Decision No. C09-0463

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 08R-478TR

IN THE MATTER OF THE PROPOSED RULES REGULATING TRANSPORTATION BY MOTOR VEHICLE, 4 CODE OF COLORADO REGULATIONS 723-6.

ORDER ADDRESSING EXCEPTIONS

Mailed Date: May 1, 2009
Adopted Date: April 29, 2009

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I. BY THE COMMISSION:

A. Statement

1. This matter comes before the Commission for consideration of exceptions to Recommended Decision No. R09-0149 (Recommended Decision) filed by Mr. George Connolly and Mr. Harvey Mabis. No party to this rulemaking docket filed a response to these exceptions. Both sets of exceptions pertain to certain rules that apply to towing carriers. Now, being fully advised in the matter and consistent with the discussion below, we grant the exceptions filed by Mr. Connolly and deny the exceptions filed by Mr. Mabis in their entirety.

B. Procedural background

2. The Commission issued a Notice of Proposed Rulemaking (NOPR) on October 30, 2008. *See* Decision No. C08-1130. The basis and purpose of the proposed rules was to implement House Bills 08-1216 and 08-1227; to make modifications to advertising rules; to consolidate the rules on revocation, suspension, alteration, or amendment of certain authorities, permits, and registrations; to clarify the applicability of the Unified Carrier Registration Agreement (UCR); to increase the flat rate for taxi service to and from Denver International Airport (DIA); to clarify the rules regarding luxury limousine exterior signs and graphics, and operational requirements; to increase towing and storage rates and charges for non-consensual tows; and to add a consumer advisement and binding arbitration rule for household goods movers. *Id.*, at ¶3.

3. The hearing was held on December 3, 2008 in front of Administrative Law Judge (ALJ) Paul C. Gomez. Mr. Mabis and Mr. Connolly are two of the parties that commented at the hearing. The ALJ issued the Recommended Decision on February 19, 2009.

C. Exceptions filed by Mr. Connolly

4. Mr. Connolly is the president of Bob's Towing and Recovery, Inc., and he also represents Towing and Recovery Professionals of Colorado. In his exceptions, he recommended that the Commission modify proposed Rule 6511(k). Proposed Rule 6511(k), as recommended by the ALJ, states that:

> A towing carrier that accepts a credit card as payment for its drop charge, or its towing and storage fees, may charge the customer a credit card transaction fee in an amount up to and including, but not more than, the credit card transaction fee that the towing carrier must pay the credit card company for the transaction.

5. Mr. Connolly argues that a merchant accepting credit cards does not receive the credit card statement until the month following the transaction. There are many different fees associated with accepting credit cards and it is not known what fees might be assessed by each credit card company until after a charge is processed. Mr. Connolly therefore argues that the Commission find a common percentage that would be a proxy to all possible fees and charges, such as 5 percent. He believes that a fixed percentage would alleviate the potential for abuse.

6. We agree and grant the exceptions on this issue. We find that the 5 percent credit card transaction fee is reasonable considering that the fees generally run between 3 and 5 percent and that towing carriers may incur additional expenses when processing credit card transactions. We therefore amend Rule 6511(k) as follows:

> A towing carrier that accepts a credit card as payment for its drop charge, or its towing and storage fees, may charge the customer a credit card transaction fee in an amount up to and including, but not more than, the credit card transaction fee that the towing carrier must pay the credit card company for the transaction. If the credit card transaction fee will not be known until after the charges are processed, the towing carrier may charge the customer a credit card transaction fee in the amount of up to 5 percent of the drop charge, or the towing and storage fees.

