

PUBLIC VERSION

Decision No. R17-0707

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 17M-0460TR

IN THE MATTER OF THE PETITION OF DWIGHT POLICH TO REVERSE AN INITIAL DRIVER DISQUALIFICATION DETERMINATION PURSUANT TO RULE 6105 OF 4 CCR 723-6.

**RECOMMENDED DECISION OF
ADMINISTRATIVE LAW JUDGE
ROBERT I. GARVEY
GRANTING PETITION**

Mailed Date: August 24, 2017

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I. STATEMENT

1. On June 26, 2017, Dwight Polich (Petitioner) filed a Petition to reverse an initial determination of driver disqualification pursuant to Commission Rule 6105 of 4 *Code of Colorado Regulations* (CCR) 723-6, Rules Regulating Transportation by Motor Vehicle.

2. On July 20, 2017, the matter was referred to an Administrative Law Judge (ALJ) for disposition by minute entry during the Commission's Weekly Meeting.

3. On July 25, 2017, pursuant to Decision No. R17-0612-I, a hearing was scheduled for August 22, 2017.

4. On July 26, 2017, Trial Staff of the Commission (Staff) filed its, Entry of Appearance through counsel.

5. The hearing in this matter was convened as scheduled on August 22, 2017. Petitioner appeared *pro se*. Staff appeared through its counsel. Petitioner testified on his own behalf. Staff presented the testimony of Ms. Allison Torvik,¹ and Staff offered Exhibit Nos. 1, 2 and 3 and Confidential Exhibit Nos. 1c and 2c which were admitted. At the conclusion of the hearing, the ALJ took the matter under advisement.

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

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

¹ Ms. Torvik is employed by the Commission as a data analyst.

² See Hearing Exhibit 2.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED]

III. ISSUES

15. Should Staff’s initial disqualification of Petitioner Dwight Polich, as a driver for a Commission certified motor carrier under § 40-10.1-110(3)(a), C.R.S., be reversed?

16. Should *Rule 6105(f)(II)(D) of the Rules Regulating Transportation by Motor Vehicle, 4 CCR 723-6* be waived to allow the Petitioner, Dwight Polich, to be employed as a driver for a Commission certified motor carrier?

IV. APPLICABLE LAW

17. “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

activity bus, luxury limousine, medicaid client transport, 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.

18. 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;

§ 40-10.1-110(3), C.R.S.

19. Pursuant to § 40-10.1-110(4), C.R.S., the Commission “shall consider the information resulting from the criminal history record check in its determination as to whether the individual has met the standards set forth in section 24-5-101 (2), C.R.S.” That latter statute provides that

[w]henver any state or local agency is required to make a finding that an applicant for a license, certification, permit, or registration is a person of good moral character as a condition to the issuance thereof, 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. The intent of this section is to expand employment opportunities for persons who, notwithstanding that fact of conviction of an offense, have been rehabilitated and are ready to accept the responsibilities of a law-abiding and productive member of society.

Id.

20. A driver is not of good moral character and shall be disqualified and prohibited from driving, if the driver has a conviction in the State of Colorado, within the four years preceding the date the criminal history record check is completed, of any Class 4 felony under Articles 2, 3, 3.5, 4, 5, 6, 6.5, 8, 9, 12, or 15 of Title 18, C.R.S. *Rule 6105(f)(II)(D) 4 CCR 723-6.*

21. The Commission has promulgated these rules to ensure orderly and fair treatment of all persons. The Commission may, for good cause shown, grant waivers or variances from tariffs, Commission rules, and substantive requirements contained in Commission decisions. In making its determination the Commission may take into account, but is not limited to, considerations of hardship, equity, or more effective implementation of overall policy on an individual basis. The Commission may subject any waiver or variance granted to such terms and conditions as it may deem appropriate. *Rule 1003(a), 4 CCR 723-1* of the Rules of Practice and Procedure.

22. The Petitioner bears the burden of proof by a preponderance of the evidence as to claims stated in the Petition.³ The preponderance standard requires the finder of fact to determine whether the existence of a contested fact is more probable than its non-existence. *Swain v. Colorado Department of Revenue, 717 P.2d 507* (Colo. App. 1985). A party has met this burden of proof when the evidence, on the whole, slightly tips in favor of that party.

V. DISCUSSION

23. The record clearly establishes that Staff's initial determination of ineligibility was warranted by Petitioner's conviction of a Class 4 felony.

24. Petitioner did not establish that the initial determination was not supported by fact or law. The extent to which Mr. Polich remains ineligible to operate a commercial vehicle hinges therefore on the mandate to consider the Petition under the standards of § 24-5-101(2), C.R.S.

³ Section 13-25-127(1), C.R.S.; Rule 1500 of the Rules of Practice and Procedure, 4 CCR 723-1.

25. Mr. Polich testified credibly about the offenses that led to his disqualification.

26. Mr. Polich has taken responsibility for his actions which led to his conviction for a Class 4 felony.

27. The undersigned ALJ notes that no evidence was presented that Mr. Polich has any previous convictions for any offenses.⁴

28. Mr. Polich has not found employment after his disqualification and has been forced to take early social security payments.

29. The undersigned ALJ also notes that the offense which led to the disqualification⁵ of Mr. Polich, is no longer a Class 4 felony. If Mr. Polich would have committed the same offense after 2012, it would not have led to a disqualification. Even more persuasive is that at the time he was charged in 2014, a theft of \$1,000 to \$20,000 was a Class 5 felony and would not have led to a disqualification⁶.

30. The evidence presented by Mr. Polich is substantial and under § 24-5-101(2), C.R.S., meets his burden to show by a preponderance of the evidence that Staff's initial disqualification under § 40-10.1-110(3)(a), C.R.S., should be reversed.

31. In addition, based upon the evidence provided by Mr. Polich, the undersigned ALJ finds good cause under *Rule* 1003(a), 4 *CCR* 723-1 to waive Mr. Polich's disqualification under *Rule* 6105(f)(II)(D) 4 *CCR* 723-6.

⁴ There was evidence of an additional charge against Mr. Polich but that charge was dismissed after a motions hearing

⁵ A violation of § 18-4-401(2)(h), C.R.S.

⁶ He was charged under the statute as it existed in 2008, the date of the offense.

VI. CONCLUSION

32. The Petitioner, has shown by a preponderance of evidence that Staff's initial disqualification under § 40-10.1-110(3)(a), C.R.S., should be reversed.

33. The Petitioner has shown good cause to allow a waiver of *Rule 6105(f)(II)(D) 4 CCR 723-6*, to be employed as a driver for a Commission certified motor carrier.

VII. ORDER**A. The Commission Orders That:**

1. Dwight Polich's petition to reverse an initial determination of driver disqualification under § 40-10.1-110(3)(a), C.R.S., and waiver of Rule 6105 of 4 *Code of Colorado Regulations 723-6*, Rules Regulating Transportation by Motor Vehicle is granted.

2. 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.

3. 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.

4. 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

A handwritten signature in cursive script that reads "Doug Dean".

Doug Dean,
Director