Decision No. C03-1344

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 02F-505CP

DAVID J. ARCHULETA AND KEITH L. NIETERT,

COMPLAINANTS,

V.

BROADMOOR HOTEL, INC. D/B/A BROADMOOR HOTEL GARAGE,

RESPONDENT.

ORDER PARTIALLY GRANTING EXCEPTIONS

Mailed Date: December 2, 2003
Adopted Date: November 5, 2003

I. BY THE COMMISSION

A. Statement

1. This matter comes before the Commission for consideration of Respondent Broadmoor Hotel, Inc.'s (Broadmoor) Exceptions to Administrative Law Judge (ALJ) Decision No. R03-1035 (Recommended Decision), which were filed on October 1, 2003. The Broadmoor advances four arguments: (1) due to inadequate notice in the complaint, the Recommended Decision imposes civil penalties in violation of the Broadmoor's due process rights; (2) the Recommended Decision attempts to impose fines upon the Broadmoor even though the Complainants David J. Archuleta and Keith L. Nietert abandoned their request for fines; (3) the ALJ's Recommended Decision constitutes an improper collateral attack on Decision No. R02-216 which imposed no civil penalties; and (4) the civil penalties imposed should be stricken or reduced because the purposes of civil penalties are not furthered in this case.

2. Complainants Archuleta and Nietert (representing themselves) filed a response to the Exceptions. Now, being duly advised in the matter, we grant in part, and deny in part the Broadmoor's Exceptions.

II. BACKGROUND

3. The original complaint was filed with the Commission on September 17, 2002, under Docket No. 01A-532CP, which had been opened to consider a Broadmoor application to lease two certificates of public convenience and necessity (CPCNs) to Ramblin' Express, Inc. (Ramblin' Express). (The ALJ issued Decision No. R02-216 which approved the transfer of the two CPCNs save for the dormant portions of those authorities.) The complaint was then provided its own docket number, 02F-505CP.

4. The Commission issued its Order to Satisfy or Answer to Respondent Broadmoor, and fixed a hearing date of November 6, 2002. In response to Respondent's Motion for Continuance of Hearing filed on September 25, 2002, in Decision No. R02-1174-I, the ALJ reset the hearing for December 13, 2002. On September 30, 2002 Respondent filed a Motion to Dismiss the Complaint. This was denied on November 18, 2002, and a new hearing date was set for January 28 and 29, 2003. The hearing was held on schedule, and the ALJ issued Recommended Decision No. R03-1035, effective on September 11, 2003. The Broadmoor then filed the Exceptions currently before the Commission.

III. ALJ'S FINDINGS OF FACT

5. The ALJ made numerous findings of fact, and those will be reviewed here, to the extent they are relevant to the Exceptions.

6. Respondent Broadmoor holds two CPCNs issued by the Commission: PUC No. 275 and PUC No. 9909. CPCN PUC No. 275 has been in effect for decades and was most recently amended in April 2001. It contains three parts and authorizes:

I. Transportation in sightseeing service of

passengers

between all points within Colorado Springs, Colorado, and between said points, on the one hand, and all points within the Pikes Peak region, on the other hand.

II. Transportation in call-and-demand limousine service of

passengers and their baggage

between all points within Colorado Springs, Colorado, and between said points, on the one hand, and all points within the State of Colorado, on the other hand.

III. Transportation of

passengers and their baggage in scheduled service

between the Broadmoor Hotel, 10 Lake Street, Colorado Springs, Colorado 89096, on the one hand, and points within Colorado Springs, Colorado, on the other hand.

RESTRICTIONS: This Certificate is restricted as follows:

A. Item (I) is restricted against the use of vehicles with a passenger capacity of 32 or more.

B. Item (I) is restricted to providing sightseeing service which originates and terminates at the same point, except when providing sightseeing service between Colorado Springs, Colorado, and the Summit of Pikes Peak, in which case one-way service may be provided from Colorado Springs, Colorado, to the Summit of Pikes Peak or from the Summit of Pikes Peak to Colorado Springs, Colorado.

C. Item (III) is restricted to providing service only for employees of the Broadmoor Hotel.

7. A 2001 amendment to CPCN PUC No. 275 added Part III, which is referred to as the Employee Shuttle. To effectuate Part III, the Broadmoor filed a tariff (Exhibit 11) and a Passenger Time Schedule (Exhibit 12), both of which were effective on June 9, 2001. The

Employee Shuttle operated on a schedule, seven days per week from 4:14 a.m. until 2:15 a.m. Ramblin' Express subsequently received Commission approval to discontinue the Employee Shuttle.

