

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :

of :

MARY E. JACOBI :

DECISION
DTA NO. 826332

for Review of a Notice of Proposed Driver License :
Suspension Referral under Tax Law § 171-v.

Petitioner, Mary E. Jacobi, filed an exception to the determination of the Administrative Law Judge issued on April 16, 2015. Petitioner appeared by Andreozzi, Bluestein, Weber and Brown, LLP (Randall P. Andreozzi, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Michele W. Milavec, Esq. and Linda Harmonick, Esq., of counsel).

Petitioner filed a brief in support of the exception. The Division filed a letter brief in opposition. Petitioner filed a letter reply brief. Oral argument was heard in Albany, New York on November 19, 2015, which date began the six-month period for the issuance of this decision.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether the Division of Taxation's notice of proposed driver license suspension referral issued to petitioner pursuant to Tax Law § 171-v should be sustained.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge, except that we have modified the Administrative Law Judge's findings of fact 1, 3, 8, 9 and 10 to better reflect the

record. We have not included the Administrative Law Judge's findings of fact 7, 11 and 12 in our findings because such findings merely state the parties' legal arguments. We have also renumbered the Administrative Law Judge's findings of fact 8, 9 and 10 as 7, 8 and 9 herein. The Administrative Law Judge's findings of fact and the modified findings of fact are set forth below.

1. The Division of Taxation (Division) brought a motion seeking an order dismissing the petition herein or, in the alternative, denying the petition and granting summary determination in its favor. The petition protests a notice of proposed driver license suspension referral, dated August 2, 2013, and issued to petitioner, Mary E. Jacobi, pursuant to Tax Law § 171-v (suspension notice or 60-day notice). The suspension notice informed petitioner that she had outstanding tax liabilities in excess of \$10,000.00 owed to the State of New York and that, unless she responded within 60 days of the mailing date of the suspension notice, her driver's license would be suspended. Specifically, petitioner was advised through a consolidated statement of tax liabilities that income tax assessment number L-036560876-4 in the amount of \$56,550.00, plus interest in the amount of \$10,869.32, and penalty in the amount of \$7,226.76, less payments or credits of \$1,384.02, for a balance due of \$73,262.06 was subject to collection action.¹

2. Petitioner requested a conference before the Bureau of Conciliation and Mediation Services (BCMS) and on March 14, 2014, BCMS issued to petitioner a conciliation order, CMS number 259102, that sustained the August 2, 2013 suspension notice.

3. On June 11, 2014, the Division of Tax Appeals received a petition challenging the suspension notice. According to the petition, petitioner and her spouse are currently unemployed

¹ The notice also listed two income tax assessments as bills not yet subject to collection action and two other income tax assessments that were under formal or informal review.

and do not receive any unemployment benefits. According to the statement of financial condition and other information (form DTF-5) filed in support of an offer in compromise that she made to the Division, petitioner receives disbursements from certain entities totaling \$87,460.00 annually, but Mr. Jacobi does not have any income. The petition asserts that the statement of financial condition shows that she and her husband are insolvent and do not have any excess monthly income to pay their unpaid taxes from prior years. According to the petition, petitioner is paying her current taxes. The petition also maintains that petitioner's tax debt is currently uncollectible. As noted, petitioner has made an offer in compromise to the Division and she has been making voluntary payments of \$750.00 per month toward her outstanding tax liability. The petition notes that petitioner's offer in compromise is still pending. According to the petition, petitioner lives in a suburban area that lacks accessible public transportation. The petition also states that there are no food stores or pharmacies within walking distance of petitioner's home. The petition asserts that petitioner suffers from arthritis and needs her car to visit doctors or fill prescriptions. The petition submits that the loss of her driving privileges will have a severe effect on petitioner's life.

4. The Division filed an answer to the petition and thereafter brought its motion with an affidavit by Matthew McNamara, who is employed as an Information Technology Specialist 3 in the Division's Civil Enforcement Division (CED). Mr. McNamara's duties involve maintenance of the CED internal website, and include creation and modification of reports based on the Division's internal systems. His duties further involve the creation and maintenance of programs and reports run on a scheduled basis that facilitate and report on the movement of cases, including the creation of event codes based on criteria given by end users. Mr. McNamara's

affidavit details the steps undertaken by the Division in carrying out the license suspension program authorized by Tax Law § 171-v.

