



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

ISSUED: August 25, 1998

DOCUMENT
 FOLDER

REFER TO OUR FILE
 IN REPLY PLEASE

A-00114754

EARL BIERMAN
 186 NORTH MAIN STREET
 NEW HOPE PA 18938

Application of Earl Bierman . . .

TO WHOM IT MAY CONCERN

Enclosed is a copy of the Initial Decision of Administrative Law Judge Allison K. Turner. This decision is being issued and mailed to all parties on the above specified date.

If you do not agree with any part of this decision, you may send written comments (called Exceptions) to the Commission. Specifically, an original and nine (9) copies of your signed exceptions **MUST BE FILED WITH THE SECRETARY OF THE COMMISSION IN ROOM B-20, NORTH OFFICE BUILDING, NORTH STREET AND COMMONWEALTH AVENUE, HARRISBURG, PA OR MAILED TO P.O. BOX 3265, HARRISBURG, PA 17105-3265, within twenty (20) days of the issuance date of this letter.** The signed exceptions will be deemed filed on the date actually received by the Secretary of the Commission or on the date deposited in the mail as shown on U.S. Postal Service Form 3817 certificate of mailing attached to the cover of the original document (52 Pa. Code §1.11(a)) or on the date deposited with an overnight express package delivery service (52 Pa. Code 1.11(a)(2), (b)). If your exceptions are sent by mail please use the address shown at the top of this letter. A copy of your exceptions must also be served on each party of record. 52 Pa. Code §1.56(b) cannot be used to extend the prescribed period for the filing of exceptions/reply exceptions. A certificate of service shall be attached to the filed exceptions.

If you receive exceptions from other parties, you may submit written replies to those exceptions in the manner described above within ten (10) days of the date that the exceptions are due.

Exceptions and reply exceptions shall obey 52 Pa. Code 5.533 and 5.535 particularly the 40-page limit for exceptions and the 25-page limit for replies to exceptions. Exceptions should clearly be labeled as "EXCEPTIONS OF (name of party) - (protestant, complainant, staff, etc.)".

If no exceptions are received within twenty (20) days, the decision of the Administrative Law Judge may become final without further Commission action. You will receive written notification if this occurs.

Very truly yours,

James J. McNulty
 James J. McNulty

Secretary

law
 Encls.
 Certified Mail
 Receipt Requested

cc: ALJ TURNER/ OFFICE OF ALJ/OSA/PIO/LAW/T&S-KEEZEL/T&S-LEGAL/ NEW FILING/ OUR FILE/ CHAIRMAN/
 COMMISSIONERS
 WILLIAM M BARNES ESQUIRE
 SCHNADER HARRISON SEGAL & LEWIS LLP
 1600 MARKET STREET SUITE 3600
 PHILADELPHIA PA 19103

MICHAEL S HENRY ESQUIRE
 JOHN GALLAGHER ESQUIRE
 1760 MARKET STREET STE 1100
 PHILADELPHIA PA 19103

EEF

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Application of Earl Bierman :
For the right to begin to transport, as a :
common carrier, by motor vehicle, :
persons in airport transfer service :
from points in the borough of New Hope, :
Bucks County, and points within an : Docket No.
airline distance of twenty (20) statute : A-00114754
miles of the limits of said borough, to :
the Philadelphia International Airport :
in the city and county of Philadelphia, :
and the township of Tinticum, Delaware :
County, and the Allentown-Bethlehem- :
Easton Airport in the county of Lehigh. :

DOCKETED
AUG 27 1998

INITIAL DECISION

**DOCUMENT
FOLDER**

Before
Allison K. Turner
Administrative Law Judge

This application was received at the Commission on March 16, 1998, docketed on March 23, 1998, and published in the Pennsylvania Bulletin for protests on April 4, 1998. Protests were timely filed on behalf of Tropiano Airport Shuttle, Inc. (Tropiano), and Lehigh Valley Taxicab Co, Inc. (Lehigh Valley).

