

Decision No. R04-0417

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 04G-118EC

COLORADO PUBLIC UTILITIES COMMISSION,

COMPLAINANT,

V.

ROBERT TURNER, DOING BUSINESS AS WE-FETCH,

RESPONDENT.

**RECOMMENDED DECISION OF
ADMINISTRATIVE LAW JUDGE
DALE E. ISLEY
DISMISSING CIVIL PENALTY ASSESSMENT
PROCEEDING, WITHOUT PREJUDICE**

Mailed Date: April 22, 2004

I. STATEMENT

1. This is a civil penalty assessment proceeding brought by the Staff of the Colorado Public Utilities Commission (Staff) against the Respondent, Robert Turner, doing business as We-Fetch (Turner).

2. In Civil Penalty Assessment Notice (CPAN) No. 28257 Staff alleges that Turner violated § 40-16-103, C.R.S., on January 15, 2004, by offering to provide services as a “property

carrier by motor vehicle” without first registering with the Commission.¹ *See*, Exhibit 4. The subject CPAN seeks imposition of a civil penalty in the amount of \$1,100.00.

3. The matter was set for hearing at the Commission’s offices in Denver, Colorado, on April 20, 2004, pursuant to an Order Setting Hearing and Notice of Hearing issued by the Commission on March 16, 2004.

4. The undersigned Administrative Law Judge called the matter for hearing at the assigned time and place. Staff appeared through Mr. John P. Opeka, a Commission Compliance Investigator. Turner did not appear at the hearing. During the course of the hearing, Exhibits 1 through 5 were identified, offered, and admitted into evidence. Testimony was received from Mr. Opeka in support of the allegations contained in CPAN No. 28257.

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

II. FINDINGS OF FACT

6. On or about July 23, 2003, Staff received complaints from two regulated passenger carriers that Turner was advertising, offering, and/or providing services as a property carrier by motor vehicle in and around Grand Junction, Colorado, without first registering with

¹ A “property carrier by motor vehicle” is defined by § 40-16-101(6.5), C.R.S., as a person who transports the property of others for compensation, in intrastate commerce, upon the public highways of this state by use of a motor vehicle; except that the term does not include a towing carrier as defined in § 40-13-101, C.R.S., or a mover as defined in § 40-14-102, C.R.S.

the Commission to do so. One of the complainants forwarded to Staff a copy of written material advertising Turner's services.² *See*, Exhibit 1.

7. The matter was assigned to Mr. Opeka for investigation. He reviewed the Commission's records and determined that Turner was not registered as a property carrier by motor vehicle. On July 28, 2003, he contacted Turner by telephone and inquired as to whether he was offering property carrier services. Turner acknowledged that he was. He also acknowledged that he had not registered with the Commission under § 40-16-103, C.R.S. Mr. Opeka then advised him of the registration requirements imposed by that statute as well as the registration process followed by the Commission. Mr. Opeka confirmed these requirements by correspondence directed to Turner that day. *See*, Exhibit 2. Mr. Opeka's correspondence included all necessary registration instructions and materials and was forwarded to Turner via certified mail, return receipt requested. *See*, Exhibit 3. The return receipt was returned to Staff on August 7, 2003. It acknowledged Turner's receipt of Mr. Opeka's correspondence on August 4, 2003.

8. Between August 2003 and January 2004 Mr. Opeka monitored the Commission's records and determined that Turner had yet to register as a property carrier by motor vehicle. He contacted Turner several times during this period to encourage him to do so. On one such occasion Turner stated that he had prepared and forwarded a registration application to the Commission. However, Mr. Opeka could find no evidence of the Commission's receipt of such an application.

² Mr. Opeka was also advised by others that Turner's services were advertised via television. In October and November of 2003 and in January of 2004 he also observed advertising similar to that contained in Exhibit 1 on park benches located in the Grand Junction area.

9. On January 21, 2004, Mr. Opeka called Turner and requested the transportation of documents from a point in Clifton, Colorado, to a point in Grand Junction, Colorado. The individual answering the call identified herself as a representative of “We-Fetch”, the trade name used by Turner in connection with the subject services. She offered to perform the requested services for a \$20.00 charge.

