

Decision No. R14-1069

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 14G-0359CP

PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO,

COMPLAINANT,

V.

STACEY JAENKE, A/K/A STACEY DVORAK DOING BUSINESS AS GREELEY TAXI,

RESPONDENT.

**RECOMMENDED DECISION OF
ADMINISTRATIVE LAW JUDGE
MELODY MIRBABA
ASSESSING CIVIL PENALTY FOR COUNT 2 OF THE
CPAN, AND DISMISSING COUNT 1 OF THE CPAN**

Mailed Date: September 4, 2014

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I. STATEMENT, FINDINGS, DISCUSSION, AND CONCLUSION**A. Procedural History.**

1. On April 18, 2014, the prosecutorial Staff for the Public Utilities Commission (Staff) filed Civil Penalty Assessment Notice (CPAN) No. 108977 against “Stacey Jaenke and Stacey Dvorak, doing business as Greeley Taxi”.¹ The CPAN alleges that the Respondent violated §§ 40-10.1-104 and 40-10.1-107(1), C.R.S., by operating or offering to operate as a motor carrier in intrastate commerce without authorization from the Commission, and for doing so without maintaining and filing with the Commission evidence of financial responsibility. The CPAN seeks the Commission assess a civil penalty of \$13,310 against Respondent, as well as an order requiring Respondent to cease and desist continuing violations of the above-referenced Colorado statutes.

2. On May 14, 2014, the Commission referred this matter to an administrative law judge (ALJ) for disposition.

3. On May 21, 2014, counsel for Staff filed an Entry of Appearance and Notice Pursuant to Rule 1007(a) of the Commission’s Rules of Practice and Procedure, 4 *Code of Colorado Regulations* (CCR) 723-1.

¹ Staff later requested the CPAN be amended to reflect that Stacey Jaenke and Stacey Dvorak are the same person, that is, it be amended to name “Stacey Jaenke a/k/a Stacey Dvorak” rather than name them as separate persons. The ALJ granted the request. *Infra*, ¶ 6. All references to Respondent are to Stacey Jaenke a/k/a Stacey Dvorak, doing business as Greeley Taxi.

4. On May 29, 2014, the ALJ scheduled the matter for an evidentiary hearing to be held on July 8, 2014. Decision No. R14-0575-I. The same Decision provides information to the parties on the procedural aspects of the hearing, including the burden of proof.

5. At the date, time, and location designated, July 8, 2014 at 10:00 a.m., the ALJ convened the hearing. Staff appeared through counsel. Ms. Stacey Dvorak appeared without counsel. Ms. Dvorak indicated that she wished to represent herself in this proceeding. Consistent with Rule 1201(b)(I), 4 CCR 723-1, the ALJ permitted Ms. Dvorak to represent herself.

6. Before the evidentiary portion of the hearing began, Staff requested that the CPAN be amended from naming “Stacey Jaenke and Stacey Dvorak, doing business as Greeley Taxi” as Respondents to naming “Stacey Jaenke a/k/a Stacey Dvorak, doing business as Greeley Taxi” as the single Respondent. The change is intended to clarify that Stacey Dvorak and Stacey Jaenke are the same person. Ms. Dvorak did not object to the amendment, clarifying that Dvorak is her married name, and Jaenke is her maiden name. She is known by her married name; for that reason, the ALJ will refer to her as Stacey Dvorak or Ms. Dvorak. There being no objection, and finding that the proposed amendment does not implicate Ms. Dvorak’s substantial rights, the ALJ granted the request. The CPAN is amended to name as a single Respondent, “Stacey Jaenke a/k/a Stacey Dvorak, doing business as Greeley Taxi” and the caption is likewise amended to reflect this change. All references herein to Stacey Dvorak are references to Stacey Jaenke and vice versa.

7. During the hearing, Mr. Nate Riley, Mr. Brian Gates, and Mr. Anthony Cummings testified for Staff. Ms. Dvorak testified on her own behalf. Hearing Exhibits 1 through 16 were identified, offered, and admitted into evidence.

B. Evidence Presented at Hearing.**1. Staff's Evidence in Support of the CPAN.****a. 2013 Investigation.**

8. Mr. Nate Riley is a criminal investigator with the Commission's Transportation section. As a part of his job duties, he conducts safety and compliance reviews and inspections, and verifies regulatory compliance of motor carriers subject to the Commission's jurisdiction. He also investigates complaints the Commission receives from the public regarding regulated carriers.

9. Mr. Riley became aware of Respondent during an investigation he conducted in 2013 on Greeley Taxi, based upon a complaint made by Ms. Terry Ogan. Ms. Ogan worked for a limousine company operating in the Greeley area. Ms. Ogan provided a photograph of a white minivan that displayed "Greeley Taxi" and "970-324-7728" on at least two of its windows. Hearing Exhibit 6. Ms. Ogan took the photographs depicted in Hearing Exhibit 6, sometime before August, 2013. Although the photographs do not show the license plate number of the white minivan, Ms. Ogan made note of it and provided it to Mr. Riley. (Hearing Exhibit 6).