5. Mr. McNamara's affidavit addresses four sequential actions or steps, to wit, the "Initial Process," the "DMV Data Match," the "Suspension Process" and the "Post-Suspension Process." These steps are summarized as follows:

a) The "Initial Process" involves the Division's identification of taxpayers who may be subject to the issuance of a 60-day notice under Tax Law § 171-v. This process involves first reviewing internally set selection criteria to identify taxpayers owing a cumulative and delinquent tax liability (tax, penalty and interest) equal to or greater than \$10,000.00, and then reviewing additional data to determine whether any of such taxpayers are excluded from application of the driver's license suspension provisions of Tax Law § 171-v (5) under the following elimination (or exclusion) criteria:

- (1) the taxpayer is deceased;
- (2) the taxpayer is in bankruptcy;
- (3) the age of any assessment included in determining the cumulative amount of liability is more than 20 years from the notice and demand issue date;
- (4) a formal or informal protest has been made with respect to any assessment included in the cumulative balance of tax liability where the elimination of such assessment would leave the balance of such liability below the \$10,000.00 threshold for license suspension; or
- (5) the taxpayer is on an active approved payment plan.

b) The "DMV Data Match" involves reviewing information on record with the Department of Motor Vehicles (DMV) for a taxpayer not already excluded under the foregoing criteria to determine whether that taxpayer has a qualifying driver's license potentially subject to suspension per Tax Law § 171-v. This review examines the following 14 data points:

- (1) social security number,
- (2) last name,
- (3) first name,
- (4) middle initial,
- (5) name suffix,
- (6) DMclient ID,
- (7) gender,
- (8) date of birth,
- (9) mailing address street, (10) city, (11) state, (12) zip code,
- (13) license class, and
- (14) license expiration date.

If, upon this review, the Division determines that a taxpayer has a qualifying driver's license, that taxpayer is put into the suspension process.

c) The "Suspension Process" commences with the Division performing a post-DMV data match review to confirm that the taxpayer continues to meet the criteria for suspension. If the taxpayer remains within the criteria for suspension, then a 60-day notice will be issued to the taxpayer. In describing the process of issuance of the 60-day notice, Mr. McNamara states:

"The date of the correspondence trigger will be stored on the database as the day that the 60-day notice was sent, but an additional 10 days will be added to the date displayed on the page to allow for processing and mailing. Additionally, the status will be set to 'Approved' and the clock will be set for seventy-five (75) days from the approval date.

The taxpayer(s) is sent the 60-day notice (form DTF-454) via regular U.S. mail to the taxpayer's mailing address."

After 75 days with no response from the taxpayer, and no update to the case such that the matter no longer meets the requirements for license suspension (i.e., the case is not on hold or closed or otherwise changed), the case will be electronically sent by the Division to DMV for

license suspension.² Data is exchanged daily between the Division and DMV. If an issue of data transmission arises, an internal group within the Division (DMV-Failed Suspensions) will investigate and resolve the issue. Upon successful data processing and transfer, DMV will send a 15-day letter to the taxpayer, advising of the impending license suspension. In turn, if there is no response from the taxpayer, and DMV does not receive a cancellation record from the Division, the taxpayer's license will be marked as suspended on the DMV database.

d) The "Post-Suspension Process" involves monitoring events subsequent to license suspension so as to update the status of a suspension that has taken place. Depending upon the event, the status of a suspension may be changed to "on-hold" or "closed."

6. A copy of the 60-day notice at issue in this matter, the consolidated statement of tax liabilities, and a payment document (form DTF-968.4) by which petitioner could remit payment against the liabilities in question, were included with Mr. McNamara's affidavit. Mr. McNamara avers, based upon his knowledge of Division policies and procedures regarding driver's license suspension referrals, and upon his review of the Division's records, that on August 2, 2013, the Division issued to petitioner a 60-day notice.

