

IN THE CIRCUIT COURT OF OHIO COUNTY, WEST VIRGINIA

TIMOTHY R. McCABE,
Petitioner,

v.

CIVIL ACTION NO. 18-CAP-11
Judge David J. Sims

PAT S. REED, Commissioner,
The West Virginia Division of Motor Vehicles,
Respondent.

ORDER

On November 15, 2018, Petitioner filed a "Petition for Judicial Review of the Commissioner of the West Virginia Division of Motor Vehicle's Final Order Denying Petitioner's Application for a Salesperson License, SL11299", pursuant to the West Virginia Rules of Procedure for Administrative Appeals and W.Va. Code §29A-5-1, *et seq.* On November 19, 2018, the Court entered an Order staying the Commissioner's Order pending the outcome of this appeal. On January 11, 2019, the Court entered directing Respondent to file her Response Brief on or before February 14, 2019, and directing Petitioner to file his Reply Brief on or before February 28, 2019. The parties have submitted their briefs, transcripts and exhibits to the Court. After reviewing the said pleading and the applicable law, the Court makes the following decision.

I. STANDARD OF REVIEW

When reviewing the decision of an administrative agency, i.e. the West Virginia Department of Motor Vehicles, the Circuit Court reviews the administrative agency's decision pursuant to the Administrative Procedures Act. Specifically, W. Va. Code §29A-5-4 provides in relevant part:

"The court may affirm the order or decision of the agency or remand the case for further proceedings. It shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decision or order are:

- (1) In violation of constitutional or statutory provisions; or
- (2) In excess of the statutory authority or jurisdiction of the agency; or
- (3) Made upon unlawful procedures; or
- (4) Affected by other error of law; or
- (5) Clearly wrong 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.”

II. PROCEDURAL HISTORY

1) Petitioner, Timothy R. McCabe (hereinafter referred to as “Mr. McCabe”), applied for an automobile salesperson license through the West Virginia Division of Motor Vehicles on April 5, 2018, a license which he was required to obtain to continue with his employment at Matt Jones Preowned Auto, LLC.

2) After passing the requisite test, Mr. McCabe was granted a temporary salesperson license, license number SL11299.

3) On April 30, 2018, Mr. McCabe received certified mail advising that he was being denied a permanent salesperson license because he pleaded guilty to a felony in 2005. Specifically, the denial stated that pursuant to W.Va. Code §17A-6E-4(c)(5), which states that the Division shall refuse to issue a license if the applicant has been convicted of a felony, that Mr. McCabe’s request to engage in the business of a salesperson was required to be denied.

4) As a result of this denial, Mr. McCabe appealed this decision pursuant to W.Va. Code §17A-6R-4(c)(5).

5) Mr. McCabe was granted a hearing before Respondent during which he explained the circumstances surrounding his decision to plead guilty to a felony in 2005.

6) Subsequent to the hearing, on October 19, 2018, Respondent entered a Final Order denying Mr. McCabe's automobile salesperson license, SL 11299, stating that the circumstances surrounding the prior conviction could not be taken into consideration due to Respondent's literal reading of §17A-6E-4(c)(5).

7) Mr. McCabe then petitioned the Circuit Court of Ohio County, West Virginia, the county in which he both resides and conducts his business, pursuant to W.Va. Code § 29a-5-1, *et seq.*, to review the Final Order on the grounds that there exist questions of law in regard to the constitutionality of § 17A-6E-4(c)(5) and the application of the same that must be considered and ruled upon by this Court.

III. FINDINGS OF FACT

The West Virginia Division of Motor Vehicles (hereinafter the "DMV") is responsible for the issuance of all motor vehicle salesperson licenses. In order to be issued such a license and to continue with employment as a salesperson in the automobile industry in West Virginia, an application with the DMV must be completed by those who wish to obtain or retain their licensure.

Mr. McCabe is an Ohio County resident who resides in Wheeling with his wife and their ten (10) children. Mr. McCabe has been involved in the sales of motor vehicles and the automobile industry as a whole throughout the entire course of his adult career. In 2018, Mr. McCabe began working at Matt Jones Preowned Auto, LLC (hereinafter "Matt Jones Auto") in Wheeling. As a result, Mr. McCabe was required to apply for a salesperson license from the West Virginia DMV in order to continue with his employment.

