



COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
P.O. BOX 3265, HARRISBURG, PA 17105-3265

IN REPLY PLEASE
REFER TO OUR FILE
Bp8# 2070216

November 22, 2011

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

Re: Pennsylvania Public Utility Commission, Bureau of Transportation and
Safety v. Robert Levan t/a Nite Moves
Docket No. C-2009-2070216

Dear Secretary Chiavetta:

Enclosed for filing are an original and nine (9) copies of the Exceptions of the
Bureau of Transportation and Safety in the above-captioned matter.

Copies have been served on the parties of record in accordance with the Certificate
of Service.

Very truly yours,

Stephanie M. Wimer
Prosecutor

Enclosures

cc: Cheryl Walker Davis, OSA

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**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

**Pennsylvania Public Utility Commission,
Bureau of Transportation and Safety**

v.

Robert Levan t/a Nite Moves

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Docket No. C-2009-2070216

EXCEPTIONS OF THE BUREAU OF TRANSPORTATION AND SAFETY

Stephanie M. Wimer
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Dated: November 22, 2011

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INTRODUCTION

The Bureau of Transportation and Safety (BTS) of the Pennsylvania Public Utility Commission (Commission),¹ respectfully submits these Exceptions to the November 7, 2011, Initial Decision of Administrative Law Judge Dennis J. Buckley (ALJ Buckley or ALJ).

On March 6, 2009, BTS issued a Complaint against Robert Levan t/a Nite Moves (Respondent) that alleged a single count violation: that Respondent held himself out to transport household goods in use between points in the Commonwealth of Pennsylvania, for compensation, without having a certificate of public convenience. This violation occurred sometime during the first week of September 2008, when Bradley Stiles, the shipper, allegedly had a telephone conversation with Respondent wherein Respondent agreed to transport household goods in use at the amount of \$130 per hour, with three men and a driver. Respondent and the shipper agreed that the shipper would rent a truck, and that Respondent would pick up the rental truck and deliver it to the shipper's residence on the day of the move, September 27, 2008.

On September 27, 2008, BTS Enforcement Officer Turriziani was in a vehicle that was parked near the shipper's residence. Respondent allegedly saw Officer Turriziani in his vehicle and turned the truck around before reaching the shipper's residence.

¹ The Law Bureau Prosecutory Staff (Prosecutory Staff) represented BTS in this proceeding. Effective August 11, 2011, the prosecutory functions of the Law Bureau and the Motor Carrier Enforcement Division of BTS were transferred to the Bureau of Investigation and Enforcement pursuant to the Commission's reorganization. *See Implementation of Act 129 of 2008 Organization of Bureaus and Offices*, Docket No. M-2008-2071852 (Order entered August 11, 2011). As this Complaint was issued prior to the Commission's reorganization, the parties will be referenced as Prosecutory Staff and BTS.

Respondent then returned the rental truck, and the shipper arranged for his own transportation and completed the move without Respondent's assistance.

In its single count Complaint, BTS alleged that Respondent held himself out to transport household goods in use move without having a certificate of public convenience and thereby violated Section 1101 of the Public Utility Code. 66 Pa. C.S. § 1101. BTS requested a civil penalty of \$1,000, which is the statutory maximum for this sole violation.

On March 24, 2009, Respondent, represented by counsel, filed an Answer denying BTS' allegation. Respondent averred that he agreed to provide a pack and load service wherein Respondent would provide a dolly and packing materials, and would arrange for the services of two other persons who would load the shipper's property into the shipper's vehicle. Respondent stated that he picked up a Budget rental truck for the customer because it was inconvenient for the shipper to retrieve the truck on his own. Respondent admitted that he drove the Budget rental truck to the customer's residence, observed BTS enforcement officers and then returned the vehicle to avoid the appearance of impropriety. Respondent stated that he received no compensation from the shipper.

On August 25, 2011, a Notice of Hearing was issued that scheduled a hearing in this matter on September 15, 2011, before ALJ Buckl y.

On August 26, 2011, Prosecutory Staff filed an Application for Issuance of a Subpoena to compel the shipper's, Mr. Bradley Stiles', attendance at the hearing, so that

BTS could obtain testimony from Mr. Stiles regarding Respondent's offer to transport household goods in use move.

On August 31, 2011, Respondent and BTS filed a Settlement Agreement, wherein Respondent agreed that he offered to transport household goods in use between points in the Commonwealth of Pennsylvania for compensation. Respondent agreed to pay \$500 for his violation and to cease and desist from committing future violations.

On September 13, 2011, a notice was issued cancelling the hearing that was scheduled for September 15, 2011.

On November 7, 2011, ALJ Buckley issued an Initial Decision that modified the Settlement Agreement by increasing the civil penalty to \$5,000, which is five times greater than the relief that was originally requested in the Complaint and is ten times greater than the agreed-upon civil penalty. The Initial Decision further provided that the matter would be scheduled for hearing only if the parties did not accept the modification.

