



COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
COMMONWEALTH KEYSTONE BUILDING
400 NORTH STREET, HARRISBURG, PA 17120

BUREAU OF
INVESTIGATION
&
ENFORCEMENT

September 25, 2023

Via Electronic Filing

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

Re: Bureau of Investigation and Enforcement v. Good Cab
Bureau of Investigation and Enforcement v. Best Taxi
Consolidated Cases
Docket Nos. C-2022-3029079
C-2022-3029070

I&E Brief on the Constitutionality of 52 Pa. Code § 29.505(b)(1)

Dear Secretary Chiavetta:

Enclosed please find the Brief on the Constitutionality of 52 Pa. Code § 29.505(b)(1) of the Bureau of Investigation and Enforcement in the above-referenced proceeding. *This corrected document should replace the Brief that was timely e-filed on Friday, September 22, 2023, but was rejected due to an erroneous docket number on the transmittal letter only.*

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

Should you have any questions, please do not hesitate to contact me.

Sincerely,

A handwritten signature in blue ink, appearing to read 'G. Rosul', written over a light blue horizontal line.

Grant Rosul
Prosecutor
PA Attorney ID No. 318204

Enclosure
GR/jfm

cc: Hon. Dennis Buckley, Administrative Law Judge (*via e-mail*)
Michael L. Swindler, Deputy Chief Prosecutor (*via e-mail*)
Per Certificate of Service

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Bureau of Investigation and Enforcement	:	
	:	
v.	:	
	:	Docket Nos. C-2022-3029079
Good Cab, LLC	:	C-2022-3029070
	:	
Bureau of Investigation and Enforcement	:	Consolidated Cases
	:	
v.	:	
	:	
Best Taxi, LLC	:	

**BRIEF
OF THE
BUREAU OF INVESTIGATION AND ENFORCEMENT**

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Dated: September 25, 2023

I. PROCEDURAL HISTORY

On October 6, 2021, Enforcement Officers Barry Pacovsky and Timothy Troxell of the Pennsylvania Public Utility Commission (“Commission”) Bureau of Investigation and Enforcement (“I&E”) – Motor Carrier Division conducted an inspection of the vehicle and driver records of Best Taxi, LLC (“Best Taxi”). Upon inspection of the records, it became apparent that Best Taxi had allowed one driver to operate a taxicab even though, due to his criminal history, he was neither qualified nor suitable to provide safe transportation.¹

On October 7, 2021, PUC Enforcement Officers Travis Griffith, Barry Pacovsky, and Elliot Miller conducted an inspection of the vehicle and driver records of Good Cab, LLC (“Good Cab”). Upon inspection of the records, it became apparent that Good Cab had failed to review the criminal histories of three drivers prior to allowing them to operate company vehicles. Further, Good Cab had allowed one driver to operate a taxicab even though, due to his criminal history, he was neither qualified nor suitable to provide safe transportation.²

On June 21, 2022, an evidentiary hearing was held in the Good Cab case wherein evidence was produced and admitted into the record, including six (6) I&E exhibits. Included in the exhibits was the criminal record of Brian Hickman. Hickman was convicted in 2006 of robbery, a felony of the first degree, and was convicted in 2017 of possession with intent to manufacture or deliver a controlled substance.

On June 22, 2022, ALJ Chiodo entered an order to permit Good Cab to file a brief regarding a “constitutional issue” — specifically, the constitutionality of the Commission’s regulation at 52 Pa. Code § 29.505(b)(1) disqualifying certain individuals from acting as a call or demand or limousine driver if they have been convicted of certain criminal offenses.

¹ I&E Complaint at C-2022-3029070.

² I&E Complaint at C-2022-3029079.

On July 19, 2022, an evidentiary hearing was to be held in the Best Taxi case. However, no evidence was introduced. During this hearing, the parties agreed to consolidate the Best Taxi and Good Cab matters.

On July 19, 2022, ALJ Chiodo entered an order suspending the briefing schedule.

On September 23, 2022, ALJ Chiodo entered an Order consolidating BIE v. Good Cab, LLC at C-2022-3029079 and BIE v. Best Taxi, LLC at C-2022-3029070.

On January 6, 2023, a Joint Stipulation of Facts was filed by I&E and Best Taxi, LLC, including that one of Best Taxi's drivers, Harvell Johnson, was convicted of a felony violation of The Controlled Substance, Drug, Device, and Cosmetic Act on August 11, 2015, in the Dauphin County Court of Common Pleas.

No further briefing schedule had been ordered and the parties, by their counsel, have agreed to provide briefs on the sole issue of the constitutionality of 52 Pa. Code § 29.505(b)(1), with both parties filing their respective briefs by September 22, 2023.