10. Shortly after the above-described call, Mr. Opeka again checked the Commission’s records to determine whether Turner had submitted the necessary registration application. After confirming that he had not, Mr. Opeka prepared CPAN No. 28257. However, he erroneously inserted January 15, 2004, instead of January 21, 2004, as the date Turner violated § 40-16-103, C.R.S. He also erroneously dated the CPAN January 20, 2004, one day prior to the day of his conversation with the Turner representative described above.

11. Mr. Opeka mailed CPAN No. 28257 to Turner via certified mail on January 26, 2004. The return receipt, acknowledging Turner’s receipt of the CPAN on February 3, 2003, was returned to Staff on February 5, 2004. *See*, Exhibit 5.

12. On February 5, 2005, Turner contacted Mr. Opeka to discuss the CPAN. Mr. Opeka agreed to dismiss it if Turner would complete the necessary registration requirements within 30 days. In February and early March Mr. Opeka had several additional conversations with Turner concerning this matter. In a conversation held on February 12, 2004, Turner again indicated that a registration application had been mailed to the Commission. However, Mr. Opeka could find no evidence of the Commission receiving it. In a conversation held on March 1, 2004, he requested that Turner forward a copy of the completed application via facsimile transmission. However, Turner failed to do so. On March 8, 2004, Mr. Opeka

attempted to contact Turner one additional time. However, he was unsuccessful in doing so and Turner failed to return the call. When these many efforts to secure Turner's registration as a property carrier failed, Mr. Opeka requested that the CPAN be set for hearing. As indicated above, the Commission did so on March 16, 2004.

III. DISCUSSION

13. Section 40-16-103, C.R.S., provides, in pertinent part, that "[N]o person may offer services pursuant to this article unless he is registered with the public utilities commission of this state." Property carriers by motor vehicle are subject to regulation to the extent provided in Article 16. *See*, § 40-16-102 (1), C.R.S. Notwithstanding their status as carriers exempt from regulation as public utilities, property carriers by motor vehicle offer services pursuant to Article 16 and are, therefore, subject to the registration requirement contained in § 40-16-103, C.R.S. Their failure to comply with this requirement subjects them to civil penalties of \$1,100.00 per day under § 40-7-113(1)(f), C.R.S. *See*, § 40-16-102(2), C.R.S., and § 40-7-112(1), C.R.S.

14. Commission enforcement personnel have authority to issue CPANs under § 40-7-116, C.R.S. That statute provides that the Commission has the burden of demonstrating a violation by a preponderance of the evidence.

15. As indicated above, Staff has alleged in CPAN No. 28257 that Turner violated § 40-16-103, C.R.S., on **January 15, 2004**. However, the factual basis underlying this CPAN is Turner's failure to be registered on **January 21, 2004**, the date he offered, through his representative, to provide services as a property carrier by motor vehicle to Mr. Opeka. While the evidence establishes that Turner was not registered with the Commission on January 15,

2004, there is insufficient evidence in the record to conclude that he actually offered to provide property carrier services on that day. Mr. Opeka admitted that he had no firsthand knowledge that Turner offered to directly provide such services on January 15, 2004. He was also unable to confirm that such an offer was made on that day through any direct observation of Turner's advertising. Accordingly, Staff has failed to prove the allegations contained in CPAN No. 28257 by a preponderance of the evidence.

16. In addition, § 40-7-116, C.R.S., provides that CPANs issued by the Commission must contain, among other things, the date of the CPAN. CPAN No. 28257 is dated January 20, 2004, one day prior to Mr. Opeka's January 21, 2004, conversation with Turner's representative. As a result, it does not comply with the technical requirements of § 40-7-116, C.R.S.

IV. CONCLUSIONS

17. Staff has not sustained its burden of proving the allegation contained in CPAN No. 28257 by a preponderance of the evidence as required by § 40-7-116, C.R.S.

18. CPAN No. 28257 is not in compliance with the requirements of § 40-7-116, C.R.S.

19. For these reasons, CPAN No. 28257 must be dismissed, without prejudice.³

V. ORDER

A. The Commission Orders That:

1. Civil Penalty Assessment Notice No. 28257 is dismissed, without prejudice.

³ Dismissal without prejudice allows the Staff to initiate a new civil penalty assessment proceeding against Turner on the basis of the same factual allegations set forth in CPAN No. 28257 by issuing a new, corrected CPAN.

2. 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.

3. 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.

4. 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