

STATE OF NORTH CAROLINA)
)
DEPARTMENT OF TRANSPORTATION) Administrative Hearing
) Customer No. XXXXXX
DIVISION OF MOTOR VEHICLES) D.O. B. XXXXXXXX
)
In the matter of the Driving Privilege of:)
)
XXX, Petitioner,)

Jurisdiction

This case is adjudicated under the authority of North Carolina General Statute 20-17.8.

Statement of Case

The Division of Motor Vehicles revoked the driving privileges of XXXX after it received a non-compliance report from the ignition interlock service provider certified by the Commissioner. This report claims the petitioner operated a vehicle when the ignition interlock system indicated an alcohol concentration in violation of the restriction placed upon her by North Carolina General Statute 20-17.8(b)(3).

XXXX requested a hearing to contest the revocation of her driving privileges by the Division of Motor Vehicles.

The hearing was held, as noticed the XX day of April, 20XX at 10:00 a.m. at the Division of Motor Vehicle office located at 3637 N. Patterson Avenue, Winston-Salem, Forsyth County, North Carolina. Administrative Hearing Officer XXXX conducted the hearing.

The petitioner was present with his attorney, Clarke Dummit, Bar #XXXXXX

Division Exhibits number 1 through 5 were admitted and made part of the record.

List of Exhibits

1. Division Exhibits One: Non-Compliance Report, Monitor Report and Logger from Monitech Inc., - dated 12/28//20XX.

2. Division Exhibit Two: Client Response Form from Monitech Inc. – dated 12/28/20XX
3. Division Exhibit Three: Affidavit from Monitech Inc. technician, XXX, dated 12/28/20XX.
4. Division Exhibits Four: North Carolina Division of Motor Vehicle Driving Record Check
5. Division Exhibit Five: ACR and II notification letter from NCDMV – dated 03/03/20XX

Issues

Pursuant to NCGS 20-17.8(j), the scope of the hearing is limited to the issues of whether:

- (1) The driver license of the person had an ignition interlock requirement; and
- (2) The person:
 - a. Was driving a vehicle that was not equipped with a functioning ignition interlock system; or
 - b. Did not personally activate the ignition interlock system before driving the vehicle; or
 - c. Drove the vehicle in violation of an applicable alcohol concentration restriction prescribed by subdivision (b)(3) of this section.

Motions and Rulings

Motion #1: Mr. Dummit filed a Motion to dismiss based on his statement that there was no violation under G.S. 20-19(c3). He argues that his client only had one reinstatement of his license, and therefore should have a .04 restriction, not .00 as is noted on his driving record. With his level being a .04, there is no evidence in the non-compliance report to violate that level.

The motion is denied. Petitioner's BAC level is determined by G.S. 20-19(c3) and the petitioner's ignition interlock requirement is determined by 20-17.8(c3)(2)... "For the second or subsequent restoration of a drivers' license for a person convicted of driving while impaired...that the person not operate a vehicle with an alcohol concentration greater than .00...In addition the restrictions shall be in effect(i)seven years from the date of restoration if the person's license was permanently revoked." The petitioner was permanently suspended for three or more offenses of Driving While Impaired effective March 2, 20XX. The petitioner had a restoration hearing on June XX, 20XX and was conditionally

reinstated effective July XX, 20XX. The Petitioner's conditional restoration concluded on June XX, 20XX. Mr. Dummit contends the petitioner has only gone through one restoration of his license. However, this argument does not consider the fact that the petitioner was eligible to have his license restored before his permanent suspension, as he could have been reinstated for either the first offense of DWI or the second offense of DWI. The petitioner was disqualified for both of these because he continued to drive during the revocation and was convicted of Driving While License Revoked. The petitioner was eligible for restoration of his driving privilege for the first two offenses of DWI, but forfeited this restoration because he continued to violate North Carolina Law.

Motion #2: Mr. Dummit filed a Motion To Dismiss by holding the Commissioner of the Division in Contempt for Failure to Answer Discovery.

The motion was denied based on the fact that there is no provision in the North Carolina General Statutes or Administrative Code authorizing discovery. With the exception of Rule 45 which authorizes subpoenas, the **Rules of Civil Procedure do not apply to Division Hearings.**

Motion #3: Mr. Dummit filed a Motion to Determine Proper Quasi-Judicial Official.

