

Decision No. R14-1402-I

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 14G-0373CP

COLORADO PUBLIC UTILITIES COMMISSION,

COMPLAINANT,

V.

COLORADO CAB COMPANY LLC,

RESPONDENT.

**INTERIM DECISION OF
ADMINISTRATIVE LAW JUDGE
ROBERT I. GARVEY
DENYING MOTION TO DISMISS
AND REQUIRING FILING**

Mailed Date: November 24, 2014

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A. The Commission Orders That:13

I. STATEMENT

1. On April 24, 2014, the Public Utilities Commission's Staff (Staff) issued Civil Penalty Assessment Notice (CPAN) No. 109241 against Colorado Cab Company LLC (Colorado Cab or Respondent). The CPAN alleges over 700 violations against Colorado Cab.

2. On May 5, 2014, Respondent filed its Entry of Appearance Request for a Hearing and Request to set a Prehearing Conference.

3. On May 21, 2014, the Commission referred this matter to an administrative law judge (ALJ) for disposition.

4. On May 21, 2014, Staff filed its Entry of Appearance, Joinder in Request for a Prehearing Conference and Notice Pursuant to Rule 1007(A).

5. The procedural history of this proceeding is set out in previous Decisions and is repeated here as necessary to put this Decision in context.

6. On August 7, 2014, Colorado Cab filed its Motion to Dismiss Fraud Violations (Motion to Dismiss).

7. On August 20, 2014, Staff filed its Unopposed Motion for Extension of Time to File Response.

8. By Interim Decision No. R14-1020-I, issued on August 22, 2014, the Unopposed Motion for Extension of Time to File Response was granted.

9. On August 26, 2014, Staff filed its Response to Colorado Cab's Motion to Dismiss Fraud Violations.

10. On August 28, 2014, Colorado Cab filed its Motion to Reply in Support of its Motion to Dismiss.

11. On September 9, 2014, Staff filed its Response to Colorado Cab's Motion to Reply in Support of its Motion to Dismiss.

12. By Interim Decision No. R14-1133-I, issued September 15, 2014, the Motion to Reply in Support of its Motion to Dismiss was granted.

13. On September 26, 2014, Colorado Cab filed its Reply in Support of its Motion to Dismiss the Fraud Violations.

II. ARGUMENTS OF COLORADO CAB

14. Colorado Cab requests the Commission dismiss violations 236 through 658 in CPAN No. 109241 issued on April 24, 2014.

15. The violations that Colorado Cab requests be dismissed all involve violations of 4 *Code of Colorado Regulations* (CCR) 723-6-6102(a)(I) of the Commission's Rules Regulating Transportation by Motor Vehicle and 49 *Code of Federal Regulations* (CFR) § 390.35 and/or 4 CCR 723-6-6106(b). All of these violations allege fraud on the part of Colorado Cab.

16. Colorado Cab provides various arguments for the dismissal of the alleged violations.

A. Probable Cause

17. Colorado Cab argues that the Commission has adopted a probable cause standard for the issuance of CPANs.¹ Colorado Cab looks to language found in the CPAN issued by Staff

¹ Motion to Dismiss p. 4.

and also cites Decision No. C07-0488 at ¶ 29² in Proceeding No. 06R-504TR issued June 8, 2007, in support of this proposition.

18. Colorado Cab further argues that under, *Nelson v. Gas Research Institute*, 121 P.3d 340, 343 (Colo. App. 2005), to establish fraud it must be established that a false representation of a material fact was made, knowing that representation to be false; that the person to whom the representation was made was ignorant of the falsity; that the representation was made with the intention that it be acted upon and that reliance resulted in damage.

19. Colorado Cab argues that the probable cause standard is the reasonable person standard and that no reasonable person could “conscientiously entertain a reasonable belief that each driver committed fraud.”³

B. Specificity

20. Next, Colorado cab argues five different ways the CPAN issued by Staff does not provide sufficient information.

21. First, Colorado Cab argues the CPAN does not provide “facts or incidents which constitute the fraud.”⁴

22. Second, Colorado Cab argues that the CPAN does not allege that the drivers knew their representations were false.

23. Third, Colorado Cab argues that the CPAN failed to cite which subsection of 49 CFR § 390.35⁵ were violated.

² In the Motion to Dismiss Colorado Cab cites to ¶27 for this proposition. In its reply, Colorado Cab cites to ¶29 which is the correct paragraph.

³ Motion to Dismiss p. 5

⁴ Motion to Dismiss p. 11-12.