10. Mr. Riley ran a search in the Colorado Department of Revenue's database on the license plate number that Ms. Ogan provided. The license plate is assigned to a vehicle registered in Ms. Dvorak's name, and lists the vehicle as a "PV", which stands for passenger van. Hearing Exhibit 7.

11. Mr. Riley searched Commission records to determine if Respondent had a permit or authority from the Commission; he discovered none. He also searched for records showing Respondent had proof of financial responsibility on file with the Commission; he discovered none.

12. Mr. Riley contacted the City of Greeley (Greeley) to determine if they had records concerning Greeley Taxi and Ms. Dvorak. He learned that Greeley maintains their own taxicab licensing municipal authority, by which carriers operating in the area are required to file an application with Greeley. He confirmed that Ms. Dvorak filed an Application for a Taxicab Business license (Application) to operate as Greeley Taxi. Hearing Exhibit 2, at 3. Greeley provided Mr. Riley with that Application and related documents. Hearing Exhibit 2. Ms. Dvorak completed the Application herself. *Id.* Her Application identifies “Greeley Taxi” as the business name and a sole proprietorship. *Id.* In addition to Ms. Dvorak, several of her family members also filled out applications to be a taxicab driver for Greeley Taxi. *Id.*

13. Mr. Riley sent Respondent a letter on August 2, 2013, which he described as a “violation warning.” Hearing Exhibit 3. The letter is addressed to “Greeley Taxi and/or Stacey Jaenke (Dvorak).” The letter informs Ms. Dvorak that the Commission received a complaint that she was operating without a Commission issued permit. *Id.* The letter identifies and quotes § 40-10.1-201(1), C.R.S., which prohibits any person from operating as a common carrier in intrastate commerce without a Commission permit. It also identifies and quotes § 40-10.1-302(1), C.R.S., which prohibits any person from operating a charter bus, children’s activity bus, fire crew transport, luxury limousine, or off-road scenic charter in intrastate commerce without a Commission permit.

14. In addition, the letter quotes Rules 6007(a)(I) and 6007(f) of the Rules Regulating Transportation by Motor Vehicle, 4 CCR 723-6. *Id.* Rule 6007(a)(I) requires motor carriers to keep in full force and effect motor vehicle liability coverage, and Rule 6007(f) requires motor carriers to cause proof of that motor vehicle liability coverage be filed with the Commission. *Id.* The letter states that it serves as a “Violations Warning” for violation of the referenced statutes

and rules. It also states that Ms. Dvorak is required to cease any advertisements for transportation services, and that if it is later discovered that Ms. Dvorak is advertising, offering to operate, or operating as a common carrier or a limited regulation carrier, that she will be subject to an enforcement action and civil penalties up to \$13,000 per day, and possible criminal prosecution. *Id.* The letter includes Mr. Riley's name and contact information, and encourages Ms. Dvorak to call if she has questions.

15. The letter was mailed by United States certified mail, return receipt requested to Ms. Dvorak (and Greeley Taxi) at 2130 28th Avenue, #4, Greeley Colorado 80634. This is the same address listed on Ms. Dvorak's Application on file with Greeley. Hearing Exhibit 2, at 3 and 14. Mr. Riley received the signed return receipt indicating that the letter had been signed for and received. In addition, Mr. Jason Dvorak called Mr. Riley shortly after the letter was received. Mr. Dvorak told Mr. Riley that he was calling on behalf of Ms. Dvorak and Greeley Taxi. Mr. Dvorak told Mr. Riley that he operated Greeley Taxi with his wife, Ms. Dvorak. He inquired as to the reason the violation warning (in the letter) was issued. He was confused because Greeley Taxi had a license from Greeley. Mr. Riley explained that although Greeley has municipal authority to issue a license, that the municipal authority does not exempt Ms. Dvorak from obtaining a permit from the Commission, and that if they wished to continue to operate, they must obtain a permit from the Commission. Mr. Riley ended the conversation by transferring Mr. Dvorak to another person at the Commission's office, who would provide additional information on how to apply for an authority.

b. 2014 Investigation.

16. Early in 2014, Mr. Riley was assigned two separate complaints that Respondent was continuing to operate in the Greeley area. The allegations of the complaints were identical,

so he moved forward with investigating the complaint that contained the most information. That complaint was made by Mr. Jones.² At the time, Mr. Jones was a transit manager for “public works” in Greeley. Mr. Riley spoke to Mr. Jones on March 14, 2014. Mr. Jones stated that he observed Greeley Taxi operating in the Greeley area, and that he had also seen their advertisements.

17. Mr. Jones provided Mr. Riley with a flyer advertising Greeley Taxi’s services. Hearing Exhibit 4. He told Mr. Riley that he picked up the flyer near a transportation hub in Greeley, in close proximity to when he made the complaint to the Commission. Mr. Riley never indicated exactly when the complaint was made to the Commission, but, based on the date Mr. Riley first spoke with Mr. Jones, (March 14, 2014), Mr. Jones picked up the flyer before March 14, 2014.