I&E now submits the instant Brief to support its position that 52 Pa. Code § 29.505(b)(1) is constitutional, the violations set forth in I&E's complaints are proper and its complaints should be sustained in their entirety.

II. STATEMENT OF THE CASE

While conducting routine inspections of Good Cab driver records pursuant to 52 Pa. Code § 29.501 *et seq.* it was discovered that, *inter alia*, Good Cab employed Brian Hickman, who had been convicted of robbery in 2006 and possession with intent to manufacture or deliver on April 1, 2017.

While conducting routine inspections of Good Cab driver records pursuant to 52 Pa. Code § 29.501 *et seq.* it was discovered that, *inter alia*, Best Taxi employed Harvell Johnson,

who had been convicted of a felony violation of The Controlled Substance, Drug, Device, and Cosmetic Act on August 11, 2015.

III. SUMMARY OF ARGUMENT

Best Taxi and Good Cab lack standing to assert the constitutional right of their former employees to not be barred from driving a taxi on account of the employees' felony criminal convictions.

In the alternative, to the extent that Best Taxi and Good Cab (cumulatively referred to hereafter as "the Companies") have standing to challenge the regulation on the ground that it violates the constitutional rights of its former employees, the Commission's regulation prohibiting those convicted of certain crimes from operating as call or demand and limousine drivers is constitutional. The touchstone for evaluating whether prohibitions on certain type of work by reason of criminal record is whether there is a rational relationship between the bar to employment and the public interest. Because it is rational to prohibit those with drug- or violence-related convictions from operating as taxi drivers to protect the health, safety, and welfare of citizens who use taxi services, the regulation is constitutional.

IV. ARGUMENT

The Companies lack standing to assert the constitutional right of their former employees to not be barred from driving a taxi on account of the employees' felony criminal convictions. "Litigants typically lack standing to assert the rights of third parties." United States v. Hansen, 1463 S. Ct. 1932, 1939 (2023). See also Kowalski v. Temer, 543 U.S. 125, 127 (2004) (Attorneys lack standing to assert rights of indigent defendants to challenge Michigan procedure on appointment of counsel for indigent criminal defendants); Warth v. Seldin, 422 U.S. 490, 499 (1975) ("[T]he plaintiff generally must assert his own legal rights

and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.”).

Here, the Companies are attempting to assert the unconstitutionality of a Commission regulation *vis a vis* their former employees — convicted felons who were barred at the time the Commission brought its complaints against the Companies because of their convictions. The Companies are not asserting that their own rights have been violated by the Commission’s regulation restricting when they may employ convicted felons. Because they are attempting to challenge the regulation by asserting the rights of third parties, they do not have standing.

In the alternative, to the extent the Companies are deemed to have standing, the Commission regulation is constitutional. Statutes enacted by the General Assembly are presumptively valid and are held to be constitutional “unless it clearly, palpably and plainly violates the constitution.” West Mifflin Area School District v. Zahorchak, 607 Pa. 153, 163 (2010). Furthermore, any party who questions the constitutionality of a statute has the heavy burden of persuasion to counteract the presumption of being constitutional. Barrel of Monkeys, LLC v. Allegheny County, 39 A.3d 559, 563 (Pa. Commw. 2012). This framework also applies to regulations promulgated by the Commission. See Pocono Manor Investors, LP v. Pennsylvania Gaming Control Bd., 592 Pa. 625 (2007) (“We presume, as we do with all statutes, that the Board intended its regulations to be constitutional.”).

The Commission regulation at issue, 52 Pa. Code § 29.505(b)(1), provides that a carrier must conduct, or have a third party conduct, a local and national criminal background check on any driver applicant prior to permitting that person to act as a taxi driver. The regulation further provides that a “carrier shall disqualify an applicant convicted of certain

crimes.”³ Those crimes include a felony conviction for a violation of The Controlled Substance, Drug, Device and Cosmetic Act (35 P.S. §§ 780-101 — 780-144) within the preceding seven (7) years, a conviction for robbery within the preceding ten (10) years, and a conviction for a crime of violence as defined in 18 Pa.C.S. § 5702 at any time.⁴

While there is no case law addressing the constitutionality of this specific Commission regulation, its bar to employment in a regulated job role is analogous to other similar statutory restrictions in state and federal law that are applicable to a wide range of positions, from labor unionists to police officers to airport workers to bankers to employee benefit plan trustees.