⁵ 49 CFR § 390.35 has three subsections.

24. Fourth, Colorado Cab argues that the CPAN does not state a violation other than a reporting or record keeping violation that is being hidden. Colorado Cab states that the CPAN describes the violation as “making or causing to make fraudulent or intentionally false statements or records and/reproducing fraudulent records if such action misrepresents a fact that constitutes a violation other than a reporting or recordkeeping violation.”⁶

25. Finally, Colorado Cab argues that the violations should be dismissed because the CPAN does not adhere to the requirements of pleading of fraud required in District Court.

III. ARGUMENTS OF STAFF

A. Provision for Motor Carrier

26. Staff argues that the CPAN was issued to Colorado Cab and not to the individual drivers. Staff states that the Motion to Dismiss fails to mention that motor carriers are subject to the provisions of 4 CCR 723-6-6102(a)(I) and 49 CFR § 390.35 and not individual drivers.

27. Staff disagrees with the assertion by Colorado Cab that the violations are against any individual drivers. Staff states that although the initial responsibility for recording hours falls upon the drivers, the motor carrier is required to verify the accuracy of the records.

B. Intent

28. Staff also argues that the violations are safety rules and therefore no requirement of intent is necessary.

29. In addition, the Commission has ruled that if it is shown that the carrier was aware of the rule and fails to act or acts in violation of the rule, intent has been shown. Staff intends to

⁶ Motion to Dismiss p. 5

show evidence of Colorado Cab's knowledge of the rule prior to the acts alleged to constitute a violation.

C. Statutory Pleading Requirements

30. Staff states that the CPAN is compliant with the pleading standards contained in § 40-7-116(1)(b), C.R.S.

31. Staff also argues that Colorado Cab has failed to allege why a heightened pleading standard is required and that Colorado Cab's attempts to argue a lack of probable cause are based on criminal law cases which are not relevant in a civil penalty assessment proceeding.

D. Common Law Fraud

32. Finally, Staff urges the Commission to deny the argument of Colorado Cab that Common Law fraud principals are applicable in the instant proceeding.

IV. DISCUSSION

A. Probable Cause

33. Colorado Cab cites numerous criminal cases in support of the notion that Staff did not have probable cause to issue a CPAN for the fraud violations. This statement is based on the fact that "[b]ased on the records alone ... a person of ordinary prudence and caution could be suspicious in the face of the discrepancies noted above, but would investigate further before claiming fraud, especially when confronted with similar data discrepancies between 29 drivers and especially knowing of DYC's timekeeping transition."⁷

34. Each of the criminal cases Colorado Cab cites speaks to a lack of evidence to sustain a finding of probable cause at a preliminary hearing.

⁷ *Colorado Cab Motion to Dismiss*, p. 7.

35. Colorado Cab must understand that the instant proceeding is administrative not criminal. The concept of “probable cause” is significantly different in a criminal context than it is in an administrative hearing. The concept of “probable cause” in a criminal context generally deals with the deprivation of liberty manifested by incarceration before trial or the constitutionality of warrantless searches.

36. The first major problem with Colorado Cab’s Motion to Dismiss for lack of probable cause is that it asks for only certain violations to be dismissed.⁸ It appears by this argument that Colorado Cab believes there was probable cause to issue the CPAN, just not for the fraud violations.

37. The concept of probable cause, if it is even necessary, is a threshold issue concerning the issuance of the CPAN. The burden of proof required to sustain a finding that a Respondent violated a rule or statute in a hearing is proof by a preponderance of the evidence. The argument of Colorado Cab takes the threshold issue of the issuance of the CPAN and places the proof necessary to issue a CPAN at the same level, or greater, than the proof necessary to sustain a finding of a violation at a hearing.

38. Either there is probable cause to issue a CPAN or there is not, much the same as a traffic ticket. An officer may have reasonable suspicion⁹ to believe that a motorist has been speeding and stop the driver. Upon contact the officer notices signs of intoxication and also cites the driver for driving under the influence (DUI). The officer did not have reasonable suspicion

⁸ The undersigned ALJ finds this an odd request. Generally, an officer/investigator has probable cause to arrest or in this case issue a CPAN or he does not. The remedy for a lack of probable cause is generally suppression of evidence from the fruits of the poisonous tree. If the argument is that there was no probable cause to issue a CPAN then all violations should logically be dismissed.