Upon passing the required test, which was a prerequisite to obtaining the appropriate sales licensure, Mr. McCabe was granted a temporary salesperson license on April 5, 2018. Thereafter, on April 30, 2018, Mr. McCabe received certified mail from the West Virginia DMV stating that the Respondent was refusing his application for licensure pursuant to W.Va. Code § 17A-6E-4(c)(5) which provides:

The division shall refuse to issue the license if the applicant . . .

[h]as been convicted of a felony: Provided, That upon the applicant's appeal the commissioner may grant an exemption to this restriction if the felony did not involve financial matters or the motor vehicle industry.

As a result of Mr. McCabe guilty plea to a felony thirteen (13) years prior that involved financial matters in the automobile industry, Mr. McCabe was denied his salesperson licensure. Nevertheless, Mr. McCabe exercised his appeal rights, and a hearing was set before the West Virginia Division of Motor Vehicles on this matter.

As part of Mr. McCabe's appeal, he provided five (5) character/reference letters from members of his community whom he had established relationships with over the years vouching for his character, notwithstanding the felony conviction in 2005. These letters were written by (1) a former FBI agent, Thomas Burgoyne; (2) an Assistant U.S. Attorney for the Northern District of West Virginia, Stephen L. Vogrin; (3) the Associate Pastor at St. Michael Parish School in Wheeling, Rev. Fr. William K. Matheny, Jr; (4) a respected local attorney and mediator, Elba "Bo" Gillenwater, Jr.; and (5) long-time high school football coach and Director of Alumni Relations, Mike Young. All of the letters of support evidenced that Mr. McCabe was and is a reputable member of the community who had overcome his past legal issue.

Notwithstanding the fact that there were numerous letters in support of Mr. McCabe's trustworthiness and ability to work as a salesman in the automobile industry, and further, evidence that Mr. McCabe has never had any related legal issues since his plea agreement in 2005, even

though he has spent a majority of his career, including up until the present day, working in the automobile industry, Respondent upheld the denial of Mr. McCabe's salesperson license due to the sole fact that Mr. McCabe pleaded guilty to a felony thirteen (13) years ago.

Respondent's Final Order found that even though there were numerous letters of support and no subsequent legal issues involving Mr. McCabe, W.Va. Code §17A-6E-4(c)(5). "is very clear that an exemption cannot be given in this situation." Mr. McCabe then pursued this appeal asserting that questions of law exist as to the retroactivity of this statute when applied to an individual whose crime was committed well before the enactment of the same, as well as the constitutionality of W.Va. Code §17A-6E-4(c)(5).

IV. CONCLUSIONS OF LAW

A. W.Va. Code §17A-6E-4(c)(5) cannot lawfully be applied retroactively to those who have been convicted of felonies prior thereto the enactment of this statute.

W.Va. Code §17A-6E-4, which was enacted in March of 2006, after Mr. McCabe's felony conviction was final, states that "no person may engage in business in this state as a motor vehicle salesperson on and after January 1, 2008 without holding a license issued under the provisions of this article."

It is apparent from the statute that prior to 2008, individuals employed in the automobile industry and/or salespersons in the automobile industry, were not required to have a license to continue their employment. However, effective on January 1, 2008, not only did West Virginia law require licensure, but also placed restrictions on those who could obtain or keep their licensure.

Mr. McCabe began working in the automobile industry in 1998 as a finance manager. In 2000, Mr. McCabe became the general manager of Marhefka's Autos. Thereafter, Mr. McCabe stepped down as a general manager to become more involved in automobile sales. At some point

in 2005, the FBI began an investigation into the business practices of Marhefka's Autos. Mr. McCabe, as an employee of Marhefka's, apparently cooperated with the FBI investigation; however, he was informed during the investigation that if any wrongdoing at Marhefka's was found, Mr. McCabe would also be criminally charged as a result of his prior title and work as a General Manager. Mr. McCabe contends that due to his growing family and his desire not to put them through a formal and public investigation into his life and business, he decided to plead guilty to a felony charge of falsifying a loan application.

Mr. McCabe's plea agreement was entered into on October 5, 2005. At the time Mr. McCabe entered into the plea agreement, W.Va. Code §17A-6E-4(c)(5) had not been enacted. Moreover, at the time Mr. McCabe entered into the plea agreement, he was not barred from continuing his employment in the automobile industry as a salesperson. Respondent's Final Order applies a statute that did not exist at the time of Mr. McCabe's guilty plea. The application of the statute to Mr. McCabe to his detriment is not only unconstitutional, but also it is in violation of public policy principles.