7. Under the heading "How to avoid suspension of your license," the suspension notice instructs the taxpayer to "pay the amount due or set up a payment plan to avoid suspension of your license." The notice also advises the taxpayer that a driver's license suspension referral will be provided to the DMV unless the taxpayer, within 60 days, resolves his or her debts or sets up a

² Prior to license suspension, the Division performs another compliance check of its records. If, for any reason, a taxpayer "fails" the compliance criteria check, the case status will be updated to "on-hold" or "closed" (depending on what is presented) and the suspension will be stayed. If the status is "on-hold," the 60-day notice remains on the Division's system but the suspension will not proceed until the "on-hold" status is resolved. If the suspension is "closed," then the 60-day notice will be canceled. If the taxpayer "passes" this final criteria compliance check, the suspension by DMV will proceed.

payment plan; notifies the Division of his or her eligibility for an exemption from suspension;³ or protests the proposed suspension of the license by filing a request for a conciliation conference or a petition with the Division of Tax Appeals.

8. Petitioner's offer in compromise and accompanying statement of financial condition and other information was filed with the Division on June 3, 2014. The offer in compromise proposed \$36,000.00 as a fixed and final liability, payable by 48 monthly payments of \$750.00. The offer in compromise reported outstanding tax liabilities totaling \$479,990.94, less payments of \$49,214.93. Petitioner included an installment payment of \$750.00 toward the unpaid income tax liabilities with her submission of the offer in compromise.

9. In support of her position, petitioner's representative filed an affirmation in opposition to the motion for summary determination. According to the affirmation, after her offer in compromise was pending for more than seven months, petitioner was advised that her offer had been assigned a settlement officer for review and evaluation. On June 4, 2014, the day after petitioner filed her offer in compromise, DMV issued an order of suspension or revocation advising her that her driver's license will be suspended effective June 18, 2014 because of the tax debt. On June 14, 2014, petitioner was advised that this suspension of her driver's license had been rescinded as of June 11, 2014. As of the date of the affirmation (January 21, 2015), the Division had not rejected the offer in compromise or returned any payment made under the proposed offer.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

Preliminarily, the Administrative Law Judge determined that, as the Division of Tax

³ The suspension notice identifies a child support exemption and a commercial driver's license exemption, neither of which are relevant here.

Appeals had subject matter jurisdiction over the petition, the Division's summary determination motion was the proper means by which to consider the Division's arguments in this matter.

Consistent with this finding, the Administrative Law Judge also determined that the Division's motion to dismiss was improperly brought.

The Administrative Law Judge explained that Tax Law § 171-v provides for the enforcement of past-due tax liabilities through the suspension of driver's licenses. He noted that the Division must provide notice to a taxpayer of his or her inclusion in the license suspension program no later than 60 days prior to the date the Division intends to refer the taxpayer to DMV for action (Tax Law § 171-v [3]). He noted further that the liability set forth in the consolidated statement of tax liabilities issued to petitioner met the threshold requirement for suspension of a driver's license pursuant to Tax Law § 171-v (1).

The Administrative Law Judge rejected petitioner's contention that the Division should not have proceeded with the suspension of her license while her offer in compromise was pending. The Administrative Law Judge noted that, pursuant to Tax Law § 171-v (3) (b), a taxpayer could avoid a proposed license suspension by either fully satisfying the liabilities or by making payment arrangements satisfactory to the Commissioner. He reasoned that, as the Commissioner had not acted on petitioner's offer in compromise, there were no payment arrangements in place that were satisfactory to the Commissioner. Hence, Tax Law § 171-v (3) (b) provided no relief to petitioner.

The Administrative Law Judge also explained that petitioner's right to challenge the notice of proposed driver's license suspension was limited to the specific grounds listed in Tax Law § 171-v (5). He determined that petitioner's personal health problems and difficult financial

situation did not provide a basis to grant the petition because neither of these circumstances fall within the grounds listed in Tax Law § 171-v (5).

Accordingly, the Administrative Law Judge granted the Division's motion for summary determination and denied the petition.

