

Decision No. R14-0572

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 14G-0033EC

COLORADO PUBLIC UTILITIES COMMISSION,

COMPLAINANT,

V.

AIRPORT'S BEST TRANSPORTATION LLC,

RESPONDENT.

**RECOMMENDED DECISION OF
ADMINISTRATIVE LAW JUDGE
ROBERT I. GARVEY
ASSESSING CIVIL PENALTY
AND CLOSING PROCEEDING**

Mailed Date: May 30, 2014

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I. STATEMENT

1. On January 7, 2014, Staff of the Commission (Complainant or Staff) served Respondent Airport's Best Transportation LLC (Respondent or Airport's Best),

with Civil Penalty Assessment Notice (CPAN) No. 108470 arising out of ten alleged violations of *Rule 6105(c) of the Rules Regulating Transportation by Motor Vehicle, 4 Code of Colorado Regulations (CCR)*.

2. On January 8, 2014, pursuant to the directive set forth in CPAN No. 108470, Airport's Best contacted the Colorado Public Utilities Commission (Commission or PUC) and requested that a hearing be scheduled in this matter.

3. On January 15, 2014, counsel for Staff entered his appearance.

4. On January 24, 2014, the Commission scheduled the above captioned proceeding for an evidentiary hearing to be held on February 19, 2014.

5. At the date and time scheduled, the proceeding was called and the Respondent failed to appear. The proceeding was recessed and called again after 15 minutes and the Respondent failed to appear. Staff began its case and after ten minutes Mr. Saeid Asgari, the owner of Airport's Best Transportation LLC, appeared for the hearing.

6. Mr. Asgari stated that he had arrived at the offices of the Commission prior to the scheduled start of the hearing but had been directed to the incorrect hearing room. The undersigned Administrative Law Judge (ALJ) determined after a series of questions that Mr. Asgari could represent the interests of the Respondent but due to difficulties with the English language required a translator.

7. Due to Mr. Asgari's difficulty with the English language the hearing was continued for him to obtain a Farsi translator.

8. Pursuant to Decision No. R14-0194-I, issued on February 20, 2014, an evidentiary hearing was convened in the Commission offices on April 8, 2014.

Staff appeared through its counsel and Respondent, Airport's Best, appeared through Mr. Saeid Asgari. Mr. Asgari was assisted by Farsi translator Hamid Moallem-Zmdeh.

9. The ALJ went over Mr. Asgari's rights and the hearing procedures and Mr. Moallem-Zmdeh was sworn to translate for the proceeding.

10. Staff offered the testimony of Ms. Nancy Brandt and Mr. Brian Gates. Respondent offered the testimony of Mr. Asgari. Hearing Exhibits 1 through 8 and Exhibit 10 were offered and admitted. Confidential Hearing Exhibit 9 was offered and admitted. At the conclusion of the evidence, both parties presented an oral closing statement. At that point, the ALJ closed the record and took the matter under advisement.

11. Pursuant to § 40-6-109, C.R.S., the ALJ now transmits to the Commission the record of the hearing and a written recommended decision in this matter.

II. FINDINGS OF FACT

12. Ms. Nancy Brandt is a criminal investigator (CI) employed by the Commission's Transportation Investigation and Enforcement Section. Her duties include performing safety and compliance reviews (SCRs) on carriers that are regulated by the Commission.

13. Mr. Brian Gates is a CI employed by the Commission's Transportation Investigation and Enforcement Section. His duties include performing SCRs on carriers that are regulated by the Commission.

14. Respondent is a Luxury Limousine carrier operating with Commission Permit No. LL-02216. The permit became active on March 11, 2013. *Hearing Exhibit 2*.

15. Mr. Saeid Asgari is the sole owner of Airport's Best and its only employee. Mr. Asgari is of Iranian decent and is a natural Farsi speaker.

16. SCRs entail reviewing any applicable PUC files on the carrier, driver qualifications files, vehicle maintenance files, and inspecting the vehicles.

17. On November 13, 2013, CI Brandt contacted Mr. Asgari by telephone at approximately 10:00 a.m. The contact was made in order to set up a time to conduct an SCR at Airport's Best's facility.

18. During the conversation CI Brandt advised Mr. Asgari that the SCR would consist of inspecting his vehicle and looking at driver files and hours of service to make sure all the documents were properly organized in the driver file and the vehicle file. The SCR was then scheduled for November 21, 2013.

19. On November 13, 2013, at 10:34 a.m. CI Brandt sent an e-mail to Mr. Asgari confirming the date and what documents Mr. Asgari would be required to provide during the SCR. *Hearing Exhibit 3*. Included in the list of documents Mr. Asgari was to have for the SCR was "[e]vidence that your drivers have submitted fingerprints to the PUC for a background check if required by C.R.S. 40-10.1-110." *Id. at p.3*.

