Decision No. C04-1119

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 04G-101CP

COLORADO PUBLIC UTILITIES COMMISSION,
Complainant,
v.
NEMARDA CORPORATION DOING BUSINESS AS
AIRPORT BOULEVARD CO. AND/OR ABC SHUTTLE,
Respondent.

COMMISSION ORDER DENYING APPLICATION FOR REHEARING, REARGUMENT, OR RECONSIDERATION

Mailed Date: September 28, 2004
Adopted Date: September 14, 2004

I. BY THE COMMISSION

A. Background

1. This matter comes before the Commission for consideration of the application for rehearing, reargument, or reconsideration (RRR) of Commission Decision No. C04-0884, filed by Commission Staff (Staff). In that Decision the Commission struck exceptions filed by Staff to Recommended Decision No. R04-0550 in which an Administrative Law Judge (ALJ) found that Nemarda Corporation, doing business as Airport Boulevard Co. and/or ABC Shuttle (Nemarda), had violated Commission rules, and imposed a civil penalty of $6,600. In Decision No. C04-0884, the Commission also vacated Recommended Decision No. R04-0550.

2. The Commission took those actions because Staff appeared without counsel at the hearing before the ALJ, and also filed exceptions without counsel, in violation of § 40-6-109(7), C.R.S., and Commission Rule 4 *Code of Colorado Regulations* (CCR) 723-1-21.

3. In Civil Penalty Assessment Notice (CPAN) No. 28513, Staff alleges that Nemarda, violated various portions of the October 1, 1998 edition of the Federal Motor Carrier Safety Regulations, 49 Code of Federal Regulations (CFR) Chapter III. These regulations have been incorporated into the Commission's Rules Regulating Safety for Motor Vehicle Carriers and Establishing Civil Penalties (Safety Rules), 4 CCR 723-15-2.1.

4. Nemarda is a common carrier providing for-hire passenger carrier services within the State of Colorado pursuant to Certificate of Public Convenience and Necessity PUC No. 25810, and luxury limousine services within Colorado pursuant to Registration No. LL-01116. On February 24, 2004, Staff conducted a safety review of Nemarda at its facility, and found that many recordkeeping requirements were not being met.

5. Staff found that employment applications did not contain all the information required by 49 CFR Part 391.21(b), including information concerning applicants' driving history for the past three years. Staff also found that Nemarda's driver qualification files maintained in connection with these drivers failed to include inquiries into past employment histories as required by 49 CFR Parts 391.23(c) and/or 391.51(b)(2). Also missing was evidence of an annual review of the driving record of one driver as required by 49 CFR Part 391.25, and a request for a list of violations over the last 12 months as required by 49 CFR Part 391.27. The review indicated that Nemarda allowed one driver to drive during a period when his medical card had expired in violation of 49 CFR Part 391.45(b)(1), and that Nemarda's file on one driver did not contain a copy of his medical card as required by 49 CFR Part 391.51(b)(7). Staff also found that Nemarda failed to keep proper vehicle maintenance records as required by 49 CFR Part 396.3(b)(3). Finally, Staff found that driver vehicle inspection report forms did not contain all the information required by 49 CFR Part 396.11(b).

6. Staff then reviewed the Commission's records on prior safety reviews of Nemarda, and found that all the recordkeeping violations discovered on February 24, 2004 had been previously brought to Nemarda's attention in connection with previous safety reviews in 2000, 2002, and 2003. The Commission did not initiate civil penalty assessment proceedings in connection with the previous violations. However, because Staff believed there to be a consistent failure to maintain proper records, Staff initiated a CPAN proceeding with respect to the February 2004 violations.

7. CPAN No. 28513 was issued on March 8, 2004 to Nemarda's representative, and the matter was set for hearing on May 25, 2004. Staff appeared through Mr. Opeka, the investigator who issued the CPAN; Nemarda did not appear. Mr. Opeka offered exhibits into evidence and provided testimony as to Nemarda's violations.

