

Taxi & Limousine Comm'n v. Zagre

OATH Index No. 1934/21 (May 25, 2021), *adopted*, Comm'r Dec. (May 25, 2021), **appended**

At a summary suspension hearing, petitioner failed to establish that TLC driver arrested for assault in the third degree poses a direct and substantial threat to public health or safety. Suspension of respondent's TLC Driver License should be lifted.

**NEW YORK CITY OFFICE OF
ADMINISTRATIVE TRIALS AND HEARINGS**

In the Matter of
TAXI AND LIMOUSINE COMMISSION
Petitioner
- against -
DELWENDE ZAGRE
Respondent

REPORT AND RECOMMENDATION

SUSAN J. POGODA, *Administrative Law Judge*

Petitioner, the Taxi and Limousine Commission ("TLC"), brought this summary suspension proceeding against respondent, Delwende Zagre, holder of TLC Driver License No. 5876866. Admin. Code § 19-512.1 (Lexis 2021); 35 RCNY § 68-15(d) (Lexis 2021). On April 26, 2021, petitioner suspended respondent's TLC Driver License after receiving notice of his April 9, 2021, arrest for assault in the third degree, Penal Law section 120.00(1), a class A misdemeanor (Pet. Exs. 1, 3). Petitioner contends that respondent's suspension should be continued pending the outcome of his criminal case because his continued licensure would pose a direct and substantial threat to the health or safety of the public (Pet. Ex. 1). Respondent denies the charges, opposes continued suspension of his license, and asserts that he does not pose a direct and substantial threat to the public.

Due to the COVID-19 pandemic, a post-suspension hearing was held by remote videoconference on May 5, 2021, at which petitioner relied solely on documentary evidence. Respondent testified on his own behalf with the assistance of a French interpreter and produced documentary evidence. For the reasons below, I find that petitioner failed to prove that respondent

poses a continuing direct and substantial threat to public health or safety. I recommend that respondent's suspension be lifted.

ANALYSIS

Under New York City's Administrative Code, petitioner may suspend a TLC Driver License before a hearing "for good cause shown relating to a direct and substantial threat to the public health or safety." Admin. Code § 19-512.1. If a license is suspended based solely on an arrest, the licensee may challenge that at a post-suspension hearing, where the issue is whether "the charges pending against the Respondent, if true, demonstrate that the continuation of the Respondent's License during the pendency of criminal charges would pose a direct and substantial threat to public health or safety." 35 RCNY § 68-15(d)(5). Evidence relevant to this issue includes the circumstances underlying the charges, including any nexus between the driver's duties and the alleged offense; the licensee's driving record; the licensee's previous criminal record "or lack thereof;" and the driver's "character and standing in the community." *Id.*

As the Second Circuit has noted, in order to maintain a license suspension, petitioner must establish that the driver poses a continuing threat to the public that is both "direct" and "substantial." *Nnebe v. Daus*, 931 F.3d 66, 82 (2d Cir. 2019). The Court noted that "in the majority of cases, the further removed the crime is from the driver's job, the less 'direct' the threat," and that "[d]epending on the surrounding circumstances and the driver's history, the threat may also be more or less 'substantial.'" *Id.* Other considerations include whether the charged crime is the "sole infraction in an otherwise spotless record" and whether the underlying conduct, even if it satisfies the elements of a crime, "was technical or mitigated, such that continuation of the driver's license did not pose the kind of threat conjured by the general nature of the crime charged." *Id.*

This tribunal has applied the *Nnebe* factors in analyzing whether petitioner has proven that a driver's continued licensure during the pendency of his criminal case would pose the type of risk to the public that necessitates continuing his suspension. *See, e.g., Taxi & Limousine Comm'n v. Bah*, OATH Index No. 1927/20 at 6-7 (June 1, 2020), *adopted*, Comm'r Dec. (June 9, 2020) (suspension of driver arrested for criminal possession of a weapon and menacing lifted where driver presented "compelling evidence" of his "admirable" work history, good character, favorable driving record, and absence of criminal history, and where allegations in the arrest documents did