20. On November 21, 2013, CI Brandt conducted the SCR for Airport's Best. During the SCR, CI Brandt determined that Airport's Best had not submitted the fingerprints of its only driver, Mr. Asgari to the PUC.

21. CI Brandt then explained to Mr. Asgari that he was out of service as a driver until he submitted his fingerprints to the PUC.

22. CI Brandt did not issue a CPAN to the Respondent based upon any violations she discovered during the SCR.

23. On December 2, 2013, Mr. Asgari went to the Lone Tree Police Department and had his fingerprints taken and put on a fingerprint card. *Confidential Hearing Exhibit 9*.

24. On December 23, 2013, CI Gates and CI Riley were conducting field operations on Level 5 of the Denver International Airport.

25. CI Gates observed a black SUV, with Luxury Limousine permit number, drop off passengers. CI Gates approached the vehicle and asked the driver if he was available to provide transportation for two passengers to downtown Denver. The driver of the black SUV was later identified as Mr. Asgari.

26. Mr. Asgari agreed to transport CI Gates and another passenger to downtown Denver. At this time CI Gates and CI Reily identified themselves as investigators for the Commission.

27. CI Riley asked Mr. Asgari for his driver's license, medical card, and the charter order for the trip he had just completed.

28. Mr. Asgari went to the trunk of the vehicle and produced a file which contained all of the requested items, but also contained an original fingerprint card and the final report from the SCR conducted by CI Brandt.

29. CI Gates asked Mr. Asgari if he had submitted his fingerprints to the PUC. Mr. Asgari stated that the Lone Tree Police Department had told him that they would submit the fingerprints to the PUC.

30. CI Gates told Mr. Asgari that it was his responsibility to submit the fingerprints to the PUC.

31. On December 24, 2014 at 1:22 p.m., CI Gates sent an e-mail to Mr. Asgari, requesting all of Airport's Best's trip sheets for November and December of 2013. Mr. Asgari was warned that failure to provide this information before 5:00 p.m. on December 24, 2013

would result in a fine of \$275 per day. No mention was made of the fingerprint card. *Hearing Exhibit 10 p.1.*

32. At 5:14 p.m. on December 24, 2013, Mr. Asgari provided the requested information to CI Gates via e-mail. *Id.*

33. On December 30, 2013, CI Gates sent an e-mail to Mr. Asgari stating that he could not read the dates on the sheets for November. CI Gates requested that they be resent. *Id. at p. 2.*

34. Between December 30, 2013 and January 3, 2014, a series of e-mails¹ were sent between CI Gates and Mr. Asgari. CI Gates did not request that Mr. Asgari submit his fingerprints to the PUC in person in any of the e-mails. *Id.*

35. On January 6, 2014, CI Gates wrote a warning letter to Airport's Best admonishing it to cease operating in violation of *Rule 63094 CCR 723-6*.² *Hearing Exhibit 6.*

36. On January 7, 2014, CI Gates preformed a search of the Commission's database to determine if Mr. Asgari had submitted his fingerprints to the Commission. He concluded that as of January 7, 2014, Mr. Asgari had not submitted his fingerprints to the Commission. *Hearing Exhibit 7.*

37. At 7:49 a.m. on January 7, 2014, CI Gates telephoned Mr. Asgari and told him that he needed to submit his fingerprints to the Commission by 11:30 that morning. When Mr. Asgari arrived at the Commission offices with the fingerprint card he was served with

¹ A total of seven e-mails.

² Providing Luxury limousine service without the service being pre-arranged, requiring a charter order be in the possession of the driver at all times when providing limousine service, and the prohibition against stationing a luxury limousine at a pick up point at the airport without a charter order.

CPAN No. 108470 and the warning letter admonishing the Respondent to cease operating in violation of *Rule 63094 CCR 723-6*.

III. DISCUSSION AND CONCLUSION

38. As the proponent of a Commission order, Complainant has the burden of persuasion in this proceeding pursuant to 4 CCR 723-1-1500 of the Rules of Practice and Procedure.

39. Section 40-7-116, C.R.S., mandates a number of procedures for the imposition of civil penalties by the Commission: After specifying that the listed officials are the ones authorized to issue civil penalty assessments for violations of law, § 116(1)(a) states that, “When a person is cited for the violation, the person operating the motor vehicle involved shall be given notice of the violation in the form of a civil penalty assessment notice.” Section 116 further directs that the civil penalty assessment notice “shall be tendered by the enforcement official, either in person or by certified mail, or by personal service by a person authorized to serve process under rule 4(d) of the Colorado rules of civil procedure.” § 40-7-116(1)(b), C.R.S.