8. On May 27, 2004, the ALJ issued Recommended Decision No. R04-0550. This decision dismissed several of the counts in the CPAN because errors in the CPAN meant that Nemarda was not properly apprised of the allegations it was charged with. The ALJ also dismissed a portion of the recordkeeping violations because he believed that it was the driver's duty under the Commission's rules to be sure records were properly kept, not Nemarda's as alleged in the CPAN.

9. The ALJ then levied $6,600 in fines against Nemarda for its violations.[1] Staff filed exceptions claiming that the ALJ erred in dismissing a portion of the violations due to the drafting error in the CPAN, and in concluding that the drivers, rather than Nemarda have the responsibility for submitting complete driver applications.

[1] Staff initially sought $8,400 in civil penalties against Nemarda.

10. In Decision No. C04-0884, the Commission struck Staff's exceptions and vacated the Recommended Decision because Staff did appear through counsel. Counsel for Staff then filed an entry of appearance on August 17, 2004, two motions for an extension of time to file an application for RRR the first of which was granted on August 25, 2004, the second of which we will grant in this order, and finally an application for RRR on September 7, 2004.

B. Discussion

11. In its application for RRR, Staff puts forward several arguments as to why the Commission's decision was erroneous, and should be reversed.

12. First Staff argues that § 40-6-109(7), C.R.S., applies only to non-adjudicatory proceedings and may not be interpreted to bar Staff from appearing before the Commission without counsel in adjudicatory proceedings. Section 40-6-109(7), C.R.S., provides:

> The Commission may by general rule or regulation provide for appearances *pro se* by, or for the representation by authorized officers or regular employees of, the commission's staff, corporations, partnerships, limited liability companies, sole proprietorships, and other legal entities in certain non-adjudicatory matters before the commission.

13. "In construing a statute, we attempt to give effect to the legislative purpose behind the statute. We do so by examining the plain language of the statute and giving the words their plain and ordinary meaning." *Colorado Dept. of Corrections, Parole Div. ex rel. Miller v. Madison,* 85 P.3d 542, 547 (Colo. 2004). Staff argues that the plain language of the statute and legislative history suggest that the Commission should not interpret the statute to apply to adjudicatory proceedings in any way. We disagree.

14. Where a statute is reasonably subject to more than one interpretation, the statute is ambiguous. *Grant v. People,* 48 P.3d 543, 548 (Colo. 2002). Legislative history is just one of several tools available to aid our resolution of ambiguous statutory terms. § 2-4-203(1), C.R.S.,

Grant at 548. We may also consider the "objective sought to be attained," and "[t]he consequences of a particular construction." *Id.*

15. The plain language of § 40-6-109(7), C.R.S., may be interpreted to bar non-attorneys from appearing in adjudicatory proceedings before the Commission. The statute grants authority for the Commission to allow Staff to appear in non-adjudicatory proceedings only. Implicitly, it does not allow the Commission to permit Staff *pro se* appearances in adjudicatory matters.

16. The legislative history also supports this reading. We believe, in light of the plain language of the statute, and the hearing testimony on Senate Bill 93-18, that the General Assembly intended to be cautious in allowing parties to appear without counsel before the Commission. That is why the statutory language allows for *pro se* appearances in non-adjudicatory matters only, where risks to parties are significantly less than in adjudicatory proceedings.[2]

17. The consequences of allowing Staff to appear without counsel in adjudicatory proceedings would be to increase the risks to the Commission and to regulated entities. Proceedings before the Commission are often complicated, procedurally and substantively, and can affect the property rights of parties, both large and small, and the public. In light of the language of the statute, the legislative history, and the consequences of allowing parties to appear without counsel in adjudicatory matters, we conclude that § 40-6-109(7), C.R.S., precludes the Commission from allowing parties to appear without counsel in adjudicatory hearings.

[2] Staff notes that the Commission has not enacted the rule allowed by the Legislature. That the statue grants authority to the Commission but does not require the Commission to enact a rule indicates the Legislature's caution on allowing parties to appear without lawyers, and also indicates deference to the Commission's expertise with respect to the matters before it.

