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September 22, 2023

Hon. Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17120

RE: BIE v. Best Taxi, LLC Docket No. C-2022-3029070
BIE v. Good Cab, LLC Docket No. C-2022-3029079

Secretary Chiavetta:

Enclosed for electronic filing, please find the Main Brief of Best Taxi, LLC; and Good Cab, LLC regarding PUC Docket No. C-2022-3029070 and C-2022-3029079. This filing has been served on all parties of record in accordance with the Commission's Rules of Practice, as evidenced by the attached Certificate of Service.

As always, if you would like to discuss this matter further, please do not hesitate to contact me.

Sincerely,

/s/Cory A. Leshner

Cory A. Leshner, Esquire
Attorney for Protestants

Encl(s).
CAL/cal
cc: Michael Swindler, Esq. (via email)
ALJ Dennis Buckley (via email)

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I. PROCEDURAL HISTORY

Respondent adopts the stipulated Procedural History submitted by the Parties on January 9, 2023.

II. CONCISE STATEMENT OF ISSUES

A. Is 52 Pa Code §29.505(b) facially unconstitutional as the same encroaches upon an interest protected by the due process clause of the United States and Pennsylvania Constitutions?

Proposed Answer: YES

III. ARGUMENT

The issue before the Court is extremely narrow. The question to be determined is whether 52 Pa. Code § 29.505(b) is facially unconstitutional. Respondents respectfully suggest that the answer is yes. Respondents have standing to make this challenge as both are certificated call or demand carriers subject to the authority and regulation of the PA Public Utility Commission. The Bureau of Investigation and Enforcement has issued each carrier a citation for its alleged violation of 52 Pa. Code §29.505(b) and thus Respondents have standing to bring this challenge to the constitutionality of said regulation.

It is a well-established rule that a law is presumed to be constitutional and may only be found to be unconstitutional if the party challenging the law can prove that it “clearly, palpably, and plainly” violates the Constitution. See *Consumer Party of Pa. v. Commonwealth*, 507 A.2d 323, 331–32 (Pa. 1986). Article I, section 1 of the Pennsylvania Constitution provides: “All men are born equally free and independent, and have certain

inherent and inalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.” Pa. Const. art. I, § 1. *Nixon v. Com.*, 839 A.2d 277, 286 (Pa. 2003). While the Commonwealth may enact laws and regulations restricting such rights, such enactments are subject to judicial scrutiny. *Id. Gambone v. Commonwealth*, 101 A.2d 634, 636 (Pa. 1954). One of the rights guaranteed under Article 1, section 1 is the right to pursue a lawful occupation. *Id.* “The right to engage in a particular occupation, however, is not a fundamental right.” *Gambone*, 101 A.2d at 636–37; *Pirillo v. Takiff*, 341 A.2d 896, 900–01 (Pa. 1975). 52 Pa. Code §29.505(b) infringes upon an individual’s right to pursue the occupation of taxi driver, and subjects certificated carrier to punishment if a carrier were to hire such individuals. Therefore, the regulation at issue is subject to a rational basis scrutiny. *Nixon* 839 A.2d at 288.

“Under the “plainly legitimate sweep” standard, a statute is only facially invalid when its invalid applications are so real and substantial that they outweigh the statute's “plainly legitimate sweep.” *Clifton v. Allegheny County*, 969 A.2d 1197, 1223 n. 37 (Pa. 2009). “Stated differently, a statute is facially invalid when its constitutional deficiency is so evident that proof of actual unconstitutional applications is unnecessary.” *Peake v. Com.*, 132 A.3d 506, 517 (Pa.Cmwlth. 2015).

52 Pa. Code §29.505(b) creates a categorical ban against the hiring of drivers with certain past criminal history. The regulation creates three categories, a 7 year ban, a 10 year ban, and a lifetime ban, based solely upon the criminal history of the applicant driver. Of note, 52 Pa. Code §29.505(b) provides no limitation that the prior conviction must relate to the driver’s ability to provide call or demand service to the public in a safe manner. Further, the

regulation does not provide a carrier with any discretion to determine if the prior conviction of the proposed driver renders him incapable of safely operating in call or demand service.