By hearing notice dated June 3, 1998 the application was scheduled for a hearing on Friday, July 31, 1998, at 10:00 a.m. in the Philadelphia State Office Building. The case was assigned to Administrative Law Judge Allison K. Turner (ALJ) for hearing and decision.

On June 17, 1998, the ALJ issued a prehearing Order setting forth procedures to be followed before and during the hearing, including procedures for requesting a continuance or cancellation.

The hearing was held as scheduled. Applicant did not appear. Counsel for Tropiano had notified the ALJ that he would not be attending. Lehigh Taxi was represented by Henri Marcel, Esq., who moved to dismiss the application. A brief transcript was created.

On August 3, 1998, Earl Bierman sent the ALJ a facsimile copy of a letter dated July 3, 1998, which he had filed with the Commission, formally withdrawing his application. Unfortunately, the ALJ had not previously received a copy of this letter.¹

Findings of Fact

1. Applicant is Earl Bierman of 186 North Main Street, New Hope, PA 18938, with the phone number (215) 862-2102. This address and phone number are identical to the ones given on the application.

2. The prehearing order, which included the date, time and location of the hearing, was served on the address above by first class mail, and there is no returned mail in the ALJ's file.

3. The hearing notice, which was dated June 3, 1998, was also served on the same address. The hearing notice included the ALJ's office address and phone number, which are in Philadelphia.

4. At about 10:15, the ALJ called Bierman's phone number and was connected with an answering machine, and left a message about the hearing scheduled for 10:00 that same morning, requesting him to return the call within 15 minutes, or the hearing would be held without him.

¹ The Commission did receive the letter as evidenced by a subsequent entry in the Commission's computerized docketing system (CMS).

5. Bierman did not call, and the hearing was held in his absence.

6. The prehearing order included the instruction that:

A request for a change of the scheduled hearing date must be submitted in writing no later than five (5) days prior to hearing. Requests for changes of initial hearings must be sent to the Chief Administrative Law Judge, P.O. Box 3265, Harrisburg, PA 17105-3265....

The instructions continue on to say that the Chief Administrative Law Judge should receive requests for initial continuances, but that subsequent requests should be directed to the ALJ.

7. Neither the Harrisburg Office of Administrative Law Judge (OALJ) nor the Philadelphia OALJ received any written or phone requests for a change in the scheduled hearing date, or for cancellation of the hearing.

8. On or around July 3, 1998, Applicant had sent a letter to the Bureau of Transportation and Safety formally withdrawing his application, which was received and docketed by July 21, 1998. He did not provide a copy to the ALJ or to OALJ. He did send a facsimile copy of this letter to the ALJ on August 3, 1998.

Discussion

At least two documents containing notice of the hearing were served on Applicant by first class mail at the address he provided, and were not returned as undeliverable. The Commission may presume he received them, and therefore that he received notice of the hearing, and of how to request a continuance or cancellation of the hearing.

Applicant made no request of record in the OALJ's files to have the hearing postponed and rescheduled. However, he did send a request to the Bureau of Transportation and Safety to withdraw his application. In the letter, he said in effect that he did not wish to proceed

with the hearing on July 31, 1998. No copy of this letter was provided to the ALJ before the date of the hearing.

Under the Public Utility Code, the Applicant as the moving party has the burden of proof to present evidence to support the grant of his application. Since he did not appear, and therefore did not present any evidence, normally, his application should be dismissed.

However, because he requested to withdraw his application several weeks before the hearing, instead of dismissing the application, Applicant's request to withdraw it will be granted. Withdrawal of pleadings in a contested proceeding is allowed under the Commission's rules, if permitted by the presiding officer. Participants must have the opportunity to oppose the request. 52 Pa. Code, Section 5.94(a). Here, since the protestants oppose the application, it is unlikely that they would oppose withdrawal. Further, they will have the opportunity to file exceptions to this initial decision, so they may express any opposition to the withdrawal in their exceptions.