18. Staff also argues that the Commission radically reinterprets Commission Rule 4 CCR 723-1-21. Rule 21 sets forth the requirements for representation by attorneys, and does not allow Staff to appear in adjudicatory matters without an attorney:

> (a) Representation by Attorney. A party to a proceeding, other than an individual appearing in accordance with subsection (b) of this section, may be represented only by an attorney at law, currently in good standing before the Supreme Court of the State of Colorado…
>
> (b) Participation by Non-Attorneys (1) *Pro se* Representation. An individual who is a party to a Commission proceeding and who wishes to appear *pro se* may represent only his individual interest in the proceeding.

19. Staff argues that it has long been Commission practice for Staff to appear at CPAN hearings on behalf of the Commission and that a Commission ruling barring such appearances has no basis in law. The application of Rule 21 to appearances by Commission Staff without lawyers has never been before the Commission for consideration. In effect, the Commission has never interpreted Rule 21 in this factual setting; we thus cannot "reinterpret" the rule. We may dismiss these matters, and direct that attorneys be admitted to practice in Colorado. *See In the Matter of the Application of Terry T. Walker, Doing Business as Care Van, P.O. Box 369, Trinidad, Colorado 81082*, Decision No. C99-0891 (1999); *In the Matter of the Application of Cirit Transportation, Inc.*, Decision Nos. C00-0982 and C00-1154. There is no reason why Rule 21, which on its face requires all parties to obtain attorneys with few exceptions, should not apply to Staff.

20. Attorneys are in the best position to ensure that procedural safeguards are followed, and that the rights of both the Commission and regulated entities are upheld. Particularly in Civil Penalty Assessment hearings, which are prosecutorial in nature, and where

even a relatively small penalty could have a large impact on a small business, we believe it appropriate to require that Staff appear through an attorney.

21. Staff also argues that the Commission's application of Rule 21 to the appearances of Staff in adjudicatory matters clearly speaks to what is or is not the practice of law, and thus must "conform to the judiciary's authority to regulate the practice of law and be gratuitous if it is to be valid and enforceable" pursuant to *Unauthorized Practice of Law Comm. v. Employers Unity, Inc.*, 716 P.2d 460, 464 (Colo. 1986). *Staff's Application for RRR*, p. 15. We disagree, and believe that Staff's reliance on *Unauthorized Practice of Law Comm.*, *supra*, is misplaced. Rule 21 does not expressly speak to what constitutes the practice of law. With limited exception, it requires that parties appear before the Commission through attorneys only.

22. We need not determine whether Staff's appearances before the Commission constitute the practice of law to determine the outcome here. The issue is not whether Mr. Opeka's conduct involved the practice of law, but rather whether his appearance was in violation of Commission Rule 21. However, because much of Staff's argument relies upon the assertion that Mr. Opeka's argument was not the conduct of law, we note that Staff's assertion--that the sole purpose for Staff's appearance was to testify and was not an appearance in a representative capacity--is unconvincing. If Staff did not appear in a representative capacity at the adjudicatory hearing, there would have been a default judgement entered, or the hearing should have been continued for failure of a party to appear. It also appears that Staff determined what evidence would be sufficient to meet Staff's burden of proof and thus protect and enforce the legal rights of the Commission. *Denver Bar Ass'n v. Public Utilities Comm'n*, 391 P.2d 467 (Colo. 1964), provides that "generally, one who acts in a representative capacity in protecting, enforcing, or defending the legal rights and duties of another and in counseling, advising and

assisting him in connection with these rights and duties is engaged in the practice of law." *Id.* at 471. In short, Staff has to appear in adjudicatory proceedings through *someone*.

23. Staff relies on *Unauthorized Practice of Law Comm. v. Employers Unity, Inc.*, *supra*, to support Staff's appearance before the Commission. There, the court concluded that the AFL-CIO, in representing individuals in workers compensation matters, engaged in the practice of law. *Id.* at 467. However, the Supreme Court endorsed the special master's recommendation that this practice be condoned under the exceptions in *Bar Association, supra,* because no important legal principles were at stake, and because the amounts at issue were small. Staff argues that this exception should be applied to practice before the Commission.