18. The flyer states that Greeley Taxi is a “taxi service at your fingertips,” offering cheap flat rates and rides to Denver International Airport. Hearing Exhibit 4. It also states that Greeley Taxi accepts cash and credit cards, and can carry up to eight passengers at a time. *Id.* It encourages the reader to “Call or Text to Schedule a Ride Anytime” and includes the following email address and telephone number: Stacey.greeleytaxi@gmail.com, 970-324-7728. *Id.*

19. Mr. Riley searched the internet to determine if there were other advertisements for Greeley Taxi. He found a website, greeleytaxi.com, which he believed to be Respondent’s website. He printed out the images displayed on this website on March 14, 2014. When he attempted to print the full images appearing on the website, only half of the image on each screen would print. Hearing Exhibit 5. The first printed page states “[n]eed safe and reliable taxi transportation services? Call us today at (970) 324-7728!” *Id.*, at 1. Each additional printed page

² Mr. Jones’s first name was not provided at any point during the hearing.

of the website includes the same statement and telephone number. *Id.*, at 2-5. The last printed page of the website lists 2130 28th Ave, #4, Greeley, CO 80634 as the address for Greeley Taxi, along with (970) 324-7728 as the phone number, and staceyjaenke@gmail.com as the email address for Greeley Taxi. *Id.*, at 5. The address on the website is the same one Ms. Dvorak listed on multiple documents she completed (Hearing Exhibits 2, 11, 13 and 14). Mr. Riley reviewed the website for Respondent on the day he testified at hearing, July 8, 2014. The website is still active; he believes it has been updated since he last checked it, although he did not indicate what had been updated.

20. Mr. Riley also searched Commission records to determine if Respondent had filed an application for Commission authority. He looked for applications for Stacey Jaenke, Stacey Dvorak, and for Greeley Taxi. He discovered none. He also searched Commission records to determine if Respondent filed evidence of financial responsibility. He found none. Mr. Riley noted that without a pending or active application, proof of financial responsibility cannot be electronically filed with the Commission.

21. In order to determine if Respondent was continuing to operate, Mr. Riley asked Mr. Brian Gates to attempt to obtain an offer from Respondent. Mr. Gates is a criminal investigator with the Commission's Transportation section. Like Mr. Riley, he conducts safety and compliance reviews and inspections, and verifies regulatory compliance of motor carriers subject to the Commission's jurisdiction. He also investigates complaints the Commission receives from the public regarding regulated carriers. It is not an uncommon practice for one investigator to aid another by making a telephone call to a person under investigation.

22. Upon Mr. Riley's request, Mr. Gates assisted with the 2014 investigation into Respondent. On March 14, 2014, Mr. Gates called Respondent at (970) 324-7728. He was

unable to reach anyone. He left a voice mail message after hearing the voice mail greeting from Stacey with Greeley Taxi. The greeting indicated that he should leave a text or voice mail message indicating a destination, pickup location and time, and that she would return the call with her availability and a rate for the transportation. In the message he left, Mr. Gates indicated that he needed transportation from the Fairfield Inn in Greeley to the Greeley Chop House at approximately 4:00 or 4:30 p.m. that same day, along with his phone number. He received a text message in response to his voice mail message. Hearing Exhibit 10. The text message is from (970) 324-7728.³ *Id.*

23. The text messages show the following exchange:

- From (970) 324-7728: “I can pick u up from the Fairfield Inn n take u to the chop house @4:30. I charge \$15 flat rate each way. If u like a ride for sure let me know. N ill plan on being there.
- From Mr. Gates: “sounds good. what type of vehicle will you pick me up in? I’ll be out front.”
- From (970) 324-7728: “A white van with tinted windows. C u then :-)”
- From Mr. Gates: “minivan?”
- From (970) 324-7728: “Yup”

Hearing Exhibit 10.

24. Mr. Gates relayed his exchange with Respondent to Mr. Riley. He also provided a printout of the referenced text message exchange with Respondent. Hearing Exhibit 10.

Mr. Riley issued the CPAN on April 11, 2014 at the conclusion of the 2014 investigation. Hearing Exhibit 8. Mr. Riley served the CPAN on Respondent by mailing it to her by certified

³ The top half of the telephone number is not visible in Hearing Exhibit 10; Mr. Gates testified that the number he called and received the text message from is (970) 324-7728.

mail, return receipt requested, to 2130 28th Ave, #4, Greeley, CO 80634. Hearing Exhibit 9. The return receipt shows that Ms. Dvorak signed for the CPAN on April 17, 2014. *Id.*

25. Mr. Anthony Cummings is a lead criminal investigator with the Commission's Transportation section. Mr. Cummings conducts safety and compliance reviews and inspections, and verifies regulatory compliance of motor carriers subject to the Commission's jurisdiction. He also investigates complaints the Commission receives from the public regarding carriers subject to the Commission's jurisdiction, and supervises three criminal investigators in the Commission's Transportation section. He supervises Mr. Gates and Mr. Riley.

26. Mr. Cummings received a phone call from a person who identified herself as Ms. Stacey Dvorak on April 17, 2014. She had questions concerning the CPAN she had received. She explained that there was a "mix-up" with the City of Greeley. She also acknowledged receiving the 2013 violation warning.

27. Staff seeks the maximum penalty for both Counts of the CPAN, with a 10 percent surcharge, a total of \$13,310, be assessed against Respondent, and that a cease and desist order be issued barring her from continuing to operate as a transportation carrier so long as she is not licensed by the Commission, and that she be required to remove all advertisements and publications which market her taxicab services.