D. Exceptions filed by Mr. Mabis

1. Request to disqualify ALJ Gomez

7. In his exceptions, Mr. Mabis moves to disqualify ALJ Gomez pursuant to § 40-6-124, C.R.S., Canon 3 of the Colorado Code of Judicial Conduct, and Rule 1108(a) of the Rules of Practice and Procedure, 4 *Code of Colorado Regulations* (CCR) 723-1. Mr. Mabis claims that ALJ Gomez disregarded his input. Mr. Mabis further claims that ALJ Gomez is biased because of his prior employment as Commission Counsel. Then Commission Counsel Gomez advised the Commission with respect to a prior rulemaking affecting towing carriers (Docket No. 06R-504TR). Mr. Mabis therefore argues that the Commission should rescind the Recommended Decision on these grounds.

a. Applicable legal standards

8. Section 40-6-124(1), C.R.S., states that:

> Commissioners and presiding administrative law judges shall disqualify themselves in any proceeding in which their impartiality may reasonably be questioned, including, but not limited to, instances in which they:
>
> (a) Have a personal bias or prejudice concerning a party;
>
> (b) Have served as an attorney or other representative of any party concerning the matter at issue, or were previously associated with an attorney who served, during such association, as an attorney or other representative of any party concerning the matter at issue;
>
> (c) Know that they or any member of their family, individually or as a fiduciary, has a financial interest in the subject matter at issue, is a party to the proceeding, or otherwise has any interest that could be substantially affected by the outcome of the proceeding; or
>
> (d) Have engaged in conduct which conflicts with their duty to avoid the appearance of impropriety or of conflict of interest.

9. Canon 3(C)(1) of the Colorado Code of Judicial Conduct states that "[a] judge should disqualify himself or herself in a proceeding in which the judge's impartiality might

reasonably be questioned." Canon 8 further states that "[a]nyone … including, for example, a referee or commissioner, is a judge for the purposes of this code." In addition, Colorado courts have implicitly and explicitly considered Canon 3 with Rule 97 of the Colorado Rules of Civil Procedure (CRCP). *See e.g., Zoline v. Telluride Lodge Ass'n.,* 732 P.2d 635, 639 (Colo. 1987), *Tripp v. Borchard*, 29 P.3d 345, 346 (Colo. App. 2001). C.R.C.P. 97 states that "[a] judge shall be disqualified in an action in which he is interested or prejudiced, or has been of counsel for any party, or is or has been a material witness, or is so related or connected with any party or his attorney as to render it improper for him to sit on the trial, appeal, or other proceeding therein."

10. We find that Canon 3 and C.R.C.P. 97 do apply to the Commission ALJs because the plain language in Canon 8 and court precedent. Further, the Colorado Court of Appeals has held that the officials presiding in a quasi-judicial administrative proceeding should be treated as judges. *Venard v. Dep't of Corr.,* 72 P.3d 446, 449 (Colo. App. 2003).[1]

11. Further, it is well settled that judges are presumed to have known and applied the law and are not presumed to have violated the Code of Judicial Conduct. *See People ex rel. S.G.*, 91 P.3d 443, 450 (Colo. Ct. App. 2004). The courts have also found that a judge has the duty to sit on the case in the absence of a valid reason for disqualification. *See Moody v. Corsentino*, 843 P.2d 1355, 1374 (Colo. 1993), citing *Smith v. District Court*, 629 P.2d 1055, 1056 (Colo. 1981). The Colorado Supreme Court has stated that "[t]he purpose of statutes and court rules which provide for the disqualification of a trial judge is to guarantee that no person is forced to litigate before a judge with a "bent of mind." *See Johnson v. District Court of County of Jefferson*,

[1] We were not able to find any case law on whether the officials presiding in quasi-legislative rulemaking proceedings should also be treated as judges. However, it is arguable, that *Venard* and similar cases apply to *any* administrative proceeding, whether quasi-judicial or quasi-legislative. Out of abundance of caution, we will apply the principles stated in Canon 3 and C.R.C.P. 97 to the Commission ALJs presiding in rulemaking dockets.

674 P.2d 952, 956 (Colo. 1984); *In re Marriage of McSoud*, 131 P.3d 1208, 1223 (Colo. App. 2006). With that in mind, we apply the above mentioned standards to the claims that Mr. Mabis makes in his exceptions.

