

Decision No. R04-1317

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO**

DOCKET NO. 04G-282CP

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COLORADO PUBLIC UTILITIES COMMISSION,

COMPLAINANT,

V.

FREEDOM CABS, INC.,

RESPONDENT.

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**RECOMMENDED DECISION OF  
ADMINISTRATIVE LAW JUDGE  
MANA L. JENNINGS-FADER  
ASSESSING CIVIL PENALTY**

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Mailed Date: November 8, 2004

Appearances:

John Roberts, Esq., Assistant Attorney General, for Staff of the  
Colorado Public Utilities Commission; and

Jerry Stevens, Esq., for Respondent Freedom Cabs, Inc.

**I. STATEMENT**

1. On June 2, 2004, Staff of the Public Utilities Commission (Staff) issued Civil Penalty Assessment Notice (CPAN) No. 28612 to Freedom Cabs, Inc. (Freedom or Respondent).

2. Staff alleges in the CPAN that Respondent committed 66 violations of Rule 4 *Code of Colorado Regulations* (CCR) 723-15-2.1, which incorporates certain federal transportation carrier safety regulations. Specifically, the allegations are that Respondent violated 49 *Code of Federal Regulations* (CFR) §§ 391.11(a), 391.11(b)(6), and 391.27; 49 CFR

§§ 391.25(a) and 391.25(c)(1); 49 CFR §§ 391.25(b) and 391.25(c)(2); 49 CFR § 395.8(a); and 49 CFR § 396.11(a).

3. On July 7, 2004, the Commission issued its Order Setting Hearing and Notice of Hearing. This Order established a hearing on August 20, 2004, in Denver, Colorado.

4. The hearing was held as scheduled on August 20, 2004. Testimony was received from Mr. Ted Barrett of the Commission's transportation safety staff and from Mr. Haine Michael Gebre Michael, President of Freedom Cabs. Exhibits No. 1 and No. 2 were marked for identification and admitted into evidence. At the conclusion of the hearing the matter was taken under advisement.

5. Pursuant to § 40-6-109, C.R.S., the record and exhibits of the proceeding together with a written recommended decision are transmitted to the Commission.

## **II. FINDINGS OF FACT, DISCUSSION, AND CONCLUSIONS OF LAW**

6. Respondent is a Colorado corporation. It holds PUC Authority No. 53638, a common carrier authority to provide taxi service.

7. Respondent does not challenge the Commission's jurisdiction, and the facts establish the Commission's jurisdiction in this proceeding. The Commission has subject matter jurisdiction over this case. In addition, the Commission has personal jurisdiction over Respondent, which acknowledged receipt of the CPAN when it was served by personal service. *See* Exhibit No. 2 at 4.

8. On June 2, 2004, Mr. Hoffman served Respondent with CPAN No. 28565, charging Respondent with violations of Rule 4 CCR 723-15-2.1 and, more specifically, of noncompliance with 49 CFR §§ 391.11(a), 391.11(b)(6), and 391.27 (10 counts); 49 CFR §§ 391.25(a) and 391.25(c)(1) (10 counts); 49 CFR §§ 391.25(b) and 391.25(c)(2) (10 counts);

49 CFR § 395.8(a) (25 counts); and 49 CFR § 369.11(a) (11 counts). Each of these 66 alleged violations carries a maximum civil penalty of \$200, for a total possible civil penalty of \$13,200. *See* Exhibit No. 2.

9. The violations charged by Staff in the CPAN are the result of a safety and compliance review and inspection performed by Staff member Ted Barrett on May 19, 2004. Based on his review of Respondent's records, Mr. Barrett found that, for the dates stated in the CPAN, Respondent did not have all the records which it was required to maintain (*see* Exhibit No. 2). The missing records are of five types: (a) records of violation (that is, an annual driver-submitted record self-reporting any traffic violations which occurred in the preceding year); (b) records of annual driving record inquiry (that is, a particular driver's motor vehicle record obtained annually by Respondent directly from the Division of Motor Vehicles); (c) records of annual review (that is, a supervisor's annual review with a driver of that driver's driving record); (d) records of driver duty status (that is, daily record of hours in service for a particular driver); and (e) records of driver vehicle inspection report (that is, a driver-completed record which is made each day a vehicle is used and which evidences that an inspection of a vehicle occurred before the vehicle was used to transport passengers). Mr. Barrett issued the instant CPAN citing Respondent for failing to have the required records.

10. Respondent did not dispute the alleged violations, did not offer testimony to refute Mr. Barrett's testimony concerning the alleged violations, and did not offer testimony to rebut Mr. Barrett's testimony concerning the alleged violations.

11. In this case Staff bears the burden of proof by a preponderance of the evidence. *See* Rule 4 CCR 723-1-82(a). Staff has met that burden of proof with respect to the alleged violations.

12. The Administrative Law Judge (ALJ) finds and concludes, on the basis of the un rebutted and unrefuted testimony of Mr. Barrett, that, as alleged in the CPAN, Respondent failed to maintain in its files the records required to be maintained by Rule 4 CCR 723-15-2.1 and, more specifically, by 49 CFR §§ 391.11(a), 391.11(b)(6), and 391.27; 49 CFR §§ 391.25(a) and 391.25(c)(1); 49 CFR §§ 391.25(b), and 391.25(c)(2); 49 CFR § 395.8(a); and 49 CFR § 369.11(a). The ALJ finds and concludes that Respondent violated Commission rules a total of 66 times.

13. Having found that Respondent violated the cited regulations, it is necessary to determine the amount of the civil penalty to be assessed for these violations. In the CPAN, Staff seeks a civil penalty of \$13,200.