The West Virginia Supreme Court of Appeals has held, "[u]nder ex post facto principles of the United States and West Virginia Constitutions, a law passed after the commission of an offense which increases the punishment, lengthens the sentence or operates to the detriment of the accused, cannot be applied to him." Syllabus Point 1, *Adkins v. Bordenkircher*, 164 W.Va. 292, 262 S.E.2d 885 (1980). Thus, ex post facto laws are barred under Article III, Section 4 of the West Virginia Constitution and Article I, Section 10 of the United States Constitution.

It is inarguable in this matter that W.Va. Code §17A-6E-4(c)(5) is an ex post facto law that operates to the detriment of Mr. McCabe. Specifically, the statute operates to deny him the ability to earn a living in a profession he has pursued nearly his entire adult life. Had Mr. McCabe known

at the time of his guilty plea that, in the future, he would be denied the ability to pursue his chosen profession, he may have made a different decision with regard to his guilty plea. The statute constitutes an unlawful ex post facto law when applied to Mr. McCabe's situation, and cannot be found to be constitutional in this regard.

With regard to the retroactivity of statutory enactments, the West Virginia Supreme Court of Appeals has stated, "[a] statute is presumed to be prospective in its operation unless expressly made retrospective." W.Va. Code § 2-2-10(bb); *Martinez v. Asplundh Tree Expert Co.*, 239 W.Va. 612, 803 S.E.2d 582, 586-587 (2017). "The presumption is that a statute is intended to operate prospectively, and not retrospectively, unless it appears, by clear, strong and imperative words or by necessary implication, that the Legislature intended to give the statute retroactive force and effect." *Id.* (citing Syl. pt. 4, *Taylor v. State Compensation Comm'r.*, 140 W.Va. 572, 86 S.E.2d 114 (1955); Syl. Pt. 2, *In re Petition for Attorney Fees and Costs: Cassella v. Mylan Pharm., Inc.*, 234 W.Va. 485, 766 S.E.2d 432 (2014)). Accordingly, "[a] statute that diminishes substantive rights or augments substantive liabilities should not be applied retroactively to events completed before the effective date of the statute (or the date of enactment if no separate effective date is stated) unless the statute provides explicitly for retroactive application." *Id.* (citing Syl. Pt. 2, *Public Citizen, Inc. v. First Nat. Bank in Fairmont*, 198 W.Va. 329, 480 S.E.2d 538 (1996) (holding that the new amendments to the UCC could not be applied retroactively when the amendments attached new legal consequences to a transaction that occurred before the amendments came into existence); see also *State ex rel. Glauser v. Board of Educ. of Ohio County*, 173 W.Va. 481, 318 S.E.2d 424 (1984) (holding that statutory amendment requiring notice and a hearing before an employee's name was placed on a transfer or reassignment list did not apply retroactively).

To determine whether a statute is being applied retroactively, the Court has further stated, “[t]he law is not retroactive merely because part of the factual situation to which it is applied occurred prior to its enactment; only when it operates upon transactions which have been completed or upon rights which have been acquired or upon obligations which have existed prior to its passage can it be considered to be retroactive in application.” *See id.* at 587 (*citing* Syl. pt. 3, *Sizemore v. State Workmen's Comp. Comm'r*, 159 W.Va. 100, 219 S.E.2d 912 (1975); *Cassella* at Syl. Pt. 3).

In this matter, it is clear that W.Va. Code §17A-6E-4(c)(5) is being applied retroactively to an event that was wholly completed before its enactment, Mr. McCabe pleading guilty to a felony in 2005. Notwithstanding the fact that the statute itself does not call for a retroactive application, Respondent has applied the statute in that very manner in deciding to deny Mr. McCabe’s licensure. Case law clearly prohibits Respondent from applying this statute to deny Mr. McCabe his salesperson license as this retroactive application “diminishes his substantive rights” as to his fundamental interest to continue with his chosen employment – the type of consequence the West Virginia Supreme Court of Appeals has clearly prohibited in regard to retroactive applications of law.

Nevertheless, as stated above, Mr. McCabe did not have the benefit of being able to evaluate whether or not he would be able to continue with his career and his means of providing a living for his family at the time he entered into the plea deal. Had Mr. McCabe known that a future law would be passed that would clearly prohibit him from working in the only career field he knows if he pled guilty to a felony, it is likely that Mr. McCabe would not only have taken this into consideration, but also would have likely turned down the plea deal he was offered. For Mr. McCabe to now suffer previously unknown consequences for his actions which occurred before

the enactment of this statute is clearly unconstitutional and moreover, wrongful as a matter of public policy as this retroactive application operates severely to his detriment in contravention to long-standing West Virginia law and precedent as set forth hereinabove.

