

Decision No. R04-0135

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 03G-501EC

COLORADO PUBLIC UTILITIES COMMISSION,

COMPLAINANT,

V.

LARRY HOLLE D/B/A BUS EXPRESS,

RESPONDENT.

**RECOMMENDED DECISION OF
ADMINISTRATIVE LAW JUDGE
KEN F. KIRKPATRICK
ASSESSING CIVIL PENALTY**

Mailed Date: February 4, 2004

Appearances:

John Opeka for the Staff of the Commission; and

Larry Holle, Respondent, *Pro Se*.

I. STATEMENT

1. This proceeding was instituted by the issuance of Civil Penalty Assessment Notice (CPAN) No. 28370. The CPAN was issued on November 17, 2003, and a hearing on the alleged violations contained therein was held on February 3, 2004 at 9:00 a.m. in a Commission hearing room in Denver, Colorado. During the course of the hearing Exhibits 1 through 6 were identified, offered, and admitted into evidence. At the conclusion the hearing the matter was taken under advisement.

2. In accordance with § 40-6-109, C.R.S., the undersigned Administrative Law Judge now transmits to the Commission the record and exhibits in this proceeding along with a written recommended order.

II. FINDINGS OF FACT

3. John Opeka, a Safety and Compliance Officer for the Public Utilities Commission, performed a safety and compliance review on April 11, 2003 of the Respondent Larry Holle, doing business as Bus Express.¹ On that date Mr. Opeka communicated to the Respondent numerous areas where it was not in compliance with Commission rules and regulations. These included failing to have a drug and alcohol program in effect, failing to require drivers to furnish Respondent with an annual list of traffic violations, failing to require drivers to prepare a record of duty status, failure to maintain a record of testing of emergency exits on buses, and failure to keep a record of driver vehicle inspection reports. In addition, Mr. Opeka placed one vehicle out of service for having, among other things, an exhaust leak at a rear clamp. On June 2, 2003, the Commission received a certificate of correction from Respondent indicating that the violations were corrected.

4. Mr. Opeka arranged to perform a safety and compliance review follow-up on September 11, 2003. However, Mr. Opeka appeared at the appointed hour and Respondent did not. After several reschedulings the safety and compliance review was eventually set for November 14, 2003.

¹ Bus Express is registered with the Commission as a Children's Activity Bus provider under § 40-16-101(1.5), C.R.S..

5. On November 14, 2003, Mr. Opeka conducted the follow-up safety and compliance review. Mr. Opeka found that while some improvements have made, other violations had not been addressed. For example, some drug and alcohol testing was in place, but not company-wide. As a result Opeka issued CPAN No. 28370 for those violations that had not been corrected since the initial safety and compliance review.

6. Respondent contests violation no. 10, failure to repair defects noted on the initial compliance report. Respondent states that it did fix an exhaust leak which was at the angle of the exhaust pipe. However, it was subsequently broken, probably by a driver backing into something and jarring the exhaust pipe. Respondent also suggests that the exhaust leak was not at the rear clamp as alleged by Staff of the Commission (Staff), but rather further up the exhaust pipe and closer to the angle joint where the pipe goes up and over an axle.

7. As of November 12, 2003, Respondent had not provided educational materials explaining federal and company drug and alcohol procedures to drivers J. Park, M. Lard, and J. Petty.

8. As of November 12, 2003, Respondent had not required driver C. Austin to produce an annual list of traffic violations.

9. As of November 12, 2003, Respondent had not required drivers C. Austin and L. Holle to prepare a record of duty status.

10. As of November 12, 2003, Respondent had not maintained a record of tests conducted on emergency exits on unit #65.

11. As of November 12, 2003, Respondent had not required driver L. Holle to prepare a vehicle inspection report.

12. On September 11, 2003, and on three subsequent dates, Respondent did not make records available for inspection to the Commission, after being requested to do so by the Commission.

III. DISCUSSION

13. Respondent essentially admits violations 1 through 9. He suggests that he did provide some educational materials on the company's drug and alcohol policies but not to the drivers named. Respondent failed to produce the required list of traffic violations for the drivers named and the duty status for the drivers named. He also failed to maintain a record of emergency exit inspections and failed to prepare a vehicle inspection report on the days cited. For these violations, nos. 2 through 9 on CPAN No. 28370, the sought penalty is \$200 per violation. In mitigation the Respondent has demonstrated that he is attempting albeit somewhat slowly, to come into compliance and is indeed in partial compliance with some of the Commission's rules indicated for other drivers, but not for drivers as classified. Respondent is in the process of getting his drug and alcohol testing program up to speed and ensuring that drivers complete the required reports. Respondent has also hired only experienced drivers with no record of alcohol or drug problems. A factor in aggravation is that the Respondent was notified of these penalties or violations several months in advance and given an opportunity to correct but did not. Having considered these factors the Administrative Law Judge concludes that a penalty in the amount of \$150 per violation for these eight violations or a total of \$1,200 is appropriate.

14. Concerning violation no. 1, failure to make records available for inspection, there were no factors in mitigation put into the record. In aggravation, it is noted that the Respondent canceled at least four appointments with the Enforcement Staff. While the precise reason for canceling the appointments is not clear from the record, a reasonable inference could be drawn that they were canceled to avoid detection of violations. Therefore a penalty in the full amount of \$200 is assessed for violation no. 1.

15. Concerning violation no. 10, Staff has not proven this violation by a preponderance of the evidence. While it was true that the inspections noted exhaust leakage in similar locations at different times, there was other testimony that the location of the violation was not where it was alleged. In addition, there was testimony that the exhaust problem had been fixed but that it had reoccurred. On balance, the evidence is equally persuasive and therefore the violation is not proven.

16. Staff has established that the Respondent violated violations nos. 1 through 9 on CPAN No. 28370. A penalty in the amount of \$1,400 should be assessed as set forth above.

17. In accordance with § 40-6-109, C.R.S., it is recommended that the Commission enter the following order.

IV. ORDER

A. The Commission Orders That:

1. Respondent Larry Holle, doing business as Bus Express, is found to have violated Commission rules as set forth on lines 1 through 9 of Civil Penalty Assessment Notice No. 28370 and is assessed a civil penalty in the amount of \$1,400. Respondent shall pay the penalty within ten days of the effective date of this Order.

2. Staff of the Commission has failed to prove the alleged violation contained on line 10 of Civil Penalty Assessment Notice No. 28370 and that alleged violation is dismissed.

3. This Recommended Decision shall be effective on the day it becomes the Decision of the Commission, if that is the case, and is entered as of the date above.

4. As provided by § 40-6-109, C.R.S., copies of this Recommended Decision shall be served upon the parties, who may file exceptions to it.

a) If no exceptions are filed within 20 days after service or within any extended period of time authorized, or unless the decision is stayed by the Commission upon its own motion, the recommended decision shall become the decision of the Commission and subject to the provisions of § 40-6-114, C.R.S.

b) If a party seeks to amend, modify, annul, or reverse basic findings of fact in its exceptions, that party must request and pay for a transcript to be filed, or the parties may stipulate to portions of the transcript according to the procedure stated in § 40-6-113, C.R.S. If no transcript or stipulation is filed, the Commission is bound by the facts set out by the administrative law judge and the parties cannot challenge these facts. This will limit what the Commission can review if exceptions are filed.

5. If exceptions to this Decision are filed, they shall not exceed 30 pages in length, unless the Commission for good cause shown permits this limit to be exceeded.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

Administrative Law Judge