2. Respondent's Evidence.

28. Ms. Dvorak decided to start her own taxicab business after working for Yellow Cab in Greeley for three years. She agreed that due to her work for Yellow Cab, she was aware that the State of Colorado regulated taxicab operations. She believes there are few reliable transportation options in Greeley. According to Ms. Dvorak, Yellow Cab taxi drivers often take several hours to respond to requests for transportation. Due to her work with Yellow Cab, she

had several clients that regularly used her transportation services, and were willing to continue to do so when she started operating as Greeley Taxi.

29. She created business cards and flyers for her taxicab business, Greeley Taxi, which she distributed around the Greeley area. Hearing Exhibit 4.

30. Ms. Dvorak testified that she did provide transportation in this state on a call-and-demand basis, for compensation, when doing business as Greeley Taxi. Her transportation service was provided indiscriminately. She believes she provided safe and reliable transportation services for a community that desperately needs more reliable transportation options.

31. Ms. Dvorak understands that she did not operate in accordance with the law. She never intended to do so, but she agrees that she will cease and desist any continued operations.

32. Ms. Dvorak testified that she believed she had complied with all legal requirements for licensing a taxicab company when she received her license from Greeley. She applied with Greeley for and received a license to operate a taxicab business (Hearing Exhibits 14 and 12); she received a permit to operate a home business (Hearing Exhibit 11); and she submitted her fingerprints to Greeley for a criminal background check so that she could be approved to drive for her taxi business (Hearing Exhibit 13). She paid all applicable fees to Greeley. Hearing Exhibits 11, 13, and 14.

33. Ms. Dvorak believed she was able to operate legally when Greeley granted her the licenses to operate her taxicab business. After the issues in this proceeding came to her attention, she contacted Greeley to find out why the City had not informed her that she needed a Commission permit in order to operate legally. She maintained that had she known that from the beginning, she never would have pursued the taxicab business.

34. Ms. Dvorak also indicated that she contacted the Commission shortly after receiving the 2013 violations warning to inquire about applying for a permit. After speaking with an unidentified individual at the Commission's office, she felt discouraged about following through with an application, because she learned it would be difficult to obtain a permit and could take up to a year if she is successful. In addition, she learned that Commission rules require vehicles to be less than ten years old. Her vehicle does not comply with this requirement. She concluded that it would be impossible to obtain a permit from the Commission, so she did not apply.

35. Ms. Dvorak admitted that (970) 324-7728 is her telephone number and is the telephone number she used when operating as Greeley Taxi. Ms. Dvorak also admitted that her home address was 2130 28th Avenue, #4, Greeley, CO 80634, which is the address the CPAN and the violation warning letter dated August 2, 2013 were served. Hearing Exhibit 3; Hearing Exhibit 9. She agreed that she did sign for and receive the CPAN in this proceeding.

36. As to the Greeley Taxi website (Hearing Exhibit 5), Ms. Dvorak testified that she never paid for or approved the publication of the website. She did meet with a representative of Dex, who showed her various options for her website. Ms. Dvorak testified that she did not agree to use Dex's services because their prices were too high. She told the Dex representative this several days after meeting with him. Several months after her meeting with the Dex representative (sometime in 2013), she discovered from a passenger that the website was up and operating. She did ask Dex to remove the website when Dex attempted to collect a payment from her, but never made this request in writing.

37. Ms. Dvorak testified that after she received the violations warning in 2013, that she no longer operated "as Greeley Taxi." However, she continued to provide transportation at

no charge to those regular customers who she considered her friends. She indicated that those friends would sometimes give her gas money to be polite. When asked on cross-examination about Hearing Exhibit 10 (the text message exchange between her and Mr. Gates), Ms. Dvorak testified that she thought Mr. Gates was one of her regular customers, and that she offered transportation, “because I did make those people aware that I could possibly give them a free ride, if they wanted to give me gas money.”

38. Ms. Dvorak testified that she never had commercial insurance in effect when operating as a taxicab business, but that she did have the highest amount of insurance coverage for the personal automobile she used for her taxicab business. She provided no documentation showing the insurance coverage she maintained.

39. Ms. Dvorak testified that a civil penalty of \$13,300 would create a financial hardship on her and her family. Her husband does not have a job, and she has two children (who were present during the evidentiary hearing). She is supporting her husband and her children. Her only source of income recently has been buying and selling furniture online (through websites such as Craig’s List). Ms. Dvorak does not know how she would go about paying a large civil penalty given her current financial condition.

40. She repeatedly promised not to operate her taxicab business without a Commission permit. She expressed remorse for having done so.

C. Governing Legal Standards.

41. Staff, as the proponent of an order, bears the burden of proof by a preponderance of the evidence. §§ 13-25-127(1) and 24-4-205(7), C.R.S.; Rule 1500 of the Commission’s Rules of Practice and Procedure, 4 CCR 723-1. 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 Department of Revenue*, 717 P.2d 507, 508 (Colo. App. 1985). A party has met this burden of proof when the evidence, on the whole and however slightly, tips in favor of that party.