B. Mr. McCabe was denied due process by Respondent in her denial of his salesperson license.

Under Article 3, Section 10 of the West Virginia Constitution, “[n]o person shall be deprived of life, liberty, or property, without due process of law, and the judgment of his peers.” In this regard, the West Virginia Supreme Court of Appeals has recognized that “[d]ue process of law, within the meaning of the State and Federal constitutional provisions, extends to actions of administrative officers and tribunals, as well as to the judicial branches of the governments.” Syl. pt. 2, *State ex rel. Ellis v. Kelly*, 145 W.Va. 70, 112 S.E.2d 641 (1960); Syl. pt. 1, *McJunkin Corp. v. Human Rights Com’n*, 179 W.Va. 417, 369 S.E.2d 720 (1988); See also Syl. pt. 5, *State ex rel. Bowen v. Flowers*, 155 W.Va. 389, 184 S.E.2d 611 (1971).

Likewise, the Fourteenth Amendment to the United States Constitution provides, “[n]o State shall make or enforce any law which shall . . . deprive any person of life, liberty, or property without due process.” In this regard, the United States Supreme Court of Appeals has outlined the following principles which must be considered when determining what procedural protections must constitutionally be afforded to individuals:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18, 33 (1976).

In addition to the Supreme Court's guidelines as set forth hereinabove, the West Virginia Supreme Court of Appeals has also held, "[t]he Due Process Clause, Article III, Section 10 of the West Virginia Constitution, requires procedural safeguards against State action which affects a liberty or property interest." Syl. pt. 1, *Waite v. Civil Serv. Comm'n.*, 161 W.Va. 154, 241 S.E.2d 164 (1977).

Among the property interests that can be impacted by state action is one's interest in their employment. Specifically, the West Virginia Supreme Court has stated, "[i]t has long been recognized that one of the liberty interests protected by due process is a person's interest in the pursuit of a lawful occupation." *Major v. DeFrench*, 286 S.E.2d 688, 696 (W. Va. 1982).

Therefore, when state action is taken that deprives one of their continued employment, it must be discerned what process is first due to that individual. Accordingly, what procedures due process may require under a given set of circumstances must begin with a determination of the precise nature of the government function involved as well as the private interest that has been impaired by government action. Syl. pt. 2, *Bone v. W. Va. Dept. of Corrections*, 163 W.Va. 253, 255 S.E.2d 919 (1979). "In regulating a given occupation, as in all legislative matters based on the police power, regulations will be valid only if they bear some reasonable relationship to the public health, safety, morals or general welfare." Const. art. 6, § 1; *Thorne v. Rush*, 164 W.Va. 165 (1979).

In this matter, the property interest at stake is Mr. McCabe's automobile salesperson licensure; and essentially, Mr. McCabe's ability to continue with his employment, a type of property interest that has long been recognized by the West Virginia Supreme Court of Appeals as shown by the finding in *State ex rel. Hoover v. Smith*, 198 W.Va. 507, 482 S.E.2d 124 (1997) wherein the Court held a **"license to practice a profession is a valuable right, one that will be protected by the law."** (Emphasis added.)

Accordingly, it is clear that because Mr. McCabe's licensure was a property interest which could not have been taken away or refused without due process, and Respondent was required to ensure that proper due process was given during its investigation of whether issuance of the license was warranted.

Upon receiving a refusal of the issuance of his automobile salesperson licensure, licensure that was required for Mr. McCabe to continue in his chosen profession, Mr. McCabe was granted the right to appeal his denial. Upon appealing the denial, a hearing was had wherein Mr. McCabe not only gave testimony in regard to the felony charge he pled guilty to a decade earlier, but further, presented letters of support from members of his community acknowledging that he was a respectable and trustworthy individual who has gone above and beyond for his community, notwithstanding the fact that he plead guilty to a crime over thirteen years ago.

Although Mr. McCabe set forth not only his own testimony regarding what happened in the past, but also the letters which further supported the fact that he would not be one to engage in any wrongdoing in the present or future, Respondent failed to take this information and evidence into consideration, and simply denied the appeal based on a literal reading of the statutory provision at hand, thus depriving Mr. McCabe of his due process rights.