In the case presently before this Court, the driver at issue was previously convicted of a violation of the Controlled Substance, Drug, Device and Cosmetic Act pursuant to 35 P.S. §§ 780-101--780-144. Specifically, on August 11, 2015 the driver was convicted of the following act: (30) Except as authorized by this act, the manufacture, delivery, or possession with intent to manufacture or deliver, a controlled substance by a person not registered under this act, or a practitioner not registered or licensed by the appropriate State board, or knowingly creating, delivering or possessing with intent to deliver, a counterfeit controlled substance. 35 P.S. § 780-113(a)(30).

There is no suggestion that this conviction relates adversely to the driver's suitability to provide service safely and legally. In fact, Mr. Ahmed as the owner of Best Taxi, employed his 20 years of experience in the operation of a call or demand service to determine that the driver's criminal history was not relevant to the position of taxi driver and thus should not disqualify him from the position. Despite such determination and exercise of discretion, the Commission issued a citation for the carrier's employment of the driver in violation of 52 Pa Code §29.505(b).

"Felony and misdemeanor convictions may be considered by an employer only to the extent to which they relate to the applicant's suitability for employment in the position for which he has applied." 18 Pa.C.S. § 9125. "In addition to the Pennsylvania Criminal History Record Information Act, 18 Pa.C.S. § 9125(b), Article I Section I of the PA Constitution also reflects, "it is against the public policy of the Commonwealth to summarily reject an

individual for employment on the ground that the individual has a prior criminal record unless in doing so the employer is furthering a legitimate public objective.” *El v. Se. Pennsylvania Transp. Auth.*, 297 F.Supp.2d 758, 761 (E.D. Pa. 2003). Additionally, the Commonwealth and its agencies, may enact laws that limit an individual's right to pursue a lawful occupation in order to achieve an important government interest. However, “the means employed to reach the desired end cannot be ‘unreasonable, unduly oppressive or patently beyond the necessities of the case;’ rather, they ‘must have a real and substantial relation to the objects sought to be attained.’” *Peake v. Com.*, 132 A.3d 506, 521 (Pa.Cmwlt. 2015)(citing *Gambone*, 101 A.2d at 637). Under the guise of protecting the public interests the legislature may not arbitrarily interfere with private business or impose unusual and unnecessary restrictions upon lawful occupations.” *Id.* “This means that the legislature can curtail the right to engage in a chosen occupation for an important reason, but it may not do so in a way that is overly broad.” *Peake v. Com.*, 132 A.3d 506, 519 (Pa.Cmwlt. 2015)

Here, the commission has promulgated a regulation that creates an irrebuttable presumption that those convicted of certain enumerated crimes are not capable of safely operating in call or demand service. “Irrebuttable presumptions often run afoul of due process protections because they infringe upon protected interests by utilizing presumptions that the existence of one fact [is] statutorily conclusive of the truth of another fact.” *Id.* (internal citations omitted). Our Supreme Court has explained that “an irrebuttable presumption is not constitutional where: (1) it encroaches on an interest protected by the due process clause; (2) the presumption is not universally true; and (3) reasonable alternative means exist for ascertaining the presumed fact.” *Department of Transportation, Bureau of Driver Licensing v. Clayton*, 684 A.2d 1060, 1063 (Pa. 1996)

Here, the irrebuttable presumption created by 52 Pa. Code §29.505(b) clearly runs afoul of the *Clayton* test. First, the regulation at issue absolutely encroaches upon an interest protected by the due process clause as the right to pursue a lawful occupation is clearly a protected interest pursuant to Article I Section I of the PA Constitution. *Nixon v. Com.* 839 A.2d 277, 288 (Pa. 2003). Second the presumption that every individual convicted of one of the enumerated criminal offenses is not capable of safely operating in call or demand service is not universally true. In fact, the Commission’s regulation at 52 Pa Code §29.505(a) recognizes this as a driver for a common or contract carrier is only disqualified from employment when convicted of a felony or misdemeanor where the same **“relates adversely to that person's suitability to provide service safely and legally.”** (emphasis added) Meaning that other similarly situated prospective drivers for certificated entities are not categorically prohibited from driving, but instead the certificate holder is empowered with discretion to determine whether the conviction impacts the person's suitability to provide service safely and legally. The third prong of the *Clayton* test, alternative means, is also met by highlighting the discretion that the Commission provides its certificate holders pursuant to 52 Pa Code §29.505(a) but denies the same such discretion to call or demand carriers pursuant to 52 Pa Code §29.505(b). An alternative, less restrictive means, to regulate clearly exists as the Commission has enacted such within a subsection of the same regulation.