42. Although the preponderance standard applies, the evidence must be substantial. Substantial evidence is defined as “such relevant evidence as a reasonable person’s mind might accept as adequate to support a conclusion . . . it must be enough to justify, if a trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.” *City of Boulder v. Colorado Public Utilities Commission*, 996 P.2d 1270, 1278 (Colo. 2000) (internal citation omitted).

43. Commission investigative personnel have authority to issue CPANs for violations enumerated in §§ 40-7-112 and 40-7-113, C.R.S. § 40-7-116, (1)(a), C.R.S. When a CPAN is issued, notice of the violation must be given in the form of the CPAN. *Id.* The notice must contain a “citation to the specific statute or rule alleged to have been violated.” § 40-7-116(1)(b)(II), C.R.S.

D. Violations Alleged by the CPAN.

1. Count 1.

44. Count 1 of the CPAN alleges that Respondent violated § 40-10.1-104, C.R.S., on or about March 14, 2014. Hearing Exhibit 8. Section 40-10.1-104, C.R.S. provides that “[a] person shall not operate or offer to operate as a motor carrier in this state except in accordance with this article.” Thus, Count 1 of CPAN generally charges Respondent with operating or offering to operate as a motor carrier in a manner that violates Article 10.1 of Title 40, but it does not identify the specific statute in Article 10.1 that Respondent is charged with violating.

45. CPANs must contain a “citation to the specific statute or rule alleged to have been violated.” §40-7-116(1)(b)(II), C.R.S. Procedural due process⁴ is at the heart of this requirement. *See e.g., Bourie v. Department of Higher Educ.*, 929 P.2d 18, 22 (Colo. App. 1996); *Shaball v. State Compensation Ins. Authority*, 799 P.2d 399, 404 (Colo. App. 1990); *People in Interest of D.G.*, 733 P.2d 1199, 1202 (Colo. 1987).

46. Procedural due process involves the question of what kind of notice and what form of hearing the government must provide when it takes certain action. *M.S. v. People*, 303 P.3d 102, 105 (Colo. 2013).

47. Due process is a flexible concept that requires the use of orderly procedures that are balanced in a way to protect constitutional interests while also furthering legitimate governmental ends. *Chiappe v. State Personnel Board*, 622 P.2d 527, 532 (Colo. 1981); *People v. Taylor*, 618 P.2d 1127, 1135 (Colo. 1980). Due process calls for the procedural protections that the particular situation demands. *Chiappe*, at 732; *People v. Taylor*, at 1135. This means that the process due depends on the circumstances of a given case.

48. Procedural due process in administrative hearings requires notice and an opportunity to be heard. *Watson v. Board of Regents*, 512 P.2d 1162, 1165 (Colo. 1973) (“courts have recognized that procedural due process requires -- prior to imposition of the disciplinary action -- adequate notice of the charges, reasonable opportunity to prepare to meet the charges, an orderly administrative hearing adapted to the nature of the case, and a fair and impartial decision”); *Bourie*, at 22; *Shaball*, at 404; *People in Interest of D.G.*, at 1202. Failure to give

⁴ The requirement of procedural due process comes from the guarantees of Fourteenth Amendment to the United States Constitution, that the government shall not deprive any person of life, liberty or property without due process of law. U.S. Const. Amend. XIV, § 1. Colorado’s Constitution provides the same guarantee. Colo. Const., Art. II, § 25.

notice violates the most rudimentary demands of due process of law. *Peralta v. Heights Med. Ctr., Inc.*, 485 U.S. 80, 84 (1988).

49. The purpose of notice under the due process clause is to apprise the affected individual of, and permit adequate preparation for, an impending hearing. *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1, 14 (1978). Due process is fundamentally the right to be heard, but that right has little worth unless one is informed of the matters at issue. *Mullane v. Central Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

50. But, the notice required in an administrative proceeding is not the equivalent of the formal, specific, and detailed notice required in a criminal proceeding. *Bourie*, 929 P.2d at 22.

51. The question presented here is whether Count 1 of the CPAN provides adequate notice, consistent with procedural due process and § 40-7-116(1)(b)(II), C.R.S., of the charge against Respondent. As discussed, the statute identified in Count 1, § 40-10.1-104, C.R.S. provides that “[a] person shall not operate or offer to operate as a motor carrier in this state except in accordance with this article.” Thus, without identification of the specific provision in Article 10.1 of Title 40, a charge of violating § 40-10.1-104, C.R.S. (as in Count 1), accuses a respondent of having violated virtually any provision of Article 10.1 of Title 40. Hearing Exhibit 8.

52. However, the ALJ does not consider this in a vacuum. Here, Count 1 also includes information on the “Nature of Violation,” which states “[o]perating or offering to operate as a motor carrier in intrastate commerce without authorization from the PUC.” *Id.* Article 10.1 of Title 40 has many statutory provisions requiring motor carriers to obtain authorization from the Commission prior to operating or offering to operate in intrastate

commerce, but none of those provisions mirror the language of the CPAN. In other words, if Respondent attempted to determine what statute alleges that a person cannot operate or offer to operate as a motor carrier in intrastate commerce without authorization from the PUC (as alleged in Count 1), she would find none.