This is evidenced in Respondent's October 19, 2018 Final Order which states:

The Applicant accepted full responsibility for his actions and appeared to be sincerely remorseful regarding the decisions he made that lead to his conviction;

The Applicant submitted numerous letters in support of his ability to work as a salesman in the automobile industry;

The Applicant has not had any related issues since 2006. Regardless, the Statute is very clear that an exemption cannot be given in this situation.

From a review of the Order, it is evident that no consideration whatsoever was given to Mr. McCabe's current character or fitness to conduct business as an automobile salesperson at this

point in time; rather, Respondent simply affirmed the denial, thus rendering the appeal hearing futile. Accordingly, it is evident that no due process was actually given to Mr. McCabe as shown by this administrative agency's failure to consider any evidence outside of the fact that Mr. McCabe previously plead guilty to a felony.

This failure to investigate a denial is in contradiction to the legislative purpose of the subject statute and provides no reasonable relationship to furthering the general welfare of the citizens of West Virginia. Specifically, when looking to the legislative purpose behind this statute, it is clear that the interest of the DMV in regulating automobile salesperson's licensing was "to protect retail motor vehicle customers, motor vehicle dealers, banks and the state from sustaining losses due to the fraudulent activity of persons engaged in the business of selling vehicles."

However, when looking at this interest in comparison to Mr. McCabe's current situation, wherein he has had no legal issues since 2005 and has proven his reputation and character in the community since that time, it is clear that there is no risk that he would engage in fraudulent activity in the future; and thus, the outright denial of his license is not only unreasonable, but also fails to further the purpose of the statute at hand.

Accordingly, it is clear that Mr. McCabe's interest outweighs those of the DMV and therefore the consideration that the DMV was unable to give Mr. McCabe before taking away his property interest in the form of his continued employment in his chosen profession is unambiguously a violation of Mr. McCabe's due process rights.

A similar finding was made by the Seventh Circuit under the due process clause of the United States Constitution in reviewing a chauffeur licensing issue in Chicago, Illinois. Specifically, in *Freitag v. Carter*, 489 F.2d 1377 (7th Cir. 1973), Mr. Freitag, wishing to drive a taxicab within the City of Chicago, applied to defendant Carter, the Commissioner of the Public

Vehicle License Commission, for a public chauffeur's license which Chicago cab drivers are required to have in order to act as a chauffeur. While investigating the application, Carter learned that Freitag had previously been a patient in a state mental hospital. Under Section 28.1-3 of Chapter 28.1 of the Municipal Code, there must have been a lack of 'infirmity . . . of mind' as a prerequisite for the issuance of a public chauffeur's license.

Because of this history, the Commissioner denied Freitag's application. Freitag immediately asked for a review of this denial, and on January 21, 1971, the Commissioner, after obtaining Freitag's permission, wrote the state mental hospital requesting information regarding plaintiff's condition at the time of his discharge from the institution and information pertinent to Freitag's ability to drive a cab. In response, the Administrative Physician at the hospital gave a brief history of Freitag's connections with the hospital, described his mental condition at the time of his hospitalization, and stated that the hospital had had no contact with Freitag since October 1957.

Upon receipt of the letter, Carter's office forwarded it to the Medical Section of the Chicago Police Department, which, on February 5, 1971, indicated to him that Freitag might be a 'bad risk.' This evaluation apparently was based solely on the fourteen-year-old information, for no expert assessed Freitag's mental condition as of 1971, nor were there facts before the Commissioner to indicate any present questionable mental status. Nevertheless, the license was again denied. Mr. Freitag again appealed his denial and upon appeal, the United States Court of Appeals for the Seventh Circuit held:

Carter's 'investigation' consisted of unearthing fourteen-year-old psychiatric records . . . and checking whether Freitag had been convicted of a disqualifying offense. At no time did Carter inquire into the plaintiff's present mental condition or show him the 'evidence' against him.

Accordingly, the Seventh Circuit affirmed the district court's holding that Freitag was not provided with due process of law in the denial of his application under the circumstances presented.

Notably, the issues in *Freitag* are extremely similar to the matter at hand in which Respondent took no other investigation into whether an automobile salesperson license should be granted to Mr. McCabe. Rather, Respondent simply stated that because Mr. McCabe was guilty of a felony stemming from his time working in the automobile industry, that he was unable to acquire licensure. Clearly, this is a violation of Mr. McCabe's due process rights under both the United State and West Virginia Constitutions which require a proper investigation into Mr. McCabe's present situation and status as a member of the community before issuing an outright denial that takes away his property interest in his continued employment, and thus reversal of the Respondent's Final Order is necessary. Furthermore, Mr. McCabe was denied his due process rights as a result of having a substantial property interest taken away without being informed that pleading guilty would take away such right at the time of his plea agreement.