8. CPCN PUC No. 9909 has been in effect since February 1975. It contains one part and authorizes:

> Transportation - in Charter Bus Service - of
>
> passengers & their baggage
>
> between Colorado Springs, Colorado & a fifteen (15) mile radius thereof & Frisco, Colorado, & that portion of a fifteen (15) mile radius thereof lying south of U.S. Highway No. 6, over the following-described route: U.S. Highway No. 24 from Colorado Springs to Hartsel, Colorado; thence over Colorado Highway No. 9 to its juncture with U.S. Highway No. 6; thence over U.S. Highway [No.] 6 to Frisco serving all intermediate points.

9. There is no evidence that the Commission has issued a civil penalty against the Broadmoor with respect to, or has otherwise taken action against, CPCN PUC No. 275 or CPCN PUC No. 9909 for violation of either a statutory provision or a Commission rule.

10. Prior to January 1, 2002, the Broadmoor operated both its authorities. Within its Transportation Department, also known as the Broadmoor Garage and the Broadmoor Transportation Department, Respondent employed office personnel, repair personnel, and 20 to 30 drivers. To provide the authorized services, the Broadmoor owned and operated 30 to 40 vehicles, including buses, Cadillac sedans, and people movers.

11. On occasion, when necessary to meet requests for service, the Broadmoor contracted (or "farmed out") work to other providers of transportation services. One of these providers was Monument Limousine Service, LLC; another was Ramblin' Express.

12. In the fall of 2001, the Broadmoor signed an agreement to lease both CPCN PUC No. 275 and CPCN PUC No. 9909, in their entirety, to Ramblin' Express. The lease was for a period of two years and contained a provision that the lease would not be effective until approved by the Commission.

13. To obtain the necessary Commission approval, Respondent and Ramblin' Express filed an application for authority for the Hotel to lease CPCN PUC No. 275 and PUC No. 9909 to Ramblin' Express. *See* Docket No. 01A-532CP (the lease proceeding). The Commission gave public notice of the lease proceeding on November 19, 2001.

14. In the instant proceeding, the ALJ found it uncontested that the Broadmoor:

> voluntarily suspended operation of the Employee Shuttle without first filing an application and obtaining Commission authorization to suspend that operation, prior to the decision in the lease proceeding, granting the requested leases. The Hotel altered, changed, and diminished the Employee Shuttle, Part III of CPCN PUC No. 275, without Commission Authorization. When it suspended operation of the Employee Shuttle, Respondent violated the cited Commission rules.

Recommended Decision, p. 22.

15. The ALJ found that in regards to the Employee Shuttle, the Broadmoor violated Commission rules for a period of 83 days, or the time from when the Broadmoor stopped operating the Employee Shuttle (Part II of CPCN PUC No. 275), until the transfer of authority to Ramblin' Express was completed. Recommended Decision, p.22.

16. The ALJ also found that the Broadmoor had no history of violations of Commission rules, and that the Broadmoor took action to mitigate the impact of cessation of the Employee Shuttle on those the shuttle was designed to serve. Recommended Decision, p. 25. The ALJ determined, however, that on February 7, 2002, the Respondent testified that it knew its

suspension of the Employee Shuttle was in violation of Commission rules, and that it "would restart all of its authorized transportation services on February 8, 2002. The fact that, insofar as the Employee Shuttle is concerned, this did not occur - even after the Broadmoor knew that its actions violated the law and even after Mr. Flood's specific promise weighs heavily in aggravation of the penalty amount." Recommended Decision, p. 26.

17. With respect to the suspensions of service under the call-and-demand limousine portion, Part II, of CPCN PUC No. 275, the ALJ found no aggravating factors, no history of prior violations of Commission rules, and that the Broadmoor restarted its operations when it learned it was in violation of Commission rules. These were deemed mitigating factors.

18. In calculating penalties for violations relating to the Employee Shuttle, the ALJ recognized the maximum penalty of $400 per day for each violation but did not assess the highest amount allowed. Rather, for the period between January 7, 2002, through and including February 7, 2002, the ALJ found $150 per day to be appropriate. From the period between February 8, 2002 through March 31, 2002, the ALJ assessed $300 per day because at that point the violation was intentional, the Broadmoor having promised to restart service. Recommended Decision, pp. 25-26. With respect to violations relating to Part II of CPCN PUC No. 275, the ALJ found $150 per day to be appropriate. Recommended Decision, p. 27. The ALJ issued total civil penalties of $19,950 and $1,050 for unauthorized suspensions of operation of the Employee Shuttle and Part II of CPCN PUC No. 275, respectively. The ALJ also found that the Complainants had failed to meet their burden of proof with respect to all other claims.