b. The claim that ALJ Gomez disregarded Mr. Mabis' input

12. We find that ALJ Gomez did not disregard the input provided by Mr. Mabis in this rulemaking docket. On the contrary, ALJ Gomez adopted Mr. Mabis' recommendation regarding notices on tow invoices that provide that persons can report problems to the Commission. *See* Recommended Decision, at ¶¶90-91. The ALJ also modified a proposed rule requiring towing carriers to accept a form of payment other than cash for payment of towing charges and drop charges, in part, due to a concern expressed by Mr. Mabis. *Id.*, ¶¶97-102. Further, the ALJ did address all of the arguments made by Mr. Mabis. It is important to note that Mr. Mabis repeats his arguments pertaining to, for example, federal preemption multiple times, with respect to each rule that is allegedly preempted. The ALJ, on the other hand, addressed the federal preemption arguments all at once. Finally, just because the ALJ ruled against Mr. Mabis on many issues and disagreed with his policy and legal arguments does not mean that the ALJ is biased or ignored the input provided by Mr. Mabis during the hearing. *See Parsons ex rel. Parsons v. Allstate Ins. Co.*, 165 P.3d 809 (Colo. App. 2006) (adverse rulings by the trial court do not constitute grounds for recusal absent evidence that the judge is biased, prejudiced or has a bent of mind).

c. The claim that ALJ Gomez is biased because of his prior employment as Commission Counsel

13. As a preliminary matter, we note that this is a different proceeding than Docket No. 06R-504TR and therefore this is not the same "matter at issue" provided for in § 40-6-124, C.R.S. This is a different docket, even if many of the legal and policy arguments presented by Mr. Mabis are similar. We find that the most helpful analogy is that of a former district attorney

who later becomes a judge and presides over a criminal trial of a defendant that the judge prosecuted in the past. The majority of courts have found that judges are not disqualified from sitting or acting in criminal cases *solely* on the ground that they have previously prosecuted the defendant in a different criminal proceeding. *See Schupper v. People*, 157 P.3d 516 (Colo. 2007); *People v. Julien*, 47 P.3d 1194, 1199 (Colo. 2002).[2] In *Julien*, the Colorado Supreme Court noted that:

> Many trial and appellate judges have spent a portion of their careers working for government agencies; disqualification should be based on bias and prejudice, or the reasonable appearance of partiality, not on technical grounds having to do with prior governmental association.

The court in *Julien* discussed former prosecuting district attorneys who later become judges and preside in criminal cases. This reasoning is even more applicable here, since public utilities law is an even more narrow and specialized field of law than criminal law. We find that ALJ Gomez should not be disqualified from this proceeding merely because of his prior employment as Commission Counsel. We therefore deny Mr. Mabis' request to rescind the Recommended Decision on this ground.

2. Oral argument

14. Mr. Mabis requests oral argument regarding his exceptions pursuant to Rule 1505(c). We find that an oral argument will not assist us in making a just and reasonable decision in this case and that written exceptions are sufficient. We therefore deny that request.

3. Federal preemption

15. In his exceptions, Mr. Mabis generally argues that many of the Commission rules that pertain to towing carriers are preempted by 49 U.S.C. § 14501(c). In the Recommended

[2] *See also, Prior Representation or Activity as Prosecuting Attorney as Disqualifying Judge from Sitting or Acting in Criminal Case* by Jay M. Zitter, J.D., 85 A.L.R.5th 471, and the cases cited therein.

Decision, the ALJ carefully analyzed this argument, beginning with the presumption that historic police powers of states are not preempted by federal law unless that was the clear and manifest purpose of Congress. The ALJ also noted that in *City of Columbus v. Ours Garage and Wrecker Service, Inc.*, 536 U.S. 424 (2002), the Supreme Court found that 49 U.S.C. § 14501(c) did not preempt states from establishing safety regulations governing towing carriers or from delegating that authority to its municipalities. The Court did not enumerate what types of regulations would fall under this safety category.

16. The United States Court of Appeals for the Tenth Circuit Court and the Colorado Supreme Court have not previously ruled on this issue. However, as the ALJ notes, although some courts have decided that § 14501(c) is more preemptive of states' authorities over towing carriers, most courts have interpreted the safety exemption contained in § 14501(c) broadly and are reluctant to tread on a state's police powers.[3]

17. We note that the Commission rules, in general, govern rates and charges for non-consensual tows, storage of towed and abandoned vehicles, requirements that must be met in cases of towed and abandoned vehicles, and procedures that must be followed during release of towed vehicles. We therefore find that the Commission rules that pertain to towing carriers fall within the safety exception and are not preempted by § 14501(c). We deny the exceptions on this ground.