53. Instead, Article 10.1 of Title 40 has many provisions relating to motor operating without a permit, but they all indicate the type of transportation operation that is prohibited without a Commission permit. The following are several examples:

- § 40-10.1-201(1)(a), C.R.S., prohibits a person from operating or offering to operate as a common carrier without a Commission-issued Certificate of Public Convenience and Necessity (CPCN);
- § 40-10.1-202(1)(a), C.R.S., prohibits a person from operating or offering to operate as a contract carrier without a Commission permit;
- § 40-10.1-302(1)(a), C.R.S. prohibits a person from operating or offering to operate a charter bus, children's activity bus, fire crew transport, luxury limousine, or off-road scenic charter without a Commission permit;
- § 40-10.1-401(1)(a), C.R.S., prohibits a person from operating or offering to operate as a towing carrier in intrastate commerce without a Commission permit; and
- § 40-10.1-502(1)(a), C.R.S., prohibits a person from operating or offering to operate or advertise services as a mover in intrastate commerce without a Commission permit.

(Emphasis added.).

54. No statutory provision in Article 10.1 broadly states, as alleged in the CPAN, that a person shall not operate or offer to operate as a motor carrier in intrastate commerce without authorization from the Commission. Instead, as illustrated above, the statutory provisions identify the type of intrastate commerce which requires Commission authorization. Thus, the CPAN's "Nature of Violation" for Count 1 also does not inform Respondent of the statutory provision she is charged with having violated, and instead alludes to a statute that does not exist.

55. Without information on the specific violation alleged, a respondent is not aware of the elements necessary to prove the violation. The lack of such information diminishes a respondent's ability to defend herself against the charge. For example, to prove that a person operated or offered to operate as a common carrier in intrastate commerce without Commission authorization, one must show that a respondent directly or indirectly, afforded (or offered to afford) a means of transportation within this state by motor vehicle or by railroad, by indiscriminately accepting and carrying passengers for compensation without having first obtained a CPCN from the Commission. §§ 40-10.1-201(1)(a), C.R.S.; 40-10.1-102(3)(a)(I), C.R.S. In contrast, the elements of proof for operating or offering to operate as a contract carrier or as a luxury limousine carrier in intrastate commerce are different than those of a common carrier. *Compare*, §§ 40-10.1-202(1)(a), 40-10.1-302(1)(a), 40-10.1-101(6) (defining contract carrier), 40-10.1-302(7) (defining luxury limousine carrier), C.R.S., to §§ 40-10.1-201(1)(a), 40-10.1-102(3)(a)(I) (defining common carrier).

56. The type of intrastate commerce alleged to have been performed (or offered), is relevant both to notice and to a respondent's ability to defend herself, as illustrated above. Here, Count 1 of the CPAN charges Respondent with a violation of § 40-10.1-104, C.R.S., which states "[a] person shall not operate or offer to operate as a motor carrier in this state except in accordance with this article." While it describes the violation as operating or offering to operate in intrastate commerce without Commission authority, it does not state the type of transportation Respondent is accused of operating, nor does it otherwise identify the specific statute in Article 10.1 which Respondent is accused of violating. As a result, the notice provided to Respondent by Count 1 defeats the purpose of notice requirements under the procedural due process clause, because it fails to apprise Respondent of the statute she is accused of violating,

thereby diminishing her ability to adequately prepare for the hearing on the CPAN. *Memphis Light, Gas & Water Division*, 436 U.S. at 14.

57. While CPANs need not meet the more stringent standards for criminal charges, a CPAN should at least identify the rule or the statute which the respondent is accused of having violated. *See* § 40-7-116(1)(b)(II), C.R.S. As illustrated above, it is notice of that statute or rule that informs the accused of the elements to prove the charges against her, and thereby fully advises her of the issues to be addressed at hearing.

58. Moreover, here, Mr. Riley identified § 40-10.1-201(1)(a), C.R.S. as one of the statutes Respondent was accused of violating in the 2013 violations warning to Ms. Dvorak. That statute prohibits individuals from operating or offering to operate as a common carrier in this state without Commission authorization. The evidence Staff presented conclusively pointed to common carrier transportation as that is referenced by § 40-10.1-201(1)(a), C.R.S. Yet, Staff failed to identify § 40-10.1-201(1)(a), C.R.S., in Count 1 of the CPAN.

59. For the foregoing reasons and authorities, the ALJ concludes that Count 1 of the CPAN fails to give adequate notice consistent with § 40-7-116(1)(b)(II), C.R.S., the due process clause of the United States Constitution (Fourteenth Amendment), and the due process clause of the Colorado Constitution (Colo. Const., Art. II, § 25), because it does not provide notice of the statute Respondent is accused of violating. As a result, Count 1 of the CPAN should be dismissed with prejudice for failing to meet minimum procedural due process requirements, as set forth herein.

2. Count 2.

60. Count 2 of the CPAN alleges a violation of § 40-10.1-107(1), C.R.S., on or about March 14, 2014. *Id.* Section 40-10.1-107(1), C.R.S., provides that “[e]ach motor carrier shall

maintain and file with the commission evidence of financial responsibility in such sum, for such protection, and in such form as the commission may by rule require as the commission deems necessary to adequately safeguard the public interest.”