IV. DISCUSSION

1. The Broadmoor's Due Process Argument.

19. Due process requirements include notice and an opportunity to be heard. *SL Group LLC v. Go West Industries, Inc*., 42 P.3d 640 (Colo. 2002), *Mathews v. Eldridge*, 96 S.Ct. 893 (1976); *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950). "(D)ue process is flexible and calls for such procedural protections as the particular situation demands." *Mathews v. Eldridge at 902, supra,* quoting *Morrissey v. Brewer,* 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484 (1972). "[A]s long as a party to an administrative proceeding is reasonably apprised of the issues in controversy, and is not misled, the notice is sufficient*." Long v. Board of Governor of the Federal Reserve System,* 117 F.3d 1145, 1158 (10th Cir. 1997), quoting *Savina Home Indus., Inc. v. Secretary of Labor,* 594 F.2d 1358, 1365 (10th Cir. 1979). As noted by the Broadmoor, the complaint presents allegations that service was discontinued without Commission approval, in violation of Commission rules, and also puts the Respondent on notice of potential penalties.

20. "Moreover, there is no infringement of due process rights unless a party has been prejudiced by the procedure to which he objects." *Electric Power Research Institute, Inc. v. City and County of Denver,* 737 P.2d 822, 828 (Colo. 1987). "It is axiomatic that a party's due process rights are not infringed unless he has been prejudiced by the administrative procedures to which he objects." *Ricci v. Davis,* 627 P.2d 1111, 1122 (Colo. 1981). The 10th Circuit has also held that to establish a due process violation, "an individual must show he or she has sustained prejudice as a result of the allegedly insufficient notice." *Long* at 1158; *see also Rapp v. United States Department of Treasury,* 52 F.3d 1510, 1519 (10th Cir. 1995).

21. Initially, the Broadmoor attacks the complaint as failing to provide Respondent with due process of law, because the Complaint provides insufficient notice of the charges facing Respondent. The Broadmoor believes that Complainants failed to meet the notice standards set forth in § 40-6-108, C.R.S., which states that complaints must be:

> in writing, setting forth any act or thing done or omitted to be done by any public utility, including any rule, regulation, or charge heretofore established or fixed by or for any public utility, in violation, or claimed to be in violation, of any provision of law or of any order or rule of the commission.

22. Respondent does not believe the complaint sets forth a rule, regulation, or charge, and thus provides inadequate notice. While we do believe the *pro* se complaint is inartfully pled, the complaint does state that the Broadmoor ceased operating portions of their CPCNs without Commission approval. In addition, 4 *Code of Colorado Regulations* (CCR) 723-1-61(a) requires notice pleading: A complaint must state "sufficient facts and information to adequately advise the respondent public utility and the Commission of how any law, order, Commission rule, or public utility tariff has been violated." This standard does not require a perfect complaint, or even a well-crafted complaint. Nor does it require a recitation of every rule violated. The complaint in this case, not crafted by attorneys, contained enough information to advise the Broadmoor of the violations at issue. Further, an examination of the record shows that the Broadmoor was not only given an opportunity to defend itself, but also understood the possible violations implicated in this docket.

23. The Summation and Exceptions filed by Respondent concede that adequate notice was provided:

> After one sorts out the employment law related assertions, the Complaint alleges three claims directed to the Commission's authority over regulated passenger carriers:
>
> (1) The Complaint alleges that Broadmoor failed to request temporary Commission approval before ceasing operations under its Certificate No. 275 prior to the approval by the Commission of the lease to Ramblin' in violation of Rule 4 CCR 723-31-40.1 (Complaint, page 3). (Summation, pages 3-4, Exceptions, page 5). …

24. Respondent cites *Weston v. Cassata*, 37 P.3d 469 (Colo. App. 2001), for the proposition that if a statute or regulation sets forth notice requirements, including citations to rules or statutes, those must be included in the complaint. That case concerns different facts and issues than the current one. *Weston v. Cassata* concerned agency revocation of statutorily created property rights, and the notice required to revoke those rights. Agency rules in *Cassata* set forth a list of items to be included in an agency notice of revocation, whereas the issue here concerns a complaint filed by a person against a utility, and the notice required for that complaint. Section 40-6-108, C.R.S., only requires notice pleading for a complaint, including facts that set forth a charge.

25. Significantly, the Broadmoor has not demonstrated that it was at all prejudiced. It merely alleges it did not receive adequate notice allowing it a "meaningful opportunity to be heard in defense of the complaint." It does not assert how it would have proceeded differently with more substantial notice. It had the full benefits of the adversarial system, including the right to discovery and cross-examination. An administrative hearing is a sufficiently "meaningful opportunity" to defend the complaint in this case.