4. Collateral attack on prior Commission decisions

18. We note that in his exceptions Mr. Mabis presents many of the arguments that he presented in prior rulemaking dockets. Many of these arguments focus not on the proposed rules

[3] We note that the two cases cited by the ALJ where federal courts have found that § 14501(c) preempted authority of states over towing carriers, *Torcher v. City of Santa Ana*, 219 F.3d 1040 (9th Cir. 2000) and *R. Mayer of Atlanta v. City of Atlanta*, 158 F.3d 538 (11th Cir. 1998) have been subsequently overruled.

themselves, but on various related issues. These issues, among other things, are: (1) whether the Commission rules should require an affidavit or a formal complaint before the Commission may request production of documents from a towing carrier; (2) minimum levels of insurance for towing carriers; (3) the claim that the Commission unlawfully delegates its authority to local law enforcement agencies; (4) and the claim that law enforcement agencies, insurance carriers, and motor clubs engage in unlawful conduct. Most importantly, we find that in his exceptions Mr. Mabis argues against certain rules that are not at issue in this rulemaking docket and are beyond the scope of the NOPR.

19. Section 40-6-112(2), C.R.S., states:

> In all collateral actions or proceedings, the decisions of the commission which have become final shall be conclusive.

See Lake Durango Water Co. v. Pub. Utils. Comm'n, 67 P.3d 12, 22 (Colo. 2003), *citing Archibold v. Pub. Utils. Comm'n*, 933 P.2d 1323 (Colo. 1997). In *Lake Durango Water Co.*, for example, the court found that the merits of final Commission decisions in a ratemaking proceeding could not be attacked in a later, separate proceeding for attorneys' fees and costs. *Id.*

20. Pursuant to § 40-6-112(2), C.R.S., Mr. Mabis may not collaterally attack previous Commission decisions that adopted rules. We find that his arguments are a collateral attack on previous Commission decisions. We therefore deny the exceptions on this ground.

II. ORDER:

A. The Commission Orders That:

1. The exceptions to Recommended Decision No. R09-0149 (Recommended Decision) filed by Mr. George Connolly are granted, consistent with the discussion above.

2. The exceptions to the Recommended Decision filed by Mr. Harvey Mabis are denied, consistent with the discussion above.

3. The Commission adopts a modification to the rules attached to the Recommended Decision. This modification is attached to this Order as Attachment A.

4. A copy of the rules adopted by this Order shall be filed with the Office of the Secretary of State for publication in *The Colorado Register*.

5. The 20 day time period provided by § 40-6-114, C.R.S., to file an application for rehearing, reargument, or reconsideration shall begin on the first day after the effective date of this Order.

6. This Order is effective upon its Mailed Date.

B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING April 29, 2009.

(S E A L)

ATTEST: A TRUE COPY

Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

RONALD J. BINZ

JAMES K. TARPEY

Commissioners

COMMISSIONER MATT BAKER
ABSENT.

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COLORADO DEPARTMENT OF REGULATORY AGENCIES

Public Utilities Commission

4 *CODE OF COLORADO REGULATIONS* (CCR) 723-6

PART 6
RULES REGULATING TRANSPORTATION BY MOTOR VEHICLE

6511. Rates and Charges.

(k) ~~Except as provided in rule 6512(a), a towing carrier shall accept at least two of the following four forms of payment for the rates and charges related to non-consensual tows:~~A towing carrier that accepts a credit card as payment for its drop charge, or its towing and storage fees, may charge the customer a credit card transaction fee in an amount up to and including, but not more than, the credit card transaction fee that the towing carrier must pay the credit card company for the transaction. If the credit card transaction fee will not be known until after the charges are processed, the towing carrier may charge the customer a credit card transaction fee in the amount of up to 5 percent of the drop charge, or the towing and storage fees.

~~(I) Cash;~~

~~(II) Cashier's check, money order, traveler's check, or other form of certified funds;~~

~~(III) A valid personal check, showing upon its face the name and address of the owner, authorized operator, lienholder or authorized agent of said vehicle; or~~

~~(IV) A valid credit card.~~