not constitute “persuasive proof of an assaultive nature” but rather showed “an isolated circumstance”); *Taxi & Limousine Comm’n v. Frimpong-Manson*, OATH Index No. 1841/20 (May 5, 2020), *adopted*, Comm’r Dec. (May 26, 2020) (continuation of suspension recommended for long-term driver charged with assault and attempted criminal obstruction of breathing where the complainant, his wife, alleged injury and was taken to the hospital, and the driver offered no mitigating testimony or explanation); *Taxi & Limousine Comm’n v. Singh*, OATH Index No. 1913/20 at 4 (Apr. 24, 2020), *adopted*, Comm’r Dec. (May, 1, 2020) (suspension lifted for licensee charged with assault where credible testimony of driver and two other witnesses showed that he “reacted to extraordinary provocation” and he presented unrefuted evidence of an unblemished TLC record).

At the post-suspension proceeding, petitioner submitted various documents in evidence, including the New York City Police Department’s (“NYPD”) arrest and complaint reports, and the New York State Department of Motor Vehicles (“DMV”) abstract of respondent’s driving record (Pet. Exs. 4, 5).

Respondent is 37 years old and was licensed by TLC in August 2018 (Pet. Ex. 2). On April 9, 2021, at about 2:00 a.m., respondent was arrested in front of a building on Fairview Avenue in Manhattan and charged with assault in the third degree following a complaint by a passenger he recently dropped off at that location (Pet. Ex. 4). Respondent was given a Desk Appearance Ticket (“DAT”) returnable on June 25, 2021. This is respondent’s first arrest (Pet. Ex. 4).

The NYPD’s arrest and complaint form typed by the arresting officer summarized the facts leading to respondent’s arrest. According to the narrative section of the complaint report and the detail section of the arrest report, the complainant alleged that on or about 1:26 a.m. on April 9, respondent “punched her in the face causing pain” (Pet. Exs. 3, 4). No facts leading up to the alleged assault were presented. The reports do not indicate that medical attention was either requested by the complainant or provided to her (Pet. Ex. 4). In addition, typed entries on the complaint report indicate “No” next to the questions, “Is victim fearful for their safety/life,” “Escalating violence/abuse by suspect?”, and “No” to the question, “Will Prosecute” (Pet. Ex. 4).

Respondent’s New York State Department of Motor Vehicles abstract shows that he was involved in two accidents, one in 2019, and the other in 2021, both involving injury and property damage and the filing of a police report (Pet. Ex. 5). The abstract does not indicate that respondent

was at fault for either accident. In 2020, respondent was convicted for passing two red lights and failing to stop at a stop sign. These infractions occurred in May and July 2018, prior to petitioner's issuance of respondent's TLC Driver License. Respondent was fined a total of \$540 and 9 points (Pet. Ex. 5).

Respondent testified that he has been a TLC licensee since August 2018. Before the suspension, respondent had been working for BQN Car Service since September 2020 (Tr. 21-22). On April 9, BQN gave him an order to pick up a passenger at 41 West 112th Street with a drop off on Fairview Avenue. When he reached the destination, the female passenger told respondent she could not pay the \$18 fare because she was drunk, lost her wallet and only had \$2 (Tr. 23-24). She gave him the \$2 and asked if he had a "Cash App." Respondent told her he only had "Zelle" and asked if she could call someone (Tr. 24-25). She asked him to drive to a laundromat on Broadway where she knew someone who could pay him. While stopped at a traffic light prior to reaching the laundromat, the passenger told him "there is nobody at the laundromat to have any money. Do whatever you, you, do whatever you have to do. I don't have any money" (Tr. 26, 39-40).

Respondent testified that if a passenger refuses to pay the fare, he "has to go to the police" (Tr. 26). He spotted a police car and when he told the passenger he was going to the police, she tried to open the van door, which would not open because he was driving. When respondent stopped at a light, the passenger stood up from the back seat, hit him in the neck, opened the sliding and passenger doors and exited the vehicle (Tr. 27, 43-44). Respondent walked around the car to close the sliding door, asked for his money and saw that she was taking a video with her cell phone. He asked her to stop recording and put his hand over the phone, but did not have any physical contact with her. The passenger then fled into the subway station, and he went back inside his vehicle to call the police (Tr. 41, 45).