SUMMARY OF ARGUMENTS ON EXCEPTION

On exception, petitioner contends that, by providing that a taxpayer may avoid a driver's license suspension by making payment arrangements satisfactory to the Commissioner, the statute presumes that taxpayers will be afforded due process of law in establishing such payment arrangements. Petitioner asserts that the absence of any such due process would allow the Division to deprive taxpayers of the right to a driver's license in its sole discretion and without recourse if the Division arbitrarily or unreasonably declines to enter into a payment arrangement. Petitioner contends that this is precisely what has occurred in the present matter.

Specifically, petitioner contends that she has made a good faith effort to establish a payment arrangement satisfactory to the Commissioner by the filing of her offer in compromise. According to petitioner, however, the Division failed to properly consider her proposed payment arrangement and thus failed to provide her with a meaningful and fair opportunity to enter into such an arrangement. Petitioner asserts that, in considering whether to enter into such a payment arrangement, the Division must examine a taxpayer's assets and also the impact that a license suspension will have on the taxpayer and his or her family. Petitioner contends that, if the statute does not allow for due process as described above, then it is unconstitutional. Petitioner also contends that, by allowing the Division to make a suspension referral without affording a taxpayer a meaningful opportunity to enter into a payment arrangement, the determination

effectively permits the Commissioner to enhance his bargaining position in negotiating offers in compromise, and to punish individuals who lack the means to pay their taxes.

Petitioner argues that Tax Law § 171-v (3) (b), which expressly provides that a taxpayer may avoid a license suspension by making payment arrangements satisfactory to the Commissioner, implies that the Commissioner must provide taxpayers with a meaningful and fair procedure for entering into such arrangements and that all such applications will be considered in a reasonable, fair and just manner. Petitioner asserts that the Division has not shown that petitioner's offer in compromise application was given any such consideration and that petitioner has thus been deprived of due process in the suspension of her driver's license. Petitioner further notes that due process applies to the deprivation of a driver's license by the State. She argues that the proposed application of Tax Law § 171-v in the present matter is constitutionally deficient because it fails to provide petitioner with an opportunity to be heard with respect to the Commissioner's failure to accept her offer in compromise.

Petitioner also argues that the Administrative Law Judge's interpretation of Tax Law § 171-v, i.e., permitting the rejection of her offer in compromise application without any procedural protections to ensure against an erroneous or arbitrary deprivation, renders substantial hardship on petitioner and deprives her of property without due process.

The Division asserts that the Administrative Law Judge correctly determined that there were no payment arrangements in place that were satisfactory to the Commissioner as required under the statute. Further, as petitioner has not asserted any of the specific grounds for relief from suspension set forth in the statute, the Division contends that the Administrative Law Judge properly granted the motion and denied the petition.

The Division asserts that an application for an offer in compromise without acceptance by the Commissioner does not constitute a payment arrangement satisfactory to the Commissioner. The Division contends that Tax Law § 171-v requires that any payment arrangement must be accepted by the Commissioner.

The Division notes that an offer in compromise seeks a reduction in liability and contends that the acceptance or rejection of such an offer is strictly within the discretion of the Commissioner. The Division asserts that the Division of Tax Appeals lacks jurisdiction to consider whether the rejection of an offer in compromise was reasonable.

The Division also argues that petitioner's claim that her due process rights have been violated should be rejected. To the contrary, the Division asserts that petitioner received notice and an opportunity to be heard with respect to the suspension notice.

OPINION

Procedurally, we agree with the conclusion of the Administrative Law Judge that the Division's motion to dismiss is not the proper vehicle for reaching a resolution of this matter and, accordingly, we decide the Division's alternative motion for summary determination. Such a motion may be granted:

“if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party” (20 NYCRR 3000.9 [b] [1]).

As we previously noted in *Matter of United Water New York*:

“Inasmuch as summary judgment is the procedural equivalent of a trial, it should be denied if there is any doubt as to the existence of a triable issue or where the material issue of fact is ‘arguable’ (*Glick & Dolleck v. Tri-Pac Export Corp.*, 22 NY2d 439 [1968]). If material facts are in dispute, or if contrary inferences may be reasonably drawn from undisputed facts, then a full trial is warranted and the

case should not be decided on a motion (*see Gerard v. Inglese*, 11 AD2d 381 [1960]). Upon such a motion, it is not for the court ‘to resolve issues of fact or determine matters of credibility but merely to determine whether such issues exist’ (*Daliendo v. Johnson*, 147 AD2d 312 [1989]) (*Matter of United Water New York, Inc.*, Tax Appeals Tribunal, April 1, 2004).”