⁹ It is the undersigned ALJ’s belief that the use of the term “probable cause” in administrative cases is more accurately described as what in criminal cases is described as “reasonable suspicion.”

or probable cause to cite the driver for DUI prior to contact and may not have enough evidence for a conviction, but the initial stop and contact was legal since there was reasonable suspicion of the speeding violation. After there is reasonable suspicion for the contact and the issuance of a citation for speeding, the driver could be cited for DUI and any other violation the officer believes the driver committed.

39. Following that logic, if Colorado Cab is not contesting probable cause for hundreds of violations contained within the CPAN, then the CPAN was issued with probable cause. If violations, which Colorado Cab claims are cited without probable cause, are contained within the CPAN, Colorado Cab may respond to these violations at the evidentiary hearing and Staff shall have the burden of proof.

40. The second problem with Colorado Cab's argument is that it fails to point to any statute or rule which requires a determination of probable cause by an investigator prior to the issuance of a CPAN.

41. Colorado Cab's support for the proposition of a requirement of finding probable cause is from two places; the statement contained on the CPAN that the investigator "has probable cause to believe the Respondent committed the violations" and a reference in Decision No. C07-0488 at ¶29 in Proceeding No. 06R-504TR.

42. The statement contained in the CPAN is not a requirement that Staff find probable cause prior to the issuance of a CPAN. It is only a statement contained in the CPAN that the investigator believes there was probable cause to issue the CPAN.

43. As far as the reference to Decision No. C07-0488 at ¶29 in Proceeding No. 06R-504TR it is instructive to read the entire paragraph to understand what the Commission actually said:

Mr. Mabis repeats his complaint that we have incorporated by reference rules related to the imposition of civil penalties, including the rules of civil procedure. Mr. Mabis would apparently have the Commission set forth possible defenses to the imposition of civil penalties, and specify how our Staff shall arrive at the decision to issue a civil penalty assessment notice (CPAN). We decline to do so for the reasons set forth above. Our Staff have authority and discretion under § 40-7-116, C.R.S. as to whether to issue a CPAN, and they are consistent in using their discretion. Only when Staff has probable cause that a violation has been committed do they issue a CPAN. The form in which our rules appear is common, legal, and clear. We therefore disagree with Mr. Mabis argument.

44. By reading the entire paragraph it becomes clear that the Commission intended to leave to the investigators the discretion to determine probable cause and to then issue a CPAN. The Commission declined to set forth defenses to CPANs or specify what evidence investigators are to use to determine probable cause.¹⁰

45. The CPAN submitted by Staff in this proceeding contains a statement from Investigator Schlitter stating that he had probable cause to believe the violations occurred. This would meet any requirements of Decision No. C07-0488 at ¶29 in Proceeding No. 06R-504TR.

46. The request by Colorado Cab to dismiss the fraud violations due to a lack of probable cause is denied.

B. Specificity

47. Colorado Cab makes numerous arguments concerning the lack of specificity contained in the CPAN issued by Staff. At no point in its argument does Colorado Cab reference

¹⁰ It is also noted that § 40-7-116, C.R.S. do not require that an investigator have probable cause prior to the issuance of a CPAN or even require a statement be contained in the CPAN that the investigator had probable cause to believe the violations occurred..

§ 40-7-116, C.R.S., which states the notice requirements for a CPAN issued by the Commission. Colorado Cab instead relies upon Colorado Rule of Civil Procedure 9(b) in support of its arguments.

48. In the case of statutory conflict, the General Assembly has provided guidance as follows:

If a general provision conflicts with a special or local provision, it shall be construed, if possible, so that effect is given to both. If the conflict between the provisions is irreconcilable, the special or local provision prevails as an exception to the general provision, unless the general provision is the later adoption and the manifest intent is that the general provision prevail § 2-4-205 C.R.S.

49. Case law has held that a special or local provision shall prevail over a general provision. This has been held as a principle in administrative hearings, reasoning that the specific provision creates an exception that carves out a niche in a special circumstance. *Telluride Resort & Spa, L.P. v. Colo. Dep't of Revenue*, 40 P.3d 1260, 1265, (Colo. App. 2002); *Smith v. Colo. Motor Vehicle Dealer Bd.*, 200 P.3d 1115, 1116 (Colo. App. 2008).

50. The provisions of § 40-7-116, C.R.S., are more specialized and local as opposed to the general provisions of Colorado Rule of Civil Procedure 9(b).