Respondent called 911 and explained that a passenger refused to pay the fare. A cell phone snapshot of the 911 call was admitted into evidence. The image shows an April 9, 1:23 a.m. call from respondent's cell phone number to 911, which lasted almost six minutes (Resp. Ex. A). The 911 operator called respondent back and told him the police were waiting for him at the Fairview Avenue address. As he was driving to the address, he saw his passenger walking, but did not have any contact with her (Tr. 29-32, 46).

When he arrived at Fairview Avenue the police were waiting for him. He explained what happened but could not make an official complaint because he did not know the passenger's name. As the police were preparing to leave, he noticed the passenger walking. He informed the police who went to speak to her (Tr. 48).

The police returned, told him that the woman accused respondent of hitting her and wanting to kidnap her. When asked if his car was locked, he responded "no, because when, when I drive, I drive the car, the car locks by itself." Respondent was arrested at the scene (Tr. 34-35).

Respondent submitted a May 4, 2021, letter from the BQN Car Service manager confirming respondent's start date. The manager stated, "we have never had any problems with him in the workplace," and respondent "has always been polite, easy going and professional" (Resp. Ex. B).

The issue to be determined is whether, assuming the pending criminal charges against respondent to be true, petitioner has established that respondent's continued licensure would pose a direct and substantial danger to public health or safety. The analysis focuses on "whether the conduct underlying the arrest and the overall record and character of the driver confirms or disproves the arrest's relation to public health or safety." *Nnebe*, 931 F.3d at 82.

Where a driver presents credible evidence to mitigate or explain the events underlying his arrest, that may help to demonstrate that his continued licensure would not pose a direct and substantial public safety threat. *See, e.g., Singh*, OATH 1913/20. *Taxi & Limousine Comm'n v. Ibrahim*, OATH Index No. 891/20 (Nov. 25, 2019), *adopted*, Comm'r Dec. (Dec. 9, 2019).

Petitioner must establish that respondent's continuing licensure poses a direct and substantial threat to the public. Whether petitioner meets this burden depends not only upon the allegations in the criminal complaint but upon other evidence relating to respondent's driving record and good character. *Compare Bah*, OATH 1927/20 at 3, 6, 7 (driver did not testify about events underlying arrest on the advice of counsel, but petitioner failed to show that his continued licensure would pose a threat to the public); *Taxi & Limousine Comm'n v. Ahmad*, OATH Index No. 1372/20 (Feb. 25, 2020) (same); *with Frimpong-Mason*, OATH 1841/20 (petitioner met its burden where arrest reports showed that complainant's wife went to hospital, suggesting use of substantial force, and respondent offered no mitigating testimony or explanation); *Taxi & Limousine Comm'n v. Khan*, OATH Index No. 1709/20 (Mar. 10, 2020), *rejected*, Comm'r Dec.

(Apr. 28, 2020) (suspension continued during pendency of criminal case where respondent did not testify about circumstances underlying arrest for assault and criminal court complaint alleged that he punched his wife, the complainant, in the head multiple times while she was holding an infant who fell during the incident).

As this tribunal has noted, under *Nnebe*, it is essential to carefully assess all of the evidence concerning the alleged crime, as well as of respondent's character. *See Taxi & Limousine Comm'n v. Singh*, OATH Index No. 701/20 at 4 (Nov. 1, 2019), *adopted*, Comm'n Dec (Nov. 19, 2019) (ALJ noted that neither petitioner's rules nor the decision in *Nnebe* support the position that every detail in a hearsay complaint must be accepted as true).

In support of continuing respondent's suspension, petitioner characterizes respondent's conduct underlying the arrest as "alarming" (Tr. 49-50). Petitioner contends the NYPD reports demonstrate that respondent punched the complainant in the face, locked her in his vehicle which caused her to flee when respondent stopped at a traffic light. Respondent then followed the passenger as she walked back to Fairview Avenue (Tr. 50-51). There are several problems with this argument. First, the reports are sparse in their description of the incident, indicating only that the respondent punched the complainant in the face. Second, the NYPD reports are devoid of any facts to substantiate that the complainant was held against her will in respondent's van. Moreover, respondent was not arrested or charged with such a serious crime.

Notably, there is no record that any medical attention was requested by the complainant or even offered by the police. *See Taxi Limousine Comm'n v. Warren*, OATH Index No. 1081/20 at 5-6 (Dec. 27, 2019), *adopted*, Comm'r Dec. (Jan. 29, 2020); *Khan*, OATH 1709/20; *compare with Frimpong-Mason*, OATH 1841/20 at 5 (noting that complaint was taken by emergency workers to the hospital).

