disqualification. However, applying the paragraphs demonstrates that they can only reasonably operate independently. Interpretation otherwise would lead to a ridiculous result. To conclude otherwise would mean that a driver would only be disqualified from driving if the Commission finds them not to be of good moral character, they have been convicted of a felony or misdemeanor involving moral turpitude, **and** they have been convicted of a specified alcohol-related offense within two years.

30. With this interpretation in mind, the Commission makes no finding whatsoever as to the moral character of an individual that has been convicted of a felony or misdemeanor involving moral turpitude, as set forth in paragraph (b). Rather, disqualification results from the demonstrated conviction without any consideration of character at the time of petition. It would appear that the Colorado Legislature (Legislature) adopted two objective disqualification criteria not dependent upon a Commission determination as to moral character. *See* §§ 40-10.1-110(3)(b) and (c), C.R.S.

31. Next, it must be considered whether the conviction at issue is a conviction within the scope of § 40-10.1-110(3)(b)(I), C.R.S., in light of the definition in § 40-10.1-110(3)(b)(II), C.R.S. Paragraph (b)(II) specifically includes any unlawful sexual offense against a child as a felony or misdemeanor involving moral turpitude as used in the paragraph. By the limiting phrase "[a]s used in this paragraph (b)," does the included term mean "moral turpitude," or is it illustrative of qualifying convictions involving moral turpitude?

32. "When the legislature specifically includes one thing in a statute, it implies the exclusion of another." *See A.D. Store Co. v. Exec. Dir.,* 19 P.3d 680, 682 (Colo. 2001) (acknowledging the doctrine of *expressio unius est exclusio alterius*); Black's Law Dictionary 661 (9th ed. 2009) (defining the term). "The General Assembly explicitly included some groups that would not normally be considered "public employee[s]" under the CGIA, it necessarily excluded all other groups not fitting the definition." *Henisse v. First Transit, Inc.,* 247 P.3d 577, 580 (Colo. 2011)

33. Thus, express inclusion of a sexual offense against a child as a crime involving moral turpitude implies exclusion of other crimes involving moral turpitude as the term is used in § 40-10.1-110(3)(b), C.R.S. If the Legislature intended this narrow construction, it could easily

have identified the specific conviction of an offense defined in § 18-3-411, C.R.S., without the need to reference involvement of moral turpitude. On the other hand, a sexual offense against a child may be specifically included without limitation.

34. Assuming hypothetically that an unlawful sexual offense against a child is illustrative of all other crimes involving moral turpitude, then a driver convicted of any crime involving moral turpitude would forever be disqualified from driving under § 40-10.1-110(3)(b), C.R.S. Minor misdemeanor convictions would result in a lifetime disqualification since the statute is silent as to any length of time for the disqualification. This outcome also conflicts with §§ 40-10.1-110(3)(a) and (4), C.R.S.

35. The Commission can disqualify an individual from driving when that person is found to be not of good moral character. When determining the moral character of an individual wishing to drive, § 24-5-101(2), C.R.S., states that "the fact that such applicant has, at some time prior thereto, been convicted of a felony or other offense involving moral turpitude, and pertinent circumstances connected with such conviction, shall be given consideration in determining whether, in fact, the applicant is a person of good moral character at the time of the application." Section 24-5-101(2), C.R.S., made applicable to a finding of moral character by § 40-10.1-110(4), C.R.S. Thus, consistent with the express public policy of § 24-5-101(2), C.R.S., someone can be found of good moral character (and not be disqualified under § 40-10.1-110(3)(a), C.R.S.) notwithstanding a conviction of a felony or other offense involving moral turpitude following rehabilitation for someone accepting responsibilities and being a productive member of society.

36. Express provision for qualification to drive despite being convicted of a felony or other offense involving moral turpitude would be rendered meaningless if that same person could never avoid disqualification under § 40-10.1-110(3)(b), C.R.S.

37. To resolve the conflict, ALJ Adams in Decision No. R12-1337, Docket No. 12M-990TR issued November 15, 2012, found consistent with the rule of statutory construction addressed above, moral turpitude in § 40-10.1-110(3)(b)(I), C.R.S., is limited in scope to the usage defined in § 40-10.1-110(3)(b)(II), C.R.S. Thus, only individuals convicted of an unlawful sexual offense against a child as defined in § 18-3-411, C.R.S., will be permanently barred from qualification.

38. A sexual offense against a child, as defined in § 18-3-411, C.R.S., includes the offense for which Mr. Herrera has been convicted, sexual exploitation of a child (§ 18-6-403(3), C.R.S.). By the decision of ALJ Adams, Mr. Herrera would be permanently barred from qualification since the statute is silent as to the length of time for the disqualification.

39. Yet a lifetime disqualification under § 40-10.1-110(3)(b)(II), C.R.S., must also be read consistent with the following:

> Except as otherwise provided in paragraph (b) of this subsection (1), the fact that a person has been convicted of a felony or other offense involving moral turpitude shall not, in and of itself, prevent the person from applying for and obtaining public employment or from applying for and receiving a license, certification, permit, or registration required by the laws of this state to follow any business, occupation, or profession. § 24-5-101(1)(a), C.R.S.