51. The notice requirements of a CPAN are found in § 40-7-116, C.R.S. They are as follows:

(1) (a) Investigative personnel of the commission, Colorado state patrol officers, and port of entry officers as defined in [section 42-8-102 \(3\), C.R.S.](#), have the authority to issue civil penalty assessments for the violations enumerated in [sections 40-7-112](#) and [40-7-113](#). 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.

(b) The 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, and shall contain:

(I) The name and address of the person cited for the violation;

- (II) A citation to the specific statute or rule alleged to have been violated;
- (III) A brief description of the alleged violation, the date and approximate location of the alleged violation, and the maximum penalty amounts prescribed for the violation;
- (IV) The date of the notice;
- (V) A place for the person to execute a signed acknowledgment of receipt of the civil penalty assessment notice;
- (VI) A place for the person to execute a signed acknowledgment of liability for the violation; and
- (VII) Such other information as may be required by law to constitute notice of a complaint to appear for hearing if the prescribed penalty is not paid within ten days.

52. The provisions of § 40-7-116, C.R.S., are applicable to all CPANs and to all alleged violations that are contained within a CPAN. The statute makes no exceptions for fraud or any other violation.

53. The CPAN issued in the above captioned case meets all of the requirements of § 40-7-116, C.R.S.

54. While the CPAN issued in this proceeding meets the requirements of § 40-7-116, C.R.S., the undersigned ALJ believes additional information is necessary to meet due process requirements. The CPAN in the instant proceeding fails to list the subsection of 49 CFR § 390.35 alleged to have been violated.¹¹

55. The entire rule in the Code of Federal Regulations reads as follows:

§ 390.35 Certificates, reports, and records: Falsification, reproduction, or alteration. No motor carrier, its agents, officers, representatives, or employees shall make or cause to make—

- (a) A fraudulent or intentionally false statement on any application, certificate, report, or record required by part 325 of subchapter A or this subchapter;

¹¹ It is noted that for the other alleged violations, which are incorporated from federal rules, the subsection of the federal rule is designated.

(b) A fraudulent or intentionally false entry on any application, certificate, report, or record required to be used, completed, or retained, to comply with any requirement of this subchapter or part 325 of subchapter A; or

(c) A reproduction, for fraudulent purposes, of any application, certificate, report, or record required by this subchapter or part 325 of subchapter A.

56. Each of the subsections of 49 CFR § 390.35 lists a different set of elements which would be required to be proven by Staff at hearing. Based upon the CPAN, as issued by Staff, Colorado Cab does not have notice as to which subsection Staff intends to pursue in the hearing.

57. 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.

58. 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.

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

60. Under: § 40-7-116(2) C.R.S.:

A civil penalty assessment notice shall not be considered defective so as to provide cause for dismissal solely because of a defect in the content of such civil penalty assessment notice. Any defect in the content of a civil penalty assessment notice ... may be cured by a motion to amend the same filed with the commission prior to hearing on the merits. No such amendment shall be permitted if substantial rights of the person cited are prejudiced.

61. Dismissal of these violations prior to the hearing for failure to designate a subsection is a drastic remedy. The evidentiary hearing in this matter is scheduled to commence on February 17, 2015. There is ample time for the CPAN to be amended prior to the start of the hearing without any prejudice to Colorado Cab. The rights of Colorado Cab, shall not be prejudiced by the filing of an amendment to the CPAN.

62. To allow proper notice to Colorado Cab, Staff shall be required to amend CPAN No. 109241 to designate which subsection they allege Colorado Cab violated for each violation of 49 CFR § 390.35. Staff shall file this amendment to CPAN No. 109241 by December 5, 2014. Failure to amend CPAN No. 109241 by December 5, 2014 may result in the dismissal of all alleged violations of 49 CFR § 390.35.

V. ORDER

A. The Commission Orders That:

1. The Motion to Dismiss Fraud Violations filed by Colorado Cab Company LLC, on August 7, 2014, is denied.

2. The Staff of the Public Utilities Commission shall file an amendment to Civil Penalty Assessment No. 109241 designating the subsection of 49 *Code of Federal Regulations*

(CFR) § 390.35 they allege was violated by Colorado Cab LLC, for each alleged violation of 49 CFR § 390.35 by end of business on December 5, 2014. Failure to make this filing may result in the dismissal of all alleged violations of 49 CFR § 390.35.

3. This Decision is effective immediately.

(S E A L)



THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

ROBERT I. GARVEY

Administrative Law Judge

ATTEST: A TRUE COPY

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

Doug Dean,
Director