40. Except as otherwise provided by statute, the Administrative Procedure Act imposes the burden of proof in administrative adjudicatory proceedings upon “the proponent of an order.” § 24-4-105(7), C.R.S. As provided in Commission Rule 4 CCR 723-1-1500, “[t]he proponent of the order is that party commencing a proceeding.” Here, Staff is the proponent since it commenced the proceeding through issuance of the CPAN. Complainant bears the burden of proof by a preponderance of the evidence. *See*, § 13-25-127(1), C.R.S.; 4CCR 723-1-1500. The preponderance standard requires the finder of fact to determine whether the existence of a contested fact is more probable than its non-existence. *Swain v. Colorado Dept. of Revenue*, 717 P.2d 507 (Colo. App. 1985). While the quantum of evidence that constitutes a

preponderance cannot be reduced to a simple formula, a party has met this burden of proof when the evidence, on the whole and however slightly, tips in favor of that party.

41. *Rule 6105(c)*, 4 CCR 723-6 provides the following:

Within ten days of contracting or being employed to drive for a passenger carrier, a driver who is not qualified by the Commission at the time of hire shall submit to the Commission a set of the driver's fingerprints, documentation of any name change from the agency where the change was approved, and payment of the actual cost to conduct a criminal history record check.

42. *Rule 6106(f)*, 4 CCR 723-6 provides the following:

A person who violates any provision of rule 6105 may be assessed a civil penalty of \$275.00 for each violation.

43. Proper service of the CPAN is vital. "The mandatory requirements for valid service of process are fundamental because of the due process requirements of notice." *Bush v. Winker*, 892 P.2d 328, 332 (Colo. App. 1994).

44. In the instant case the CPAN was personally served on Mr. Asgari the registered agent for the Respondent. This action is consistent with proper service under § 40-7-116, C.R.S.

45. At the outset, it cannot be overlooked that Mr. Asgari is from Iran and speaks English as a second language. While Mr. Asgari does appear to understand the English language, the ALJ does find that Mr. Asgari may at times have difficulty fully understanding and communicating in English.

46. Mr. Asgari went into service as a driver for the Respondent in March 2013. While the exact date he went into service is unknown, if it had been as late as March 31, 2013, Respondent would be required to submit fingerprints of Mr. Asgari to the Commission by April 10, 2013.

47. Mr. Asgari did not have his fingerprints taken until December 2, 2013, and did not submit the fingerprints to the Commission until January 7, 2014. Neither of these dates is within the ten days required of carriers to submit fingerprints of drivers to the Commission.

48. The Respondent does not contest the fact that he did not have the fingerprints of Mr. Asgari on file with the Commission at the time the SCR was performed by CI Brandt.

49. Mr. Asgari testified that he believed that the Lone Tree Police Department mailed the fingerprints to the Commission on December 2, 2013.

50. Although Respondent may have believed that he had met the requirements of *Rule 6105(c)*, 4 CCR 723-6 on December 2, 2013, it was the Respondent's responsibility to ensure that the requirements had been met.

51. The CPAN lists violations of this rule for ten consecutive days starting on December 14, 2013. The Respondent did not meet the requirements of *Rule 6105(c)*, 4 CCR 723-6 until January 7, 2014. The Respondent was in violation on the dates cited in the CPAN.

52. Staff has met its burden of proof by a preponderance of the evidence to show that the Respondent failed to submit fingerprints of its driver to the Commission within ten days of the driver being hired and had not submitted the fingerprints on the dates cited in the CPAN.

53. Having found violations of the cited regulations, it is necessary to determine the amount of the civil penalty to be assessed for these violations. The Commission is authorized to consider aggravating or mitigating circumstances surrounding particular violations in order to fashion a penalty assessment that promotes the underlying purpose of such assessment. § 40-7-113, C.R.S.

54. Pursuant to Commission Rule 4 CCR 723-1-1302(b):

The Commission may impose a civil penalty... The Commission will consider any evidence concerning some ~~o~~all of the following factors:

- (I) the nature, circumstances, and gravity of the violation;
- (II) the degree ~~o~~the respondent's culpability;
- (III) the respondent's history of prior offenses;
- (IV) the respondent's ability to pay;
- (V) any good faith efforts by the respondent in attempting to achieve compliance and to prevent future similar violations;
- (VI) the effect on the respondent's ability to continue in business;
- (VII) the size ~~o~~the business ~~o~~the respondent; and
- (VIII) such other factors as equity and fairness may require.