The categorical ban from employment as a taxi driver of individuals convicted of certain enumerated offenses is facially unconstitutional. The ban as written provides no rationale relationship to protecting the traveling public. The ban is not the least restrictive means to accomplish such a protection. In fact, 52 Pa Code §29.505(a) recognizes that a less restrictive means exists to protect the traveling public from drivers with prior criminal

convictions. Specifically, 52 Pa Code §29.505(a) vests certificated carriers with the discretion to determine if an individual with a prior felony or misdemeanor conviction can provide service safely and legally. There is no logical or rationale reason that call and demand carriers cannot exercise the same the discretion. The practical effect of 52 Pa Code §29.505(b) is a categorical ban applicable to certain individuals seeking to work as taxi drivers solely because they have been previously convicted of a crime. This ban fails under rationale basis scrutiny and creates a constitutionally impermissible irrebuttable presumption. The irrebuttable presumption is unnecessarily broad and facially unconstitutional under the “plainly legitimate sweep” standard.

Conclusion

52 Pa Code §29.505(b) is facially unconstitutional. The regulation creates a categorical ban against the hiring of certain individuals with prior criminal history without any rational relationship to the Commissions interest in protecting the traveling public. Subsection (a) of the same regulation highlights that there exists a less restrictive means to accomplish the Commission’s objective of protecting the traveling public. There is no logical or rationale reason that call and demand carriers should be treated differently than contract or common carriers in their ability to exercise discretion to determine if a prospective driver’s prior criminal history relates adversely to that person's suitability to provide service safely and legally. As such, Respondents hereby respectfully request that this Court and ultimately the Commission recognize that the regulation at 52 Pa. Code §29.505(b) is facially unconstitutional and unenforceable. Further, Respondents would request that any citation issued by the Commission for violation of 52 Pa Code §29.505(b) be dismissed.

Respectfully Submitted,

/s/Cory A. Leshner

Cory A. Leshner, Esquire

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Attorney for Protestants

Dated: September 22, 2023

PROPOSED FINDINGS OF FACT

PROPOSED FINDINGS OF FACT

1. Complainant is the Pennsylvania Public Utility Commission's Bureau of Investigation and Enforcement and is the entity established by statute to prosecute complaints against public utilities.
2. Respondents are Best Taxi LLC and Good Cab, LLC, public utilities engaged in the transportation of persons for compensation within this Commonwealth as certificated call or demand entities.
3. Maher Saber Ahmed is the owner and/or manager of Respondents.
4. Maher Saber Ahmed has 20 years of experience in the taxicab industry and is the owner of several taxicab companies organized in the central Pennsylvania area.
5. Review of the criminal background histories of Respondent's taxicab drivers revealed that driver Harvell Johnson, date of birth March 16, 1967, was convicted of a felony violation of The Controlled Substance, Drug, Device, and Cosmetic Act (35 P.S. §§ 780-101--780-144) on August 11, 2015, in the Dauphin County Court of Common Pleas.
6. Respondent, via Mr. Ahmed, was aware of Harvell Johnson's criminal conviction prior to his hire.

7. Mr. Ahmed, using his experience and judgment, determined that Harvell Johnson's criminal history was not relevant to the position of taxi driver and thus should not disqualify him from the position.

8. Despite the felony conviction, Mr. Ahmed decided to hire Harvell Johnson as a taxi driver for Best Taxi, LLC.

9. The Commission's Bureau of Investigation and Enforcement filed a Formal Complaint against Best Taxi LLC, served on February 9, 2022, alleging that Best Taxi violated 52 Pa. Code § 29.505(b)(1)(i)(D) by permitting a driver to act as a taxi driver who should have otherwise been disqualified from acting as a taxi driver due to their criminal background history,

10. The Commission's Bureau of Investigation and Enforcement's formal complaint does not allege any violations by or attributable to Harvell Johnson other than he was acting as a taxi driver where he should have been disqualified from doing so due to his criminal history pursuant to 52 Pa. Code § 29.505(b)(1)(i)(D).

