Decision No. C04-1126 [replacement of original decision]

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 04G-266CP

COLORADO PUBLIC UTILITIES COMMISSION v. TOWN AND COUNTRY TRANSPORTATION SERVICES, INC.

COMMISSION ORDER GRANTING EXCEPTIONS

Original 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 exceptions filed by Town and Country Transportation Services, Inc. (Town and Country) to Commission Decision No. R04-0771, issued on July 14, 2004. In that Decision the Commission imposed civil penalties in the amount of $6,600 against Town and Country for violations of Commission rules concerning record keeping, notably 4 *Code of Colorado Regulations* (CCR) 723-15-2.1 which incorporates certain federal carrier safety regulations. Town and Country filed its exceptions on August 6, 2004, and Commission Staff filed its responses on September 3, 2004.

2. Town and Country holds Certificate of Public Convenience and Necessity PUC No. 53589. On May 5, 2004 Mr. Barrett of the Commission's transportation staff (Staff) conducted a safety and compliance review of Town and Country, and found numerous alleged violations of Commission safety rules. As a result, on or about May 19, 2004, Staff issued Civil Penalty Assessment Notice (CPAN) No. 28601 to Town and Country. Staff charged Town and Country with 33 violations of 4 CCR 723-15-2.1 which incorporates certain federal carrier safety

regulations. The allegations in the CPAN included: 25 violations of 4 CCR 723-15-2.1 (and by incorporation, 49 *Code of Federal Regulations* (CFR) Part 395.8) because there were no records of duty status of four of Town and Country drivers; Four violations of 49 CFR 396.3(b)(2) because Town and Country failed to have preventative maintenance plans on four of its vehicles, and; Four violations of 49 CFR Part 396.11(b) which requires certain content missing on driver vehicle inspection reports relating to four of Respondent's vehicles. Each of the violations carry a penalty of $200 for a total of $6,600.

3. Staff also conducted safety reviews of Town and Country on February 15, 2001, and February 12, 2002. During those reviews, Staff found the same violations at issue in this case. However, no CPAN was issued as a result of the previous inspections.

4. A hearing was held on July 7, 2004. Testimony was received from Ted M. Barrett, of the staff of the Commission, and Rachel Von Riverburgh, owner of Town and Country. Five exhibits were marked for identification. Neither party appeared through an attorney. The Administrative Law Judge issued Decision No. R04-0771 on July 14, 2004 and imposed $6,600 in civil penalties. Town and Country received an extension of time through August 16, 2004 in which to file exceptions to the recommended decision, and filed them on August 6, 2004. Staff requested an unopposed extension of time in which to file a response on August 17, 2004 and this was granted on August 25, 2004.

5. In its exceptions, Town and Country relies on our decision in *PUC v. Nemarda*, Decision No. C04-0884 (2004) (*Nemarda*). In *Nemarda* we struck Decision No. R04-0554 and Staff's exceptions because Staff failed to appear by lawyer as required by § 40-6-109(7), C.R.S. and Commission Rule 4 CCR 723-1-21 (Rule 21).

B. Discussion

6. Town and Country cites our decision in *Nemarda* as precedent for dismissing the recommended decision in this case. In *Nemarda*, we struck the recommended decision noting that Rule 21 applies to Commission Staff as well as other parties. Rule 21 provides:

> (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.

7. The *Nemarda* decision also cited Section 40-6-109(7), C.R.S. which 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.

8. We interpreted that statute to mean that the Commission may not allow Staff to appear *pro se* in adjudicatory matters. Staff's response to Town and Country's exceptions mirrors its application for RRR in the *Nemarda* matter, and our reasoning in this matter is in turn similar to that in the *Nemarda* decision.

9. 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.

10. "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.

11. 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. (2001), *Grant* at 548. We may also consider the "objective sought to be attained," and "[t]he consequences of a particular construction." *Id.*

12. The plain language of § 40-6-109(7), C.R.S. may readily be interpreted to bar non-attorneys from appearing in adjudicatory proceedings before the PUC. 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.

13. 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 PUC. 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.[1]

14. 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

[1] 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.

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.

15. 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.

16. 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. C99-591 (1999); *In the Matter of the Application of Cirit Transportation, Inc.,* Decision Nos. C00-982 and C00-1154 (2000). There is no reason why Rule 21, which on its face requires all parties to obtain attorneys with few exceptions, should not apply to Commission Staff.

17. 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.

18. 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. *Unauthorized Practice of Law Comm. v. Employers Unity, Inc.*, 716 P.2d 460, 464 (Colo. 1986)." *Staff's Response to Exceptions*, p. 13. We disagree, and believe that Staff's reliance on *Employers Unity*, *supra*, is misplaced. Rule 21 does not expressly speak to what constitutes the practice of law. It requires that parties appear before the Commission through attorneys only.

19. 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. Barrett'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. Barrett's argument was not the practice of law, we note that Staff's assertion that the sole purpose for Staff's appearance was to testify, and not in a representative capacity, is unconvincing. If Staff did not appear in a representative capacity at the adjudicatory hearing, there should have been a default judgement entered, or the hearing should have been continued for failure 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. Whether Staff's appearance constituted the practice of law is at least debatable.

20. Staff relies on *Denver Bar Association* and *Unauthorized Practice of Law Comm. v. Employers Unity, Inc., supra,* to support Staff's appearance before the Commission. The conclusion adopted by the *Employers Unity* court, was that the AFL-CIO, in representing individuals in workers compensation matters, engaged in the practice of law. *Id.* at 464. 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. *Employers Unity* at 463. Staff argues that this exception should be applied to practice before the Commission.

21. In *Employers Unity,* however, there was no administrative rule or statute 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 without counsel, not whether Commission Staff were practicing law before the Commission. Nonetheless, 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 quite harmful.[2]

22. Staff also argues that there is no basis to overturn the $6,600 penalty assessed against Town and Country. 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

[2] While the amount at issue at the beginning of this matter was $6,600, the average weekly workers' compensation benefit at issue in *Employer's Unity Inc.* was $148.20. We question whether $6,600 would meet *Denver Bar Association's* requirement that the amount at issue be minimal.

rules is in the nature of a harmless error.[3] There is ample precedent suggesting that, when required 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*.

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

24. Here, as in the *Nemarda* matter, in appearing before the Commission without counsel, Staff was trying to fulfill its obligation to enforce the public utilities law regarding safety. Town and Country has in previous years been investigated several times for the violations discussed in Decision No. R04-0771, and Staff has an obligation to issue citations for behavior detrimental to the public safety. While we do not address the merits of Town and Country's alleged conduct, we emphasize that although we dismiss 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.[4]

[3] 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.

[4] 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.

C. Conclusion

25. Because we believe that § 40-6-109(7), C.R.S. and Commission Rule 21 require that Staff appear through counsel, we grant Town and Country's exceptions.

II. ORDER

A. The Commission Orders That:

1. Town and Country Transportation Service Inc.'s exceptions are granted.

2. Recommended Decision No. R04-0771 is struck without prejudice.

3. The 20-day time period provided by § 40-6-114(1), C.R.S., to file an application for rehearing, reargument, or reconsideration shall begin on the first day after the Commission mails or serves this Order.

4. This Order is effective on its Mailed Date.

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

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

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Commissioners

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