14. Based on the record in this case, the ALJ finds and concludes that \$10,200 is the appropriate civil penalty amount to be assessed in this proceeding. In making this determination, the ALJ began with the maximum civil penalty for these violations (*i.e.*, \$13,200); considered Commission guidance provided in previous civil penalty case decisions; considered the purposes of civil penalties; considered the factors in aggravation; considered the factors in mitigation; and considered the range of civil penalty assessments found to be reasonable in other civil penalty cases.

15. As factors in aggravation the ALJ considered that the violations of 49 CFR §§ 395.8(a) and 396.11(a) (*see* Exhibit No. 2 at counts 31 through and including 66) were repeat violations in that in October 2002 Staff performed a compliance review of Respondent and found violations of the same two regulations. *See* Exhibit No. 1 (2002 CPAN). Thus, the 36 violations which occurred in 2004 were knowing. In addition, from the fact that the same record-keeping violations occurred in 2002 and again in 2004, it appears that Respondent did not implement

sufficient (if any) internal procedures to assure that required records were maintained. The ALJ finds that, notwithstanding the 2002 violations, Respondent did not take effective corrective action to guard against future record-keeping violations. Further, the ALJ took into consideration the fact that the Commission has adopted the safety rules and the record-keeping rules for the protection of the traveling public. It is necessary that passenger carriers adhere to these rules. Finally, the ALJ took into account the type and seriousness of the violations alleged, particularly the failure of Respondent to maintain the daily driver vehicle inspection reports. These inspection reports serve as early warning advisories, alerting the driver and Respondent to potential problems with a vehicle so that a potential problem can receive attention before that potential problem becomes an actual problem that endangers the public health and safety.

16. As factors in mitigation, the ALJ took into consideration the unrefuted and unrebutted testimony of Mr. Gebre Michael, President of Freedom. First, Lincoln General, the current insurance carrier for Respondent, requires an annual submission of a current Division of Motor Vehicles driving record for each of Respondent's drivers. It is the policy of this insurance carrier not to insure a driver who has accumulated more than five points in three years. For so long as Respondent maintains this insurance carrier and this insurance carrier maintains its present policy concerning accumulated points, this addresses (at least to some degree) the same driver safety issue as that addressed by the record-keeping requirements of 49 CFR §§ 391.11(a), 391.11(b)(6), and 391.27; 49 CFR §§ 391.25(a) and 391.25(c)(1); and 49 CFR §§ 391.25(b) and 391.25(c)(2). Second, there is some evidence that Respondent's record-keeping, while not yet in compliance with the Commission's regulations, may be improving. Mr. Gebre Michael testified that required record-keeping would receive increased attention at Freedom, and the ALJ gives Freedom the benefit of this statement.

17. In his testimony, Mr. Gebre Michael stated his concern that, with respect to record-keeping for some drivers, Freedom was charged with multiple separate violations for essentially the same conduct. Mr. Gebre Michael testified that, while he does not know the law, in his experience he has never seen someone penalized multiple times for the same conduct.

18. Mr. Gebre Michael's testimony was in reference to the fact that, for each of ten drivers, Respondent violated three separate rules by failing to maintain a record of violations, an annual driving record inquiry, and an annual review for each driver. *See* Exhibit No. 2 at counts 1 through and including 30. Respondent argues that it is unfair to penalize it three times for failure to maintain traffic infraction information about its drivers. At first glance, this does appear to be a total of 30 violations for failing to maintain essentially the same records concerning the driving record of a driver. Upon closer examination, however, it is clear that no duplication exists. Each of the violations is for a separate failure on Respondent's part: the first is for the failure to maintain records of a driver's self-reported traffic infractions; the second is for the failure to maintain a driver's current driving record obtained from the Division of Motor Vehicles; and the third is for failure to maintain records demonstrating that Respondent held an annual review (that is, a discussion) with each driver about that driver's driving record. Although the violations pertain to the same subject matter (*i.e.*, a driver's driving record), that does not establish that the violations duplicate one another. In addition, even if duplication existed (which it does not), that fact would provide no excuse or mitigation for Respondent's failure to abide by duly-promulgated Commission regulations. For these reasons, the ALJ finds unpersuasive Respondent's argument that there are multiple violations for the same conduct and that this duplication should be considered in mitigation of the amount of the civil penalty.

19. The ALJ finds that a civil penalty of \$10,200<sup>1</sup> achieves the following purposes underlying civil penalty assessments: (a) deterring future violations, whether by other similarly-situated carriers and by Respondent; (b) motivating Respondent to come into compliance with the law; and (c) punishing Respondent for its past illegal behavior. In addition, assessing a civil penalty of a significant amount underscores the seriousness of the violations which occurred.

20. Pursuant to § 40-6-109(2), C.R.S., the ALJ recommends that the Commission enter the following order.

### **III. ORDER**

#### **A. The Commission Orders That:**

1. Freedom Cabs, Inc., violated Commission regulations as set forth in Civil Penalty Assessment Notice No. 28612.

2. Freedom Cabs, Inc., is assessed a civil penalty in the amount of \$10,200.

3. Freedom Cabs, Inc., shall remit to the Public Utilities Commission the amount of \$10,200 within 30 days of the effective date of this Recommended Decision.

4. 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.

5. 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

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<sup>1</sup> The penalty is assessed as follows: \$200 each for violations numbered 31 through and including 66 (for a total of \$7200) and \$100 each for violations numbered 1 through and including 30 (for a total of \$3000).

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.

6. 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

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Administrative Law Judge