26. We also note that there are procedural methods that the Broadmoor could have employed to clarify the contents of the complaint if it felt insufficiently informed. In addition, the hearing was rescheduled from November until January, which allowed more than adequate time to perform discovery and learn more about the complaint.

2. The Recommended Decision Attempts to Impose Fines Upon the Broadmoor Even though the Complainants Abandoned their Request for Fines

27. Respondent asserts that Complainants "abandoned" their request for civil penalties because they failed to mention penalties in their summation, rendering the ALJ's decision to grant penalties inappropriate. However, Respondent cites no authority for the proposition that failure to address claims in a summation should lead to dismissal of those claims, notwithstanding presentation of evidence on those claims.

28. Summations are a place for a summary of the facts elicited during the proceedings, and a place to argue the importance of those facts. If a particular point is not made in summation, the trier of fact may place little importance on those facts. A claim may be dismissed after introduction of evidence only upon a showing that the evidence introduced cannot as a matter of law support the claim. *See Huntoon v. TCI Cablevision of Colorado, Inc.,* 969 P.2d 681 (Colo. 1998). The Commission's findings of fact may not be set aside if they are supported by substantial evidence in the record. *See Ace West Trucking, Inc. v. Public Utils. Comm'n,* 788 P.2d 755, 762 (Colo. 1990). Substantial evidence means a sufficient amount of evidence to support a conclusion, or to survive a directed verdict if the facts were tried to a jury. *Id.*

29. On pages 5 through 7 of the summation, Complainants do discuss facts related to the claims for which penalties were granted, cessation of service without Commission approval.

More importantly, facts were developed during the hearing which support the results reached by the ALJ in the recommended decision. The ALJ found it uncontested that the Broadmoor stopped service without Commission approval. The Broadmoor has not demonstrated that the facts are insufficient to support the claims in this case, thus Respondent's argument alleging "abandonment" must fail.

3. The ALJ's Recommended Decision Constitutes an Improper Collateral Attack on Decision No. R02-216

30. Respondents assert that the ALJ's Recommended Decision is an improper collateral attack on Decision No. R02-216. We disagree. The proceeding in that case was to determine if a lease transfer of the CPCNs at issue from the Broadmoor to Ramblin' Express, was appropriate. Complainants have stated that they do not seek in any way to overturn the decision granting the lease transfer.

31. The doctrine of collateral estoppel "is a judicially created doctrine that bars relitigation of an issue that has been finally decided by a court in a prior action." *Sunny Acres Villa, Inc. v. Cooper*, 25 P.3d 44, 47 (Colo. 2001). The purpose is to prevent wasteful, repetitive, and annoying litigation. *Id.* The doctrine bars relitigation if four criteria are met:

(1) the issue sought to be precluded is identical to an issue actually determined in the prior proceeding;

(2) the party against whom estoppel is asserted has been a party to or is in privity with a party to the prior proceeding;

(3) there is a final judgment on the merits in the prior proceeding; and

(4) the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior proceeding.

Id.

32. First, the issues here are not identical to issues actually determined in the prior proceeding on lease transfer of the CPCNs. The ALJ in the lease proceedings did not even address whether civil penalties could be imposed let alone hold hearings on the cessation of transportation service.

33. Second, the parties in this case are not identical, and are not in privity with those in the first case. Although the Complainants were aware of the lease proceedings, they had no interest, contractual or otherwise, in the CPCNs, or in whether the leases were approved.

34. While there was a final judgment on the merits in the lease proceeding, the Complainants in this case, against whom the estoppel doctrine is being used, did not have a chance to litigate the issues in the prior case. The Complainants were not parties to the prior case, and intervention most likely would have been denied given that the hearing concerned leases of the CPCNs, about which Complainants have no interest.

35. Because the four prongs of the collateral estoppel test are not met by the Broadmoor, their assertion of the doctrine of collateral estoppel fails.