In determining a motion for summary determination, the evidence must be viewed in a manner most favorable to the party opposing the motion (*see Rizk v Cohen*, 73 NY2d 98, 103 [1989]); *Museums at Stony Brook v Village of Patchogue Fire Dept.*, 146 AD2d 572 [1989], 573-74 [1989]; *see also Weiss v Garfield*, 21 AD2d 156, 158 [1964]). However, “[u]nsubstantiated allegations or assertions are insufficient to raise an issue of fact” (*Matter of Azzato*, Tax Appeals Tribunal, May 19, 2011, *citing Alvord & Swift v Muller Constr. Co.*, 46 NY2d 276 [1978]).

Tax Law § 171-v (1), which became effective March 28, 2013, authorizes “a program to improve tax collection through the suspension of drivers’ licenses of taxpayers with past-due tax liabilities equal to or in excess of ten thousand dollars.” Tax liabilities are defined to include penalties and interest due on any tax amounts (Tax Law § 171-v [1]). The phrase “past-due tax liabilities” is specifically defined as “any tax liability or liabilities which have become fixed and final such that the taxpayer no longer has any right to administrative or judicial review” (Tax Law § 171-v [1]).

There is no dispute in the present matter that the tax, penalty and interest listed in the consolidated statement of tax liabilities as subject to collection action were past-due tax liabilities in excess of the \$10,000.00 threshold. Petitioner’s driver’s license was therefore subject to suspension pursuant to Tax Law § 171-v.

Tax Law § 171-v (3) requires the Division to notify a taxpayer that he or she is going to

be included in the driver's license suspension program by first class mail to the taxpayer's last known address no later than 60 days prior to the Division informing DMV of the taxpayer's inclusion. Tax Law § 171-v (3) also requires that the notification include: a clear statement of the past due tax liabilities, together with notice that the taxpayer's information will be provided to DMV 60 days after the mailing of the notice; a statement that the taxpayer can avoid license suspension by paying the debt or entering into a payment agreement acceptable to the Division and information as to how the taxpayer can go about this; a statement that a taxpayer can only protest the 60-day notice based upon the issues set forth in Tax Law § 171-v (5); and a statement that the suspension will remain in effect until the fixed and final liabilities are paid or the taxpayer and the Division agree to a payment arrangement (Tax Law § 171-v [3] [a] through [d]).

As evidenced by the suspension notice and the consolidated statement of tax liabilities, the Division has shown that all of the notice requirements of Tax Law § 171-v (3) have been met with respect to the notice of proposed driver's license referral issued in this matter.

Tax Law § 171-v (5), referenced above, limits the grounds upon which a taxpayer may protest a notice of suspension as follows:

“Notwithstanding any other provision of law, and except as specifically provided herein, the taxpayer shall have no right to commence a court action or proceeding or to any other legal recourse against the department or the department of motor vehicles regarding a notice issued by the department pursuant to this section and the referral by the department of any taxpayer with past-due tax liabilities to the department of motor vehicles pursuant to this section for the purpose of suspending the taxpayer's driver's license. A taxpayer may only challenge such suspension or referral on the grounds that (i) the individual to whom the notice was provided is not the taxpayer at issue; (ii) the past-due tax liabilities were satisfied; (iii) the taxpayer's wages are being garnished by the department for the payment of the past-due tax liabilities at issue or for past-due child support or combined child and spousal support arrears; (iv) the taxpayer's wages are being garnished for the payment of past-due child support or combined child and spousal support arrears pursuant to an income execution issued pursuant to section

five thousand two hundred forty-one of the civil practice law and rules; (v) the taxpayer's driver's license is a commercial driver's license as defined in section five hundred one-a of the vehicle and traffic law; or (vi) the department incorrectly found that the taxpayer has failed to comply with the terms of a payment arrangement made with the commissioner more than once within a twelve month period for purposes of subdivision three of this section."