The motion was denied based on G.S. 20-39 whereas "the Commission is authorized to designate and appoint such agents, field deputies, and clerks as may be necessary to carry out the provisions of this Article." Hearing Officers have been appointed to hold hearings for the division to carry out the provisions of this Article.

Motion #4: Mr. Dummit filed a Motion to dismiss on the grounds that the North Carolina Division of Motor Vehicles did not comply with G.S. 20-17.8 by properly notifying the petitioner that he was required to have ignition interlock per G.S. 20-17.8(e).

The motion is denied. Petitioner was sent a letter by the North Carolina Division of Motor Vehicles on XX/XX/20XX after his third offense of driving while impaired in which the letter states "Effective 7-1-20XX, motor vehicle law requires an alcohol concentration restriction and an ignition interlock restriction on a person's driver license following reinstatement for certain suspensions...You must not drive

a motor vehicle with an alcohol concentration great than BAC .000 for 7 years; You must have an ignition interlock restriction for 7 years.”

Motion #5: Mr. Dummit filed a Motion to Dismiss (or rescind action) for failure to state a claim or in the alternative Motion to Dismiss for lack of jurisdiction. His motion states that there is no “charge” as specified in NCGS 20-17.8(j). His motion also states that “The hearing must be held in the county where the charge was brought.” The hearing cannot proceed as no “charges” have been brought in Forsyth County.

The Motion is denied. G.S. 20-2(b) allows the Commissioner to adopt rules to implement this Chapter: Chapter 150B of the General Statutes governs the adoption of rules by the Commissioner. The affidavit from Monitech Inc. claims the petitioner operated a vehicle when the ignition interlock system indicated an alcohol concentration in violation of the restriction placed up on the person by North Carolina General Statute 20-17.8(b)(3).

Black’s Law Dictionary defines Charge “In general. An incumbrance, lien, or burden; an obligation or duty; a liability; an accusation.” In respect to G.S. 20-17.8 the charge brought here is an accusation. Mr. Dummit’s motion presumes the charge or accusation is brought as an act of law enforcement officer in their official capacity and before the courts. Rather, the charge or accusation is being brought by the ignition interlock service provider through the form of a notarized affidavit before the Division of Motor Vehicles. **G. S. 20-17.8 is silent as to how the charge should be brought and therefore, the Division of Motor Vehicles uses its authority under G. S. 20-2(b) to prescribe the method to bring the charge and promulgate rules and policies to facilitate this requirement.**

Findings of Facts

After consideration and weighing of the foregoing testimony and evidence, I find that the following facts are supported by substantial evidence:

1. The petitioner has an alcohol concentration restriction of .00 that began on XX/XX/20XX and expires on XX/XX/20XX.

2. The petitioner had an ignition interlock restriction that began on that began on XX/XX/20XX and expires on XX/XX/20XX.
3. The petitioner went to the certified ignition interlock provider on XX/XX/20XX. The logger report for this monitor indicated the following BAC readings:
 - a. BAC of .000 on XX/XX/20XX at 7:42 a.m. on a Prestart Test – Pass/Ignition On
 - b. BAC of .019 on XX/XX/20XX at 7:52 a.m. on a Rolling Retest - Pass
4. The affidavit from technician XXXX of Monitech Inc., states under #12 G, technician Professional Opinion: “Inconclusive.” He also did not check any boxes under #12 acknowledging the BAC reading may have been a true bac reading.

Conclusions

Based on the foregoing findings of fact, I conclude, as a matter of law, that:

1. Petitioner had an ignition interlock requirement that began on XX/XX/20XX and expires on XX/XX/20XX.
2. Petitioner had a blood alcohol content (BAC) restriction of .00 on his North Carolina Driver’s License that began on XX/XX/20XX and expires on XX/XX/20XX.
3. The logger provided by Monitech, Inc., shows that the BAC readings that occurred did present themselves on rolling retests.
4. The affidavit lacks substantial evidence that the BAC readings indicated in the affidavit and on the non-compliance report are true BAC readings.
5. The reports lack evidence that the petitioner drove the vehicle in violation of an applicable alcohol concentration restriction.

Decision

I find that all elements of proof necessary to sustain a revocation for violation of the alcohol concentration restriction under G.S. 20-17.8(b)(3) are **not supported by substantial evidence.**

THEREFORE, it is the decision of Administrative Hearing Officer XXXX that the Order of Revocation of the driving privilege of XXX, petitioner, is rescinded.

Dated this Xth day of XXX, 20XX

XXX
Administrative Hearing Officer
Division of Motor Vehicles