As set forth hereinabove, in order for proper due process to be given, there must be in place procedural safeguards that protect an individual's property interest before it is taken away. However, as set forth in the preceding paragraph, Mr. McCabe was unable to protect his property interest in the form of his continued employment as at the time he entered into the plea agreement in 2005, the subject statute which prohibits him from obtaining licensing was not in effect. Thus, for this statute to be mandatorily applied to Mr. McCabe when there were no procedural safeguards available to him in regard to this issue at the time he entered into the plea agreement, is clearly unconstitutional.

C. W.Va. Code §17A-6E-4(c)(5) is unconstitutional as it is both overly broad and overly narrow in contravention to both the West Virginia and the United States Constitution.

When considering the constitutionality of a statute, it is imperative to look at the results from the application of the same. In this regard, the West Virginia Supreme Court of Appeals has held that “[a] statute may be constitutional as written yet be unconstitutionally applied in a given case.” Syl. pt. 2, *State ex rel. Miller v. Locke*, 162 W.Va. 946, 253 S.E.2d 540 (1979). Thus, and as stated hereinabove, “[i]n order for a statute ‘to withstand constitutional scrutiny under the substantive due process standard, it must appear that the means chosen by the Legislature to achieve a proper legislative purpose bear a rational relationship to that purpose and are not arbitrary or discriminatory.’” *State ex rel. Harris v. Calendine*, 160 W.Va. 172, 179, 233 S.E.2d 318, 324 (1977).

Additionally, “[i]t is the duty of a court to construe a statute according to its true intent, and give to it such construction as will uphold the law and further justice. It is as well the duty of a court to disregard a construction, though apparently warranted by the literal sense of the words in a statute, when such construction would lead to injustice and absurdity. Syl. pt. 2, *Click v. Click*, 98 W.Va. 419, 127 S.E. 194 (1925); *Accord State ex rel. Pinson v. Varney*, 142 W.Va. 105, 109, 96 S.E.2d 72, 74 (1956) (“Where it is possible to do so, it is the duty of the courts, in the construction of statutes, to harmonize and reconcile laws, and to adopt that construction of a statutory provision which harmonizes and reconciles it with other statutory provisions.” Therefore, “[a]lthough courts should not ordinarily stray beyond the plain language of unambiguous statutes, we recognize the need to depart from the statutory language in exceptional circumstances.” *State ex rel. Frazier v. Meadows*, 193 W.Va. 20, 454 S.E.2d 65 (1994) (citing 2A G. Sutherland, *Statutory Construction* § 46.07 at 126 (5th ed. 1991)) (collecting exceptions). “Courts, therefore, may venture beyond the plain meaning of a statute in the rare instances in which . . . a literal

application of the statute would produce an absurd or unconstitutional result.” *Id.* (citing *United States v. Amer. Trucking Ass'ns*, 310 U.S. 534, 543–44, 60 S.Ct. 1059, 1063–64, 84 L.Ed. 1345, 1351 (1940)).

Under the Fourteenth Amendment to the United States Constitution, “[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” Likewise, and as set forth hereinabove, under Article 3 § 10 of the West Virginia Constitution, “[n]o person shall be deprived of life, liberty, or property, without due process of law, and the judgment of his peers.” In addition, the West Virginia Supreme Court of Appeals has held, “[t]he concept of equal protection of the laws is inherent in article three, section ten of the West Virginia Constitution, and the scope and application of this protection is coextensive or broader than that of the fourteenth amendment to the United States Constitution.” *Israel v. Israel v. WV Secondary Schools Activities Com'n*, 388 S.E.2d 480 (1989).

In this matter, it is clear that W.Va. Code § 17A-6E-4(c)(5) is both overly broad and overly narrow and as a result thereof a literal application of this statute in the current situation produces an absurd result which has led to the deprivation of Mr. McCabe’s due process and equal protection rights under both the United States and West Virginia Constitutions.

In this regard, W.Va. Code § 17A-6E-4(c)(5) unequivocally states:

The division shall refuse to issue the license if the applicant . . .