55. It is noted that CI Brandt placed Mr. Asgari out of service on November 21, 2013.

Hearing Exhibit 4. Mr. Asgari was to remain out of service until the requirements of *Rule 6105(c)*, 4 CCR 723-6 were met. It is also noted that Mr. Asgari drove for the Respondent six days³ before he went to the Lone Tree Police Department to have his fingerprints taken on December 2, 2013*Hearing Exhibit 5.*

56. The ALJ also finds the testimony of CI Gates credible that Mr. Asgari did agree to transport CI Gates to Denver on December 23, 2013 without ~~p~~prior order.

57. These actions of the Respondent could have led to the imposition of additional penalties and most likely will in the future if the Respondent fails to correct this behavior.

58. The Respondent is ~~a~~small business, with only one employee.

³ November 22, 24, 25, 27, 28, and 29, 2013.

59. Mr. Asgari did have his fingerprints taken in a timely manner after the SCR was performed by CI Brandt.

60. Due to language difficulties, the ALJ does find Mr. Asgari's testimony credible that he believed the Lone Tree Police Department had sent or would send the fingerprints to the Commission. While not an excuse for the failure to submit the fingerprints to the Commission, it is mitigation.

61. This belief is furthered by the quick responses the Respondent made to the e-mail requests made by CI Gates. As shown by the e-mail chain, the Respondent attempted to provide the information requested by CI Gates in a timely manner. In addition, the only time in the e-mail chain when CI Gates requested that the Respondent submit his fingerprints to the Commission, they were delivered within hours.⁴

62. The Respondent has no history of any prior violations

63. CI Brandt testified that the Respondent was prepared for the SCR and its records were in good order. CI Brandt testified that on a first SCR, carriers average 12 violations, the Respondent had only 3 violations. *Hearing Transcript p. 86, l. 2-21.*

64. CI Gates testified that contrary to the general practice of Staff, a CPAN was issued after the first SCR without the sending of a warning letter.⁵ *Hearing Transcript p. 136, l. 2-14.*

⁴ CI Gates testified that on December 23, 2013, he asked Mr. Asgari if he had submitted the original fingerprint card to the Commission, Mr. Asgari replied that the Lone Tree Police had sent the fingerprint card to the Commission. CI Gates then testified that he told Mr. Asgari that he needed to bring the card to the Commission. It is unclear if CI Gates told Mr. Asgari that he needed to submit the fingerprint card to the Commission immediately or only mentioned it to Mr. Asgari as an aside. *Hearing Transcript p. 131, l. 2-15.*

⁵ CI Gates testified that the general policy of the Staff is to send a warning letter before a CPAN is issued. In this instance CI Gates considered the SCR report as a warning letter.

65. The Respondent has admitted culpability for the violations and has taken the necessary steps to resolve the issue. In fact the Respondent had totally resolved the issue at the moment the CPAN was served.

66. The welfare of the public is at stake with the SCR and the requirement that drivers submit fingerprints to the Commission. It is through these actions that the Commission can ensure the proper level of safety for all those on the roads of Colorado. These are important regulations and cannot be ignored or deemed unimportant.

67. For the foregoing reasons, the ALJ concludes that Respondent committed the violations as listed on CPAN No. 108470 between December 14, 2013 and December 23, 2013 and that the assessment of a \$275 civil penalty, plus a \$27.50 surcharge for a total of \$302.50 is warranted.

68. The ALJ finds that a civil penalty of \$302.50 achieves the following purposes underlying civil penalty assessments: (a) deterring future violations, whether by other similarly-situated carriers or by Respondent; (b) motivating Respondent to come into compliance; and (c) punishing Respondent for his past behavior

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

IV. ORDER

A. The Commission Orders That:

1. As alleged in Civil Penalty Assessment Notice No. 108470, Respondent Airport's Best Transportation LLC (Respondent), violated *Rule 6105(c) of the Rules Regulating Transportation by Motor Vehicle, 4 Code of Colorado Regulations*.

2. Respondent is ordered to pay to the Commission within 30 days of the date that this Recommended Decision becomes the decision of the Commission, the sum of \$302.50. This amount represents the total of the civil penalty assessed for the violation found in Ordering Paragraph No. 1 plus the mandatory surcharge imposed by § 24-34-108, C.R.S.

3. Proceeding No. 14G-0033EC is now closed.

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 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.

(S E A L)



ATTEST: A TRUE COPY

A handwritten signature in cursive script that reads "Doug Dean".

Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

ROBERT I. GARVEY

Administrative Law Judge