61. Section 40-10.1-107(1), C.R.S., only applies to motor carriers who are regulated by the Commission. Thus, in order to determine whether Respondent violated § 40-10.1-107(1), C.R.S., it is necessary to determine whether Respondent was subject to the Commission’s regulatory jurisdiction on the date alleged by Count 2 of the CPAN, March 14, 2014.

62. The evidence presented at hearing paints an unequivocal picture of the type of intrastate transportation at issue here, that is, transportation as a common carrier.

63. A common carrier is any person who directly or indirectly affords a means of transportation within this state by motor vehicle or by railroad, by indiscriminately accepting and carrying passengers for compensation. § 40-10.1-102(3)(a)(I) and (a)(II), C.R.S. Compensation is “money, property, service, or a thing of value charged or received, or to be charged or received, whether directly or indirectly.” § 40-10.1-102(4), C.R.S.

64. Here, it was established by a preponderance of the evidence that Respondent afforded a means of transportation within this state by motor vehicle, and that she accepted and carried passengers indiscriminately for compensation, starting sometime in 2012. Respondent admitted this herself. *Supra*, ¶¶ 29 through 41; *see* Hearing Exhibits 4, 5, 10 and 12. She offered transportation as a common carrier for compensation to Mr. Gates on March 14, 2014. Hearing Exhibit 10. Respondent described and marketed her transportation service as a taxicab service, which is common carriage. Hearing Exhibit 4, (marketing “taxi service at your fingertips!!!”).

65. Respondent testified that after she received the 2013 violation warning, she ceased operating her taxicab business. She clarified that she continued to provide transportation

for her loyal customers or friends for “free”, but that she accepted money for gas from them when transporting them to their destinations. *Supra*, ¶ 38. She testified that when she informed Mr. Gates on March 14, 2014, that she would charge a flat rate of \$15 for transportation, that she only meant that he could provide her gas money in that amount. *See* Hearing Exhibit 10.

66. The ALJ finds Ms. Dvorak’s explanation of the text messages in Hearing Exhibit 10 not credible. It is clear from the text messages that Ms. Dvorak was offering to transport Mr. Gates for compensation. Contrary to Ms. Dvorak’s claims, the text message does not offer transportation for free, nor is there any mention of paying for gas. Indeed, Ms. Dvorak’s text message states that she will transport Mr. Gates as he requested, and that “I charge a \$15 flat rate.” Hearing Exhibit 10. Based on her own testimony, there is no question that Ms. Dvorak continued to operate after receiving the 2013 violation warning, and that the March 14, 2014 text message with Mr. Gates amounts to an offer to transport Mr. Gates in intrastate commerce for compensation.

67. Moreover, the fact that Respondent told Mr. Gates, who she did not know, that she would transport him to his requested destination, is a clear indication that Respondent continued to provide transportation indiscriminately at the time she offered Mr. Gates transportation on March 14, 2014.

68. And in any event, even if Ms. Dvorak was offering to transport people for free, “if they wanted to give” her “gas money,” that is still offering transportation for compensation. It is not free transportation if she offers that transportation for gas money (compensation). Irrespective of how Respondent characterizes the compensation she charged and received, it is still compensation for the transportation service she provided in this state.

69. For the purpose of Count 2 of the CPAN, it makes no difference that Mr. Gates did not pay Respondent for transportation on March 14, 2014. Indeed, the question is whether on March 14, 2014, Respondent was subject to the Commission's regulatory authority, thereby requiring her to maintain and file proof of financial responsibility with the Commission. § 40-10.1-107(1), C.R.S.

70. As demonstrated by § 40-10.1-202(1)(a), C.R.S., a party is subject to the Commission's regulatory authority when it operates or offers to operate as a common carrier in intrastate commerce in this state. Indeed, under that statute, a party cannot operate or offer to operate as a common carrier in this state unless she has first obtained a CPCN from the Commission. Thus, when Respondent offered to operate as a common carrier in this state through her text messages to Mr. Gates, Respondent was subject to the Commission's regulatory authority. Consequently, on March 14, 2014, Respondent was subject to the requirement in § 40-10.1-107(1), C.R.S., that she maintain and file proof of financial responsibility with the Commission.

71. The evidence was undisputed that Respondent failed to maintain and file proof of financial responsibility with the Commission on or about March 14, 2014 as required by Commission rules. Although Respondent testified that she maintained personal auto insurance, she never testified to any details concerning the policy. Moreover, she did not know whether that insurance met the Commission's insurance requirements. Given that the insurance was for a personal automobile, and not for use of the automobile in a commercial capacity, it cannot be disputed that Respondent's insurance (assuming she had insurance), did not meet the Commission's rules and requirements on or about March 14, 2014. And, in any event, Respondent did not cause proof of insurance to be on file with the Commission. Without that

proof, it is presumed that Respondent did not maintain insurance as required by the Commission. Rule 6007(e), 4 CCR 723-6. Respondent's testimony concerning her personal auto insurance does not rebut this presumption.