[h]as been convicted of a felony: Provided, That upon the applicant's appeal the commissioner may grant an exemption to this restriction if the felony did not involve financial matters or the motor vehicle industry

From a reading of this statute it is clear that the same is overly broad in that it provides no exceptions at all for those who have committed felonies involving financial matters or the motor vehicle industry. Rather, it sets forth a strict prohibition against those individuals acquiring a license regardless of the situation or the facts surrounding their criminal history and/or current character. Because all individuals are required to be given due process prior to the government taking away a property interest such as their fundamental right to earn a living, it is clear that this statute fails to provide for such due process.

The statute also renders Respondent's approach to hearing such appeals arbitrary and capricious in that the Commissioner can simply fail to consider any and all factors that are relevant as to whether an individual can be trusted to work in the automobile industry without committing an act of untrustworthiness simply because they were convicted of a felony in the past – no matter how distant the criminal act may have been. Clearly, this result is not what the Legislature intended in furthering the purpose behind the subject statute.

On the other hand, this statute is also overly narrow at the same time in that it specifically prohibits those who have committed a certain type of felony from obtaining the requisite licensing needed to work in the automobile field - yet allows other individuals who are guilty of criminal acts to acquire licensure so long as they have not committed a felony. For example, an individual who was convicted of a misdemeanor involving untruthfulness, fraud or forgery, or some other type of misconduct relating to their work in the automobile industry will be allowed to obtain licensing simply because their crime was not designated as a felony even though their criminal acts may be equal if not worse than a felony crime. This application of the law under the subject statute clearly results in an absurd result or application and cannot withstand constitutional scrutiny as the Fourteenth Amendment and Article 3 Section 10 of the West Virginia Constitution prohibit

the enforcement of any law which deprives any person of life, liberty, or property, without due process of law.

Here, because this statute is both overly broad and narrow, it deprives certain individuals from obtaining due process prior to their property interest in employment being taken away – rather it simply works to prohibit individuals who fall under a certain category from working in their chosen field; and further, prohibits these individuals from being able to protect their property interests, thus failing to provide equal protection under the law. As stated by the United States Supreme Court of Appeals, “[t]he concepts of equal protection of the laws and due process both stem from the American ideal of fairness, and are not mutually exclusive, nor are the concepts always interchangeable, in that equal protection of the laws is a more explicit safeguard of prohibited unfairness than due process of law, but a discrimination may nevertheless be so unjustifiable as to be violative of due process.” *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

As stated hereinabove, W.Va. Code § 17A-6E-4(c)(5) classifies certain individuals and prohibits them from obtaining their automobile salesperson licensure. This classification results in the preclusion of due process being afforded to said individuals in their attempt to retain their fundamental right to earn a living. Accordingly, both the due process and equal protection clauses under the Fourteenth Amendment are implicated in this situation.

Under the Fourteenth Amendment and as set forth hereinabove, where such a classification is made based on the overly broad or overly narrow language of a statute and impacts a fundamental interest, the statute will only be found constitutional wherein “the challenged state action rationally furthers a legitimate state purpose or interest.” *San Antonio School District v. Rodriguez*, 411 U.S. 1, 55 (1973). When it comes to whether a certain classification under legislative enactment which precludes individuals from acquiring certain licensure is constitutional

under the due process and equal protection clauses of the Fourteenth Amendment, the United States Supreme Court of Appeals has held, "any qualification must have a rational connection with the applicant's fitness or capacity to perform the job." *Schwartz v. Board of Bar Examiners*, 353 U.S. 232, 239 (1957).

In *Smith v. Fussenich*, 440 F. Supp. 1077 (D. Conn. 1977), the United States District Court for the District of Connecticut was required to apply these principles and precedent of the United States Supreme Court of Appeals in a matter that is similar to the case at hand. Specifically, in *Smith*, the Plaintiff wished to obtain licensing to become a private investigator/security guard; however, he had previously been indicted with a felony. Under Connecticut law, felony offenders were precluded from obtaining this licensure. In other words, "under the registration scheme, there [was] an automatic disqualification of any applicant who ha[d] been convicted of a felony . . . [h]owever, a misdemeanor or a person who has a history of alcoholism or drug abuse may be eligible for licensure if the Department deems the applicant fit under relevant criteria such as the nature and extent of the criminal behavior, progress made through rehabilitative treatment, and so forth." *Id.* at 1078-1080.