Petitioner also contends that respondent violated the Commission's rules by using an unauthorized form of payment and by using his cell phone to call 911 instead of going to a police station to report the incident. Petitioner's speculation that respondent's overall driving record and violation of TLC and New York State rules show he "would have no problem violating the passenger's right to her person" is without merit (Tr. 52).

Respondent is 37 years old and this is his first arrest. Despite minor inconsistencies, I found respondent's testimony to be credible, forthright, and detailed. He also presented a

compelling explanation of the facts leading to his arrest. The credible evidence shows that it was respondent who called the police because his passenger failed to pay the fare; respondent who drove back to Fairview Avenue to meet with the police and respondent who pointed out his passenger to the police. The passenger, who allegedly was assaulted by the respondent apparently did not call or go to a police station to report the assault. It was only when questioned by the police after respondent saw her approaching the Fairview Avenue address that she reported an assault. Moreover, respondent's 911 cell phone record, the lack of any specific details of the incident in the NYPD reports and that the passenger declined to prosecute and was not fearful for her life or safety are facts in respondent's favor. It is not reasonable to believe that respondent would contact and meet the police after punching the passenger in the face and locking her in his car.

Respondent's licensing record, while not perfect, does not demonstrate that he has ever been violent or made threats to a passenger and thus does not support any argument that his license should remain suspended. There was no evidence presented that respondent has ever engaged in improper behavior towards a customer. *See Taxi and Limousine Comm'n v. Zulfiqar*, OATH Index No. 1575/20 at 6 (Mar. 16, 2020), *adopted*, Comm'r Dec. (Apr. 13, 2020) (traffic violations do not demonstrate that licensee should remain suspended for assault and related charge); *Taxi & Limousine Comm'n v. Elnokrashy*, OATH Index No. 116/21 at 5 (Sept. 17, 2020), *adopted*, Comm'r Dec. (Sept. 21, 2020) (driving violations, suspension and accident do not evidence that licensee is more likely to engage in aggressive or violent behavior to member of the public).

Even presuming the criminal charge is true, as required by petitioner's rules, this record supports the conclusion that respondent's arrest on April 9, 2021, appears to be an isolated incident in an otherwise law-abiding life. *See Taxi & Limousine Comm'n v. Askari*, OATH Index No. 1960/20 (June 16, 2020), *adopted*, Comm'r Dec. (June 22, 2020) (lifting suspension for driver arrested for criminal obstruction of breathing and endangering the welfare of a child where incident underlying arrest was completely out of character).

In sum, and after considering the factors in *Nnebe*, I find that petitioner failed to establish that respondent's continued licensure would pose a direct and substantial threat to the public health or safety and the suspension of his TLC Driver License should be lifted.

FINDINGS AND CONCLUSIONS

1. Respondent was arrested for assault in the third degree.
2. Petitioner did not establish that respondent's continuing licensure during the pendency of his criminal case poses a direct and substantial threat to public health or safety.

RECOMMENDATION

I recommend lifting the suspension of respondent's TLC Driver license.

Susan J. Pogoda
Administrative Law Judge

May 25, 2021

SUBMITTED TO:

ALOYSEE HEREDIA JARMOSZUK
Commissioner/Chair

APPEARANCES:

TAKARA STRONG, ESQ.
Attorney for Petitioner

ALI NAJMI, ESQ.
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May 25, 2021

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Delwende Sagre

Re: **TLC License No. 5876866**

Licensee Sagre:

Pursuant to TLC Rule 68-15, a summary suspension hearing was concluded on May 5, 2021, as a result of your April 9, 2021 arrest for assault in the third degree.

After hearing the evidence presented, the presiding Administrative Law Judge ("ALJ"), Susan J. Pogoda, found that your suspension should be lifted.

I accept the ALJ's Recommendation and lift the suspension of your TLC license.

Sincerely,

/s/ Ryan Wanttaja

Ryan Wanttaja
Acting General Counsel

cc: Susan J. Pogoda, *Administrative Law Judge*
Ali Najmi, *Attorney for Respondent*
Anita Armstrong, *Supervising Attorney, OATH Trials (TLC)*