72. For the foregoing reasons and authorities, the ALJ concludes that the preponderance of the evidence established that, on or about March 14, 2014, Respondent violated § 40-10.1-107(1), C.R.S., by failing to maintain and file with the Commission evidence of financial responsibility in such sum, for such protection, and in such form as the Commission requires by rule. As a result, the ALJ finds that Staff met its burden of proof as to Count 2 of the CPAN.

73. Having found that Respondent violated § 40-10.1-107(1), C.R.S., it is necessary to determine the amount of the civil penalty to be assessed.

74. The Commission may consider aggravating or mitigating circumstances surrounding violations in order to fashion a penalty assessment that promotes the underlying purpose of such assessments. In accordance with Rule 1302(b), Rules of Practice and Procedure:

The Commission may impose a civil penalty, when provided by law. The Commission will consider any evidence concerning ... the following factors:

- (I) the nature, circumstances, and gravity of the violation;
- (II) the degree of 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 of the business of the respondent; and

(VIII) such other factors as equity and fairness may require.

Rule 1302(b), 4 CCR 723-1.

75. The Commission performs an important health and safety function of guaranteeing that those persons operating as a common carrier in Colorado maintain and file proof of financial responsibility with the Commission. Indeed, as stated in § 40-10.1-107(1), C.R.S., the purpose of the financial responsibility requirements is to protect and “safeguard the public interest.” Respondent disregarded her responsibilities to this Commission and the public.

76. A person who is found to have violated § 40-10.1-107(1), C.R.S., may be assessed a civil penalty of not more than \$11,000, with a 10 percent surcharge as authorized by § 24-34-109(2), C.R.S. § 40-7-113(1)(a), C.R.S. Thus, the maximum civil penalty for Count 2 is \$12,100 (including a 10 percent surcharge).

77. This case presents both mitigating and aggravating factors.

78. Mitigating factors include: Respondent’s genuine remorse for her actions, her credible promises not to operate in violation of the law, her efforts to obtain authority to operate legally from Greeley, and the impact a civil penalty would have on Respondent and her ability to support her family (including two children). At the time of the hearing, Respondent was the sole provider for her family. Respondent was genuinely concerned that she would be unable to pay a hefty civil penalty while also providing for her family.

79. Respondent testified that when she obtained a license from Greeley to operate her taxicab business, she believed she was operating legally. The ALJ finds this testimony credible, and a mitigating circumstance. However, after Respondent was warned in writing in

August 2013 that she was operating illegally, she did not cease operating.⁵ This is an aggravating factor that cannot be ignored.

80. The ALJ concludes that a civil penalty is necessary and just in the circumstances. For the foregoing reasons and authorities, the ALJ will assess Respondent a total civil penalty of \$1,200.00 for Count 2 of the CPAN, which includes a 10 percent surcharge. The ALJ finds that under the circumstances, a \$1,200 penalty will have the desired outcome, that is: (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 her past illegal behavior.

81. In addition, the circumstances warrant a cease and desist order. The ALJ will order Respondent to cease and desist operating and offering to operate as a common carrier in this state without Commission authorization. Because advertising to provide transportation service other than by brokerage is an offer to provide transportation service under Rule 6016(b) of the Rules Regulating Transportation by Motor Vehicle, 4 CCR 723-6, the cease and desist order also requires Respondent to cease and desist advertising to provide transportation service as a common carrier in this state without prior Commission authorization.

82. Pursuant to § 40-6-109, C.R.S., the ALJ transmits to the Commission the record in this proceeding along with this written recommended decision. The ALJ recommends the Commission enter the following order.

⁵ Respondent offered to transport Mr. Gates for compensation well after having notice that she was operating in violation of Colorado law. Hearing Exhibit 10.

II. ORDER

A. The Commission Orders That:

1. Civil Penalty Assessment Notice No. 108977 (CPAN), is amended to name as a single Respondent, “Stacey Jaenke a/k/a Stacey Dvorak, doing business as Greeley Taxi” and the caption is likewise amended to reflect this change. All references in this Decision to Stacey Jaenke amount to references to Stacey Dvorak, and vice versa.

2. Stacey Jaenke, also known as Stacey Dvorak, doing business as Greeley Taxi (Respondent), is assessed a total civil penalty in the amount of \$1,200.00 for Count 2 of the CPAN, which includes a 10 percent surcharge.

3. Respondent shall pay the total assessed penalty within one year of the effective date of this Decision.

4. Consistent with the discussion above, Count 1 of the CPAN is dismissed with prejudice.

5. Respondent is ordered to cease and desist operating and offering to operate as a common carrier in this state without prior Commission authorization, in violation of § 40-10.1-201(1)(a), C.R.S. Because advertising to provide transportation service other than by brokerage is an offer to provide transportation service under Rule 6016(b) of the Rules Regulating Transportation by Motor Vehicle, 4 *Code of Colorado Regulations* 723-6, this cease and desist order also requires Respondent to cease and desist advertising to provide transportation service as a common carrier in this state without prior Commission authorization to operate as a common carrier.

6. Proceeding No. 14G-0359CP is closed.

7. 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.

8. 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.

9. 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

Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

MELODY MIRBABA

Administrative Law Judge