EXCEPTIONS

EXCEPTION NO. 1: The ALJ Violated the Parties' Procedural and Due Process Rights by Issuing an Initial Decision that Modified the Civil Penalty to an Amount that Was Not Based on Record Evidence.

ALJ Buckley issued an Initial Decision that unilaterally modified the Settlement Agreement by requiring Respondent to pay \$5,000, which is five times greater than the amount that BTS originally sought in its Complaint against Respondent and ten times greater than the agreed-upon civil penalty.

Section 335(c) of the Public Utility Code requires Initial Decisions to “. . . include a statement of: (1) findings and conclusions, and the reasons or basis therefor, on all material issues of fact, law or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief or denial thereof.” 66 Pa. C.S. § 335(c). Here, no factual record was developed because the parties settled the matter prior to the hearing. ALJ Buckley's Initial Decision considered the Settlement based on the Complaint and Respondent's Answer. As no evidentiary record exists, ALJ Buckley's Initial Decision contains no findings of fact and completely lacks any factual basis to increase the civil penalty to an amount that is five times greater than the relief that was originally sought and ten times greater than the agreed-upon civil penalty. Absent any findings of fact based on a record, the ALJ erred in rejecting the settlement.

In addition, the ALJ disregarded the Commission's own regulations regarding the handling of proposed settlements. When an ALJ disapproves a settlement petition, Section 5.232(d) of the Commission's regulations requires the following:

The settlement petition will be reviewed by the presiding officer, if one has been assigned. If the presiding officer rules on the petition, the ruling will be made in the form of an initial or recommended decision, subject to § 5.537 (relating to rate case settlements), if approved, *or in the form of an order, if disapproved*. The presiding officer will determine if the settlement is in the public interest.

52 Pa. Code § 5.232(d)(emphasis added). Additionally, Section 1105(A)(5)(a) of the Commission's Procedures Manual provides that "when the ALJ determines that a settlement is not in the public interest, the ALJ shall inform all of the parties by written order, of the refusal to accept the settlement and reasons for taking this action."

Although ALJ Buckley did not "disapprove" the Settlement Agreement, his modification without a record was essentially a rejection of the proposed Settlement because he expressly concluded that the Settlement was not in the public interest unless Respondent pays a \$5,000 civil penalty. Rather than issue an Order as required by the Commission's regulations, ALJ Buckley issued an Initial Decision that was devoid of any factual basis, and the arbitrary and substantial increase in the civil penalty was not foreseen by either party, violated the parties' due process rights and violated Section 335(c) of the Public Utility Code.

The Commission's regulations and procedures are intended to ensure that the parties' due process rights are protected.² Issuance of an Order by a presiding ALJ gives the parties an opportunity to renegotiate and develop an agreement that would satisfy the public interest. If such a settlement cannot be achieved, it permits the parties to litigate the case, thereby satisfying fundamental due process. In this case, the ALJ has given the

² BTS argues that an ALJ is not permitted to waive Section 5.232(d) of the Commission's regulations, 52 Pa. Code § 5.232(d), because it affects a party's substantive due process rights.

parties limited options: 1) Respondent makes a payment of \$5,000; or 2) the parties reject the terms and conditions in the Initial Decision and have the case remanded for a hearing before the same ALJ, who will arguably be predisposed to again order the payment of a much higher civil penalty than sought in the BTS Complaint.

ALJ Buckley's Initial Decision effectively deprived BTS and Respondent of their fundamental due process rights. Due process requires that a person be provided notice and an opportunity to be heard prior to an adjudication affecting that person's rights. *Fountain Capital Fund, Inc. v. Pa. Secs. Comm'n*, 948 A.2d 208 (Pa. Cmwlth. 2008). Further, Section 332(c) of the Public Utility Code states that "every party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence and to conduct such cross-examination as may be required for a full and true disclosure of the facts." 66 Pa. C.S. § 332(c). ALJ Buckley deprived the parties of their right to a hearing before imposing a civil penalty that significantly departs from the Settlement Agreement as well as the relief requested in the Complaint. The Initial Decision is unsupported by any record evidence, as no evidentiary record exists, and violates the statutory limit on the assessment of a \$1,000 civil penalty. (*See* Exception No. 2). For these reasons, BTS requests that the Commission reject ALJ Buckley's modification to the Settlement Agreement.

EXCEPTION NO. 2: The ALJ's Modification to Increase the Civil Penalty To \$5,000 Exceeds the Statutory Maximum Based on the Allegations Set Forth in the Complaint and is Arbitrary and Capricious.