4. The Fines Imposed Should be Reduced Because the Purposes of Civil Penalties are Not Met

36. Respondents cite *Archibold v. Public Utilities Comm's of State of Colorado,* 58 P.3d 1031, 1036 (Colo. 2002) for the idea that "[c]ivil penalties are meant to punish a perpetrator, to deter future unlawful acts, and to protect the public interest by shifting costs from the public to the perpetrator; civil penalties do not reimburse consumers for overpayment or make them whole for injuries received." The Broadmoor argues several points: there is nothing about the CPCNs and Broadmoor from which the public needs protection; there are no costs to shift to the Broadmoor; the civil penalties imposed by the ALJ have no deterrent effect because

Ramblin' Express operates Broadmoor's CPCNs; but for Complainant Archuleta's unnecessary, unauthorized, and unilateral addition of the Employee Shuttle to the CPCN, there would have been no litigation of issues surrounding the Employee Shuttle, and no violation of Commission rules; and that, because the Commission agreed to allow Ramblin' Express to suspend operation of the Employee Shuttle in Decision No. 02A-669CP-Suspension-Portion, ruling it not contrary to the public interest, the Broadmoor's suspension should be treated lightly, and as not against the public interest. We believe that the purposes of civil penalties are served by the imposition of penalties in this case, but that a reduction of the penalties imposed by the ALJ is warranted.

37. The Broadmoor does not address the notion that, per *Archibold v. PUC,* punishment is a valid purpose for civil penalties. In this case the ALJ found violations of Commission rules, intentional in part with respect to the Employee Shuttle, and imposed civil penalties. The cause of punishment is served by the imposition of some penalties. In addition, the public interest is protected by shifting costs from the public to the perpetrator; the civil penalties will offset the use of state resources in this docket.

38. A significant contributing factor to the ALJ's determination of penalties was the willful violation of Commission Rules 4 CCR 723-31-5.1 and 4 CCR 723-31-7.1. Testifying on behalf of the Broadmoor, Mr. Flood assured the ALJ that the Employee Shuttle would be restarted on February 8, 2002. It was not restarted, penalties were assessed, and because the Broadmoor was violating Commission rules intentionally, penalties were stiffer than they might have been.

39. Respondent argues that cessation of the Employee Shuttle should be treated as a technical violation that had no impact on the traveling public. The ALJ specifically noted that

there was no evidence that the suspension of service had any impact on Broadmoor employees, let alone the general public, and that the suspension occurred in January when few employees were present. Recommended Decision, p. 25. The ALJ also noted that the Broadmoor mitigated the impact of elimination of the Employee Shuttle.

40. Respondent urges the Commission to take into account that it has allowed Ramblin' Express to cease operations of the Employee Shuttle permanently.

41. We agree with the Broadmoor that the civil penalties imposed in the Recommended Decision are too severe. As the ALJ notes, the unauthorized cessation of service occurred during the winter, or off-season, when few guests and employees would be impacted, and in fact there is no evidence that cessation of the Employee Shuttle had any impact upon the employees, let alone the public. The Broadmoor also made efforts to mitigate the impact of cessation upon its employees. The Broadmoor is not in the business of providing the general public with transportation services, but rather provides them as a convenience to its guests. Further, it has no record of prior violations. We believe the purposes of civil penalties, namely punishment, deterrence, and protection of the public are served in this case by the imposition of lower penalties. We therefore reduce the ALJ imposed penalties to $25 per day for the "unintentional" violations with respect to call-and-demand service and the Employee Shuttle, and $100 per day for the intentional violations with respect to the Employee Shuttle.

42. Thus, for violations regarding the Employee Shuttle, for the period between January 7, 2002 through and including February 7, 2002, the penalty shall be $775. For the period between February 8, 2002, through and including March 31, 2002, when the violations were intentional, the penalty shall be $5,100. For violations in connection with call-and-demand

service, from February 1, 2002, through and including February 7, 2002, the penalty shall be $175. The total penalty shall be $6,050.

43. The reduction in penalties should not be read in any way to condone the actions of the Broadmoor in failing to restart the Employee Shuttle after it advised this Commission that it would do so. The Commission must be able to rely on representations made by regulated entities.

V. ORDER

A. The Commission Orders That:

1. The Exceptions filed by the Broadmoor Hotel, Inc., are partially granted as described above, and are otherwise denied

2. The Broadmoor Hotel, Inc., is assessed a civil penalty in the amount of $6,050 for its violations of Rule 4 *Code of Colorado Regulations* (CCR) 723-31-5.1 and Rule 4 CCR 723-31-7.1. Within ten days of the effective date of this Order, the Broadmoor Hotel, Inc., shall pay this amount to the Commission to be credited to the General Fund of the State of Colorado.

3. The 20-day time period provided by § 40-6-114(1), C.R.S., to file an application for rehearing, reargument, or reconsideration shall begin on the first day after the Commission mails or serves this Order.

4. This Order is effective on its Mailed Date.

B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING November 5, 2003.

(S E A L)

ATTEST: A TRUE COPY

Bruce N. Smith
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

GREGORY E. SOPKIN

POLLY PAGE

JIM DYER

Commissioners

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