PROPOSED CONCLUSIONS OF LAW

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the subject matter and the parties in this proceeding.
2. It is a well-established rule that a law is presumed to be constitutional and may only be found to be unconstitutional if the party challenging the law can prove that it “clearly, palpably, and plainly” violates the Constitution. See *Consumer Party of Pa. v. Commonwealth*, 507 A.2d 323, 331–32 (Pa. 1986).
3. One of the rights guaranteed under Article 1, section 1 of the PA Constitution is the right to pursue a lawful occupation.
4. While the Commonwealth may enact laws and regulations restricting such rights, such enactments are subject to judicial scrutiny.
5. 52 Pa. Code §29.505(b) infringes upon an individual’s right to pursue the occupation of taxi driver, and subjects certificated carrier to punishment if a carrier were to hire such individuals. Therefore, the regulation at issue is subject to a rational basis test.
5. A challenge to a statute or regulation’s facial constitutionality is subject to the “plainly legitimate sweep” standard, which provides a statute is only facially invalid when its invalid applications are so real and substantial that they outweigh the statute's “plainly legitimate sweep.” *Clifton v. Allegheny County*, 969 A.2d 1197, 1223 n. 37 (Pa. 2009). Stated differently, a statute is facially invalid when its constitutional deficiency is so evident that proof of actual unconstitutional applications is unnecessary.
6. The Commonwealth and its agencies, may enact laws that limit an individual's right to pursue a lawful occupation in order to achieve an important government interest. However, “the means employed to reach the desired end cannot be ‘unreasonable, unduly oppressive or patently

beyond the necessities of the case;’ rather, they ‘must have a real and substantial relation to the objects sought to be attained.’

7. Under the guise of protecting the public interests the legislature may not arbitrarily interfere with private business or impose unusual and unnecessary restrictions upon lawful occupations.”

“This means that the legislature can curtail the right to engage in a chosen occupation for an important reason, but it may not do so in a way that is overly broad.”

8. Our Supreme Court has explained that “an irrebuttable presumption is not constitutional where: (1) it encroaches on an interest protected by the due process clause; (2) the presumption is not universally true; and (3) reasonable alternative means exist for ascertaining the presumed fact.”

9. 52 Pa Code §29.505(b) creates an irrebuttable presumption that those convicted of certain enumerated crimes are not capable of safely operating in call or demand service.

10. 52 Pa. Code §29.505(b) encroaches upon an interest protected by the due process clause as the right to pursue a lawful occupation is clearly a protected interest pursuant to Article I Section I of the PA Constitution.

11. The presumption that every individual convicted of one of the enumerated criminal offenses is not capable of safely operating in call or demand service is not universally true.

12. The Commission’s regulation at 52 Pa Code §29.505(a) provides a less restrictive alternative to protect the travelling public from individuals with a prior criminal history where the same “relates adversely to that person's suitability to provide service safely and legally.”

13. The categorical ban from employment as a taxi driver of individuals convicted of certain enumerated offenses is facially unconstitutional.

14. The ban as written provides no rationale relationship to the Commonwealth's interest in protecting the traveling public.
15. The ban is not the least restrictive means to accomplish such a protection.
16. 52 Pa Code §29.505(a) vests certificated carriers with the discretion to determine if an individual with a prior felony or misdemeanor conviction can provide service safely and legally.
17. There is no logical or rationale reason that call and demand carriers cannot exercise the same the discretion.
18. 52 Pa Code §29.505(b) fails under rationale basis scrutiny and creates a constitutionally impermissible irrebuttable presumption.
19. The irrebuttable presumption created by 52 Pa Code §29.505(b) is unnecessarily broad and facially unconstitutional under the "plainly legitimate sweep" standard.
20. by 52 Pa Code §29.505(b) is facially unconstitutional and thus cannot be enforced.

PROPOSED ORDER

PROPOSED ORDER

THEREFORE,

IT IS ORDERED:

That 52 Pa. Code §29.505(b) is facially unconstitutional and unenforceable. Further, any citation issued by the Commission against Respondents for violation of 52 Pa Code §29.505(b) shall be dismissed

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Bureau of Investigation and Enforcement,	:	
Complainant	:	
	:	Docket No. C-2022-3029070
v.	:	
	:	
Best Taxi LLC,	:	
Respondent	:	

Bureau of Investigation and Enforcement,	:	
Complainant	:	
	:	Docket No. C-2022-3029079
v.	:	
	:	
Good Cab LLC,	:	
Respondent	:	

CERTIFICATE OF SERVICE

I, Cory A. Leshner, Esquire, as counsel for Protestants, hereby aver that on the date set forth below, I cause a true and correct copy of the forgoing **Respondents' Main Brief** to be filed with the court. Service of said Breif was made upon on the following person(s) via either U.S. Mail and/or email

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

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Respectfully Submitted,

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Attorney for Respondents

Dated: September 22, 2023