ALJ Buckley modified the Settlement Agreement to increase the civil penalty from \$500 to \$5,000. (I.D. at 9; Ordering Paragraph No. 1). To support this modification, ALJ Buckley noted that Respondent admitted that he knowingly held himself out to transport household goods without a certificate of public convenience, (I.D. at 8). ALJ Buckley also mentioned that Respondent committed the same violations in 1992 and 1994. *Id.* ALJ Buckley stated that “[g]iven the willful and *ongoing conduct* on the part of the Respondent, the civil penalty in this case should be ten times the proposed settlement amount, or \$5,000.” *Id.* (emphasis added). ALJ Buckley provided no other justification to demonstrate how he arrived at the \$5,000 civil penalty. His directive that a \$5,000 civil penalty be imposed is not based on record evidence and goes well beyond the four corners of the Complaint, which identified a single violation that did not continue on an on-going basis. Further, a \$5,000 civil penalty for a single violation of holding oneself out to provide unauthorized transportation service is not consistent with the Public Utility Code, past Commission decisions or the Commission’s motor carrier penalty guidelines. As such, ALJ Buckley’s modification is arbitrary and capricious.

BTS is precluded from seeking more than \$1,000 for a single violation that did not continue. Section 3301(a) of the Public Utility Code provides in pertinent part:

If any public utility, or any other person or corporation subject to this part, shall violate any of the provisions of this part, or shall do any matter or thing herein prohibited . . . such public utility, person or corporation . . . shall forfeit and pay to the Commonwealth a sum not exceeding \$1,000, to be recovered by an action of assumpsit instituted in the name of the Commonwealth.

66 Pa. C.S. § 3301(a). Additionally, Section 3301(b) of the Public Utility Code provides the following:

Each and every day's continuance in the violation of any regulation or final direction, requirement, determination, or order of the commission . . . shall be a separate and distinct offense.

66 Pa. C.S. § 3310(b).

In its Complaint, BTS alleged that Respondent committed one violation, which was holding himself out to provide transportation for a household goods in use move to Mr. Stiles without having a certificate of public convenience. Respondent offered these services during a single conversation that took place sometime in the beginning of September 2008. Given that Respondent's conduct constituted one violation that occurred on one day, the maximum civil penalty that BTS could obtain under Section 3301 of the Public Utility Code was \$1,000.

To the extent that ALJ Buckley concludes that Respondent's conduct is ongoing, neither BTS nor the ALJ has evidence that Respondent held himself out to transport household goods in use on other dates or in transactions other than with Mr. Stiles. The last time that BTS had evidence of Respondent transporting household goods in use or

holding himself out to provide those services was in 1994, 14 years prior to the present violation.³ BTS disagrees with the conclusion that a 14 year span of time with no violations constitutes “ongoing conduct.” Thus, BTS is constrained to seek no more than \$1,000 for this violation.

BTS settled this matter for \$500 due to the following mitigating factors, which are also articulated in the Settlement Agreement: (1) Respondent did not actually perform the unauthorized transportation and he received no compensation; (2) Respondent’s violation did not have lasting consequences. The violation occurred on one day and the shipper’s property was not damaged; (3) Respondent has agreed to cease and desist from offering transportation of household goods in use to the public for compensation; and (4) Respondent had no violations between 1994 and 2008. Settlement Agreement at p. 4-7.

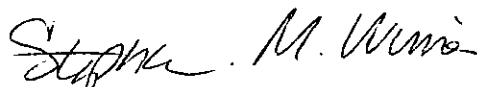
BTS and Respondent continue to assert that \$500 is a reasonable amount and is in the public interest, due to the mitigating factors. However, if the Commission fails to approve the Settlement Agreement as filed, then BTS reasserts its right to elect to withdraw from the Agreement by filing a response within fifteen (15) days of the date that the order is entered.

³ BTS issued a warning letter to Respondent on August 1, 2005, because an enforcement officer observed Respondent taking furniture from a residence in Bethlehem, Pennsylvania on February 24, 2005. Respondent’s conduct in 2005 did not rise to the level of violating the Public Utility Code because no transportation was involved. A pack and load service is not prohibited by the Public Utility Code.

CONCLUSION

For the foregoing reasons and for the reasons set forth in the Settlement Agreement, BTS respectfully requests that the Commission issue an Opinion and Order that grants these Exceptions and either approves the Settlement Agreement, as filed, or remands the matter to the Office of Administrative Law Judge for further hearing consistent with fundamental due process principles.

Respectfully submitted,



Stephanie M. Wimer
Prosecutor
Attorney ID No. 207522

Counsel for the Bureau of Transportation and
Safety of the Pennsylvania Public Utility
Commission

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Dated: November 22, 2011

CERTIFICATE OF SERVICE

I hereby certify that I am this day serving the foregoing document, Exceptions of the Bureau of Transportation and Safety, in accordance with the requirements of 52 Pa. Code § 1.54 *et seq.* (relating to service by a participant).

Notification by first class mail addressed as follows:

Dennis J. Buckley
Administrative Law Judge
Commonwealth of Pennsylvania
Pennsylvania Public Utility Commission
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