24. In *Employers Unity, Inc.*, there was no administrative rule requiring attorneys for adjudicatory administrative hearings. Again, the issue before the Commission is whether Rule 21 and § 40-6-109(7), C.R.S., preclude Staff from appearing, not whether Staff was practicing law before the Commission. However, we question whether the Supreme Court would allow Staff to prosecute cases before the Commission where the regulatory powers of the Commission are being used to affect the property rights of small companies for whom a penalty in the amount allowed in small claims court ($7,500), or allowed by § 13-1-127, C.R.S. ($10,000 for certain closely held corporations who represent themselves) could be substantial.[3]

25. Staff also argues that there is no basis to overturn the $6,600 penalty assessed against Nemarda. Staff suggests that the only remedy is to refer an unauthorized practice case to the Office of Regulation Counsel. Staff also suggests that the violation of practice rules is in the

[3] While the amount at issue at the beginning of this matter was $8,400, the average weekly workers' compensation benefit at issue in *Employer's Unity Inc.* was $148.20. We question whether $8,400 would meet the *Denver Bar Association's* requirement that the amount at issue be minimal. *Id.* at 281-282.

nature of a harmless error.[4] There is ample precedent suggesting that an appearance without an attorney is not harmless error, and that dismissal where non-lawyers present cases is appropriate. *See Bennie v. Triangle Ranch Co.* 216 P. 718 (Colo. 1923); *Woodford Mfg. Co. v. A.O.Q., Inc.*, 772 P.2d 652 (Colo. App. 1988); *Matter of Estate of Nagel*, 950 P.2d 693 (Colo. App. 1997); *In the Matter of the Application of Terry T. Walker, Doing Business as Care Van*, *supra*; *In the Matter of the Application of Cirit Transportation, Inc., supra*.

26. Staff argues that the authority to determine whether or not to obtain counsel rests solely with the Director of the PUC. We disagree. Rule 21 requires that Staff appear through counsel in adjudicatory matters, as does the statute. It is the Commission, not the Director, that interprets and enforces Commission rules in formal proceedings before the Commission.

27. It must be emphasized that, in appearing before the Commission without counsel, Staff was trying to fulfill its obligation to enforce the public utilities law regarding safety. Nemarda has in previous years been cited several times for the violations discussed in Decision No. R04-0550, and Staff has an obligation to issue citations for behavior detrimental to the public safety. While we do not address the merits of Nemarda's alleged conduct, we emphasize that, although we dismiss Staff's exceptions and the ALJ's recommended decision, we do not condone violations of the Commission's Safety Rules in any way. We encourage Staff to maintain its vigilance.[5] We do not believe Staff is culpable in any way for having appeared without counsel

[4] Staff also suggests that parties' rights are protected by the ALJ. While this is true, we believe that the presence of attorneys is a necessary additional safeguard. When an attorney represents Staff, legal judgment may be exercised on the responsibilities of the driver and company with respect to employment applications, and whether the CPAN should be prosecuted in the first place.

[5] We do not anticipate that dismissal of Staff's exceptions and the underlying recommended decision will encourage a flood of applications seeking dismissal of civil penalties in dockets long since closed. The periods for filing applications for rehearing, reargument, and reconsideration and for filing exceptions have long since expired for virtually all similar matters.

given longstanding practice. However, we must enforce Colorado statutes and the Commission rules.

C. Conclusion

28. Because we believe that § 40-6-109(7), C.R.S., and Commission Rule 21 require that Staff appear before the Commission through counsel, we deny Staff's application for RRR.

II. ORDER

A. The Commission Orders That:

1. Commission Staff's motion for an extension of time to file an application for rehearing, reargument, or reconsideration is granted.

2. Commission Staff's application for rehearing, reargument, or reconsideration is denied consistent with the discussion above.

3. This matter is dismissed without prejudice.

4. This Order is effective on its Mailed Date.

B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING September 14, 2004.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

_____

_____

_____
Commissioners

G:\ORDER\C04-1119_04G-101CP.doc:srs