Before addressing petitioner's arguments on exception, we note our agreement with the Administrative Law Judge's conclusion that a proposed offer in compromise, without an acceptance by the Division, does not satisfy the statutory requirement of "making payment arrangements satisfactory to the commissioner" to avoid a driver's license suspension (*see* Tax Law § 171-v [3] [b]).

Petitioner's arguments on exception are premised on her contention that the Division unreasonably failed to accept her proposed offer in compromise and that she must be given a meaningful opportunity to be heard with respect to the Division's action. Contrary to this contention, however, Tax Law § 171-v does not provide a process by which a taxpayer may challenge a decision by the Commissioner to reject an offer in compromise or a proposed payment arrangement. Tax Law § 171-v (5), quoted above, emphatically provides that a suspension notice may be challenged only upon the specific grounds listed in that subdivision. Plainly, none of the grounds so listed deal with the reasonableness of the Commissioner's decision to reject an offer in compromise. Furthermore, an offer in compromise of a fixed and final liability, such as petitioner's offer, is a collection activity of the Division of Taxation (*see* Tax Law § 171 [Fifteenth]; 20 NYCRR 5005.1). The Division of Tax Appeals generally lacks authority to review such an activity (*see Matter of Pavlak*, Tax Appeals Tribunal, February 12, 1998; *see also Matter of Williams*, Tax Appeals Tribunal, September 1, 1994 [Tax Appeals Tribunal "lacks statutory authority to accept or even consider" an offer in compromise]).

As we recently commented, Tax Law § 171-v is a unique tax collection statute because it involves the suspension of a taxpayer's driver's license (*see Matter of Balkin*, Tax Appeals Tribunal, February 10, 2016). As we noted in *Balkin*, a taxpayer has a property right in his or her license that would normally give rise to the due process protections of notice and a right to be heard if the State attempts to suspend that license (*see Bell v Burson*, 402 US 535, 539 [1971] [driver's licenses are important interests to the licensees because once issued, they may become essential to the "pursuit of a livelihood"]). As we also noted in *Balkin*, however, a taxpayer whose license has been suspended pursuant to Tax Law § 171-v is eligible for a restricted use driver's license (*see* Vehicle and Traffic Law § 510 [4-f] [5] [a person whose license has been suspended for failure to pay past-due tax liabilities may apply for the issuance of a restricted use licence] and Vehicle and Traffic Law § 530 [5-b] [implying that a restricted use license cannot be denied to a person whose license has been suspended for failure to pay past-due tax liabilities]). Pursuant to Vehicle and Traffic Law § 530 (1), a restricted use license may be issued if such a license is necessary for certain employment or education reasons for the person whose driver's license has been suspended, or as required for medical treatment for that person or member of his or her household. As we found in *Balkin*, these Vehicle and Traffic Law provisions preserve petitioner's right to drive for reasons of employment, education or medical treatment, and thereby ameliorate the necessity for petitioner to be provided with notice and an opportunity to be heard with respect to a denial of an offer in compromise in the context of a license suspension pursuant to Tax Law § 171-v.

Accordingly, we reject petitioner's argument that Tax Law § 171-v as applied to her in the present matter violates her right to due process. To the extent that petitioner argues that Tax

Law § 171-v is unconstitutional on its face, we decline to address this issue as it is not within our jurisdiction (*Matter of Balkin*).

Finally, we note that documents submitted with petitioner's brief on exception have not been included in the record and have not been considered in the rendering of this decision.⁴ This Tribunal has consistently held that we will not consider evidence offered with an exception if such evidence was not part of the record before the Administrative Law Judge (*see e.g. Matter of Richard Dean*, Tax Appeals Tribunal, April 16, 2013).

Accordingly it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Mary E. Jacobi is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Mary E. Jacobi is denied; and,
4. The notice of proposed driver license suspension referral, dated August 2, 2013, is sustained.

DATED: Albany, New York
May 12, 2016

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

/s/ Charles H. Nesbitt
Charles H. Nesbitt
Commissioner

/s/ James H. Tully, Jr.
James H. Tully, Jr.
Commissioner

⁴ One of the documents so submitted by petitioner is a letter dated January 26, 2015 by which the Division denied petitioner's offer in compromise. We note that, even if this document had been included in the record, it would have had no impact on our decision.