Conclusions of Law

1. If a communication is sent by first class mail, and it is not returned as undeliverable, a presumption is created that it has been received.
2. Applicant is presumed to have received the ALJ's prehearing order which contained instructions as to how to seek a continuance or cancellation. He did not follow the steps set out there, however he did notify the Bureau of Transportation that he did not wish to proceed with his application at the scheduled hearing. This notification is sufficient.


3. The applicant had the burden of proof to show that the application should be granted. 66 Pa. C. S., Section 332(a). In this case, Applicant chose to withdraw his application rather than to present proof at hearing.

4. Since Applicant did not appear to support his application, normally, it would be dismissed. However, since he requested to withdraw his application before the hearing, this request will be granted. 52 Pa. Code, Section 5.94(a). Protestants may oppose this request in their exceptions.

ORDER

And Now Therefore,

1. The Application of Earl Bierman for the right to provide airport transfer service docketed at A-001147534 is hereby considered to be withdrawn, and the case shall be marked closed.



Allison K. Turner
Administrative Law Judge

Dated: August 4, 1998

DOCUMENT
FOLDER 010747

Act 294

98 SEP 15 AM 10:53

Case Identification:

RECEIVED
SECRETARY'S BUREAU
A-00114754; Application of
Earl Bierman...

Initial Decision By:

ALJ Allison K. Turner

Deadline for Return to OSA:

September 8, 1998

This decision has not been reviewed by OSA.

RECEIVED

DOCKETED

SEP 15 1998

* * * * *

SEP 10 1998

OFFICE OF SPECIAL
ASSISTANTS

I want full Commission review of this decision.

Commissioner

Date

I do not want full Commission review of this decision.

X *[Signature]*

Commissioner

9-10-98

Date

EEF

Act 294

Case Identification: A-00114754; Application of Earl Bierman...

Initial Decision By: ALJ Allison K. Turner

Deadline for Return to OSA: September 8, 1998

This decision has not been reviewed by OSA.

* * * * *

SEP 3 1998
SEP 1 1998
ASA

I want full Commission review of this decision.

Commissioner

Date

I do not want full Commission review of this decision.

Robert K. Sloan GKS
Commissioner

8/31/98
Date

Act 294

Case Identification: A-00114754; Application of Earl Bierman...

Initial Decision By: ALJ Allison K. Turner

Deadline for Return to OSA: September 8, 1998

This decision has not been reviewed by OSA.

RECEIVED

SEP 10 1998

* * * * *

OFFICE OF SPECIAL ASSISTANTS

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Commissioner

Date

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David W. Kolka /js
Commissioner

9.9.98
Date

Act 294

Case Identification: A-00114754; Application of Earl Bierman...

Initial Decision By: ALJ Allison K. Turner

Deadline for Return to OSA: September 8, 1998

This decision has not been reviewed by OSA.

SEP 9 1998

OFFICE OF SPECIAL
ASSISTANTS

* * * * *

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Commissioner

Date

I do not want full Commission review of this decision.

Nora Mead Brownell

Commissioner

9-3-98

Date

Act 294

Case Identification: A-00114754; Application of Earl Bierman...

Initial Decision By: ALJ Allison K. Turner

Deadline for Return to OSA: September 8, 1998

This decision has not been reviewed by OSA.

RECEIVED

SEP 8 1998

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OFFICE OF SPECIAL ASSISTANTS

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Commissioner

Date

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X 

Commissioner

SEP 8 1998

Date

DATE: September 17, 1998

SUBJECT: A-00114754

TO: Office of Administrative Law Judge
Annette Shelley

FROM: James J. McNulty
Secretary

NVL

DOCKETED

SEP 17 1998

DOCUMENT
FOLDER

APPLICATION OF EARL BIERMAN...

The Initial Decision has been served upon all parties of interest.

Neither exceptions nor requests for review from the Commissioners have been received by the Commission. This matter is referred to your office for whatever action you deem necessary.

cc: Office of Special Assistants

P.S. Please note that exceptions or reply exceptions may come in timely with certificates of mailings. A second memo will not be released for these exceptions.

SRB