40. If there is a determination that a conviction, as defined in § 18-3-411, C.R.S., creates a lifetime disqualification, then it appears to be in conflict with the plain reading of § 24-5-101(1)(a), C.R.S.

41. In the case of statutory conflict, the General Assembly has provided guidance as follows:

> If a general provision conflicts with a special or local provision, it shall be construed, if possible, so that effect is given to both. If the conflict between the provisions is irreconcilable, the special or local provision prevails as an exception to the general provision, unless the general provision is the later adoption and the manifest intent is that the general provision prevail. § 2-4-205, C.R.S.

42. Case law has held that a special or local provision shall prevail over a general provision. This has been held as a principle in administrative hearings, reasoning that the specific provision creates an exception that carves out a niche in a special circumstance. *Telluride Resort & Spa, L.P. v. Colo. Dep't of Revenue*, 40 P3d 1260, 1265, (Colo. App. 2002); *Smith v. Colo. Motor Vehicle Dealer Bd.*, 200 P3d 1115, 1116 (Colo. App. 2008).

43. Contrary to that interpretation, the provisions of § 2-4-205, C.R.S., also allow the more general provision to prevail over the special or local provision if the general provision was adopted after the special or local provision. It is assumed the General Assembly "is aware of its prior enactments and deems the more recent statute to prevail over the older one." *Jenkins v. Pan. Canal Ry. Co.*, 208 P.3d 238, 242 (Colo. 2009).

44. The entire article § 40-10.1-110, C.R.S., was added by the General Assembly effective August 10, 2011. The last time § 24-5-101(1)(a), C.R.S., was amended was June 5, 2003.

45. The provisions of § 40-10.1-110(3)(b)(I), C.R.S., are more specialized and local as opposed to the general provisions of § 24-5-101(1)(a), C.R.S. In addition § 40-10.1-110(3)(b)(II), C.R.S., was adopted after § 24-5-101(1)(a), C.R.S. Under any reading

of § 2-4-205, C.R.S., the special or local provision of § 40-10.1-110(3)(b)(I), C.R.S., prevails over the general provisions of § 24-5-101(1)(a), C.R.S.

46. With § 40-10.1-110(3)(b)(I), C.R.S., being able to be read in harmony with § 24-5-101(1)(a), C.R.S., the undersigned ALJ finds that the instant case should be decided consistent with Decision No. R12-1337, Docket No. 12M-990TR. The scope of moral turpitude in § 40-10.1-110(3)(b)(I), C.R.S., is limited to the usage defined in § 40-10.1-110(3)(b)(II), C.R.S., or more plainly, limited to those with a conviction for a sexual offense against a child, as defined in § 18-3-411, C.R.S. A conviction for an offense as defined in § 18-3-411, C.R.S., as Mr. Herrera has, calls for a lifetime disqualification from driving for a limited regulation passenger carrier and/or taxi carrier.

47. While the ability exists for the Commission to waive specific rules under Rule 1003(a) of the Rules of Practice and Procedure, 4 CCR 723-1, the Commission does not have the ability to waive statutory provisions.[4]

48. Pursuant to § 40-6-109, C.R.S., it is recommended that the Commission enter the following order.

IV. ORDER

A. The Commission Orders That:

1. The Petition filed by the Petitioner, Mario Hererra is denied.

2. The Petitioner, Mario Hererra, is disqualified for life from driving for a limited regulation passenger carrier and/or taxi carrier.

3. Docket No. 12M-1221TR is now closed.

[4] The Petitioner is also disqualified under Rule 6105(f)(II)(B), 4 CCR 723-1. While this could be waived, since the ALJ is unable to waive the statutory provision, any discussion of a waiver of the Rule is moot.

4. This Recommended Decision shall be effective on the day it becomes the Decision of the Commission, if that is the case, and is entered as of the date above.

5. As provided by §40-6-109, C.R.S., copies of this Recommended Decision shall be served upon the parties, who may file exceptions to it.

a) If no exceptions are filed within 20 days after service or within any extended period of time authorized, or unless the decision is stayed by the Commission upon its own motion, the Recommended Decision shall become the decision of the Commission and subject to the provisions of §40-6-114, C.R.S.

b) If a party seeks to amend, modify, annul, or reverse basic findings of fact in its exceptions, that party must request and pay for a transcript to be filed, or the parties may stipulate to portions of the transcript according to the procedure stated in §40-6-113, C.R.S. If no transcript or stipulation is filed, the Commission is bound by the facts set out by the administrative law judge and the parties cannot challenge these facts. This will limit what the Commission can review if exceptions are filed.

6. If exceptions to this Decision are filed, they shall not exceed 30 pages in length, unless the Commission for good cause shown permits this limit to be exceeded.

(S E A L)

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

ROBERT I. GARVEY

Administrative Law Judge

ATTEST: A TRUE COPY

Doug Dean,
Director