The Plaintiff in *Smith* had been accepted for employment by the Licensee Prudent Investigation Services of Bridgeport, Connecticut; however, his license as a security guard was rejected by the Department due to his felony conviction record. As a result thereof, he asserted that his equal protection rights were violated. The District Court in reviewing the matter, relied upon the United States Supreme Court's precedent of applying the rational basis test to licensing issues and first noted that the defendant's contention that the statute's across-the-board disqualification of felons as security guards and private detectives being rationally related to the legitimate interest of the State in preventing the criminal element from a business that affects public welfare, morals

and safety was an unacceptable justification. The Court held that in reviewing the language of the statute it found, "[t]he critical defect in the blanket exclusionary rule here [was] its overbreadth. The statute is simply not constitutionally tailored to promote the State's interest in eliminating corruption in certain designated occupations . . . [i]n addition, the enactment makes an irrational distinction between those convicted of felonies and those convicted of misdemeanors. Hence, a person is eligible for licensure even though he was convicted of a crime (larceny, false entry, inciting to riot and riot) which may demonstrate his lack of fitness merely because that crime is classified as a misdemeanor under the Connecticut code. *Id.* at 1081.

Additionally, the Court held, "the statute's across-the-board disqualification fails to consider probable and realistic circumstances in a felon's life, including the likelihood of rehabilitation, age at the time of conviction, and other mitigating circumstances related to the nature of the crime and degree of participation. We believe it is fair to assume that many qualified ex-felons are being deprived of employment due to the broad sweep of the statute." *Id.* In regard to due process challenges of the statute, the Court went on to state, "we deem it appropriate to mention that the statute's irrebuttable presumption may well be impermissible as a violation of the Due Process Clause of the Fourteenth Amendment." *Id.* at 1081.

Although the Court in *Smith* did not consider whether the Plaintiff's due process rights were violated, the United States Supreme Court of Appeals has, in fact, conducted this analysis and held, "permanent irrebuttable presumptions have long been disfavored under the Due Process Clause of the Fifth and Fourteenth Amendments." *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974) (holding that mandatory termination provisions of maternity rules violate the Due Process Clause of the Fourteenth Amendment since they create a conclusive presumption that every teacher who is four or five months pregnant is physically incapable of continuing her duties).

The situation in *Smith* is nearly identical to the issue at hand in which the language of the statute is overly broad and narrow and the resulting application in this situation clearly illustrates that because of this language, there is no opportunity for Mr. McCabe to argue that his fundamental right to employment should not be taken away; nor was there ever an opportunity for Mr. McCabe to argue that his due process rights were being violated at the time he pled guilty in 2005 because W.Va. Code §17A-6E-4(c)(5) was not a statute at the time. Notably however, even if an opportunity for argument that Mr. McCabe should be allowed to obtain his licensure was given at the time he pled guilty to a felony in 2005, the very language of the statute precludes this argument from having any effect or impact due to the strict language of the statute, and in essence, is an irrebuttable presumption, a presumption which the United States Supreme Court of Appeals has held time and time again to be unconstitutional.

Respondent simply applied the subject statute retroactively to Mr. McCabe without giving any outside consideration to his present character or fitness in working in the automobile sales industry. This is a clear deprivation of Mr. McCabe's property interest without due process of law in violation of the United States and West Virginia Constitutions.

Thus, in this matter, where the application of the literal words of the statute by Respondent leads to an absurd result and an injustice in the denial of a salesperson license to Mr. McCabe who has worked in the automobile industry his entire life and without any legal issues since 2005, this Court must depart from the statutory language and consider the circumstances at hand in accordance with the principles of *State ex rel Frazier v. Meadows*, 193 W.Va. 20, 454 S.E.2d 65 (1994). This Court cannot simply affirm Respondent's Final Order without considering any factors surrounding Mr. McCabe's background. Such a ruling would be a clear disregard of due process and therefore unconstitutional under both the United States and West Virginia Constitutions.

It is accordingly


ORDERED that for all of the foregoing reasons that Petitioner's Petition shall be and is hereby **GRANTED** and Respondent's October 19, 2018 Final Order shall be and is hereby **REVERSED** and **VACATED**. It is further

ORDERED that Respondent shall grant Petitioner McCabe's Application for a Salesperson License, SL11299. It is further

ORDERED the Circuit Clerk of Ohio County shall provide an attested copy of this Order to counsel for the parties.

To which rulings the respective objections of the parties are hereby noted.

ENTER this 30th day of April, 2019.



Judge David J. Sims

A copy, Teste.



Circuit Clerk