Restriction on hiring individuals with certain criminal convictions is common for positions that require a great deal of trust to be placed in the individual so employed and carry a high degree of responsibility to do the job with integrity. For instance, Pennsylvania law prohibits any person who was convicted of a serious misdemeanor or felony from being employed as a police officer. 53 Pa. C.S. § 2164(7). Federal law prohibits the employment of anyone as an airport employee or in any position with access to an aircraft if they have been convicted of certain enumerated crimes within the 10 years preceding their employment. 49 U.S.C. § 4493. Federal law prohibits employment at a bank or financial institution to anyone convicted of crimes of dishonesty (which include drug crimes) without the approval of the FDIC, and the FDIC may not give consent to anyone convicted of crimes involving bribery or corruption in banking, embezzlement or theft, fraud or false statement in banking or bankruptcy transactions, obstructing the examination of a financial institution, or racketeering if the conviction is within 10 years of the job application. 12 U.S.C. § 1829.

³ 52 Pa. Code § 29.505(b)(1).

⁴ 52 Pa. Code §§ 29.505(b)(1)(i)(D), (ii)(B), and (iii)(B), respectively.

The right to pursue a particular occupation is not a fundamental right. Accordingly, laws which restrict the right to work in a certain occupation are analyzed under the rational basis test. Under this test, a law “must not be unreasonable, unduly oppressive or patently beyond the necessities of the case, and the means which it employs must have a real and substantial relation to the objects sought to be attained.” Nixon v. Commonwealth, 576 Pa. 385, 400–01 (2003). In other words, if a statute bears a rational relationship to the interest the General Assembly aims to achieve, the statute is constitutional.

The Nixon court continued that “[t]here is no question ... that the General Assembly may enact laws that restrict who may work with these individuals. Further, barring certain convicted criminals from working with these citizens may be an effective means of protecting such citizens from abuse and exploitation.” Id. at 402. The Commonwealth and, by extension, the Commission, may prohibit individuals with certain criminal convictions from holding certain positions and may distinguish between classes of ex-criminals so long as there is a real and substantial relationship to the interest the Commission is seeking to achieve.

Where a statute barring employment based on a past criminal conviction is challenged, courts balance the length of time between the conviction and the employment sought, the nature of the conviction (such as felony or misdemeanor, type of crime, and the details surrounding the crime) and whether it is rationally related to the job the party was denied, and whether others with similar criminal convictions are treated similarly.

In Shoul v. Commonwealth, Department of Transportation, Bureau of Driver Licensing, 643 Pa. 302 (2017), the Pennsylvania Supreme Court upheld a lifetime ban on possessing a Commercial Driver’s License to anyone convicted of drug trafficking, reasoning

that the lifetime ban passes the rational basis test on the ground that the ban is rationally related to the strong government interest in deterring drug trafficking.

Pennsylvania courts are not the only ones to have addressed this issue. Federal courts have addressed the myriad of federal conviction-based employment restrictions going back decades. For instance, in Presser v. Brennan, 389 F. Supp. 808 (N.D. Ohio 1975), a Federal District Court ruled that it did not violate the Fifth Amendment for an individual who had been convicted of a violation of the Labor Management Relations Act to be lifetime-barred from employment as a trustee of employee benefit plans. Because of the large amount of money involved in such trusts, the statute comported with its regulatory purpose to assure adequate protection to participants and beneficiaries of employee benefit plans.

Similarly, in Davis v. U.S. Department of Labor Office of Labor Management Standards, 2017 WL 3485811 (E.D. Mich. Aug. 15, 2017) (unreported), a Federal District Court held that Section 504 of the Labor Management Reporting and Disclosure Act which included a 13-year bar to employment with unions for certain enumerated offenses did not violate the Due Process Clause as there was a valid government interest to “guard against corrupt union practices by preventing those convicted of certain crimes from union employment” and to “purge the labor movement of its criminal element.” Id. at *5 (quoting Illario v. Frawley, 426 F. Supp. 1132, 1137 (D.N.J. 1977) explaining purpose of Section 504).

The cases where a challenge to a conviction-based employment bar have been sustained involved lifetime bans, and even then, only in cases of inconsistent application of the employment bar or extreme breadth of crimes making one ineligible for employment. And both of those cases involved a challenge to the Older Adult Protective Services Act.

Again, in Nixon v. Commonwealth, 576 Pa. 385 (2003), the Pennsylvania Supreme Court struck down the application of the Older Adult Protective Services Act to bar some individuals with a criminal record but not others with the same record, depending on their date of employment. Those employed for more than one year at a facility at the time of the effective date of the act did not face the same conviction-based employment bar as those with less than one year or those who were applicants for new positions. The court ruled that such a “grandfather clause” does not bear a rational relation to the goal of protecting older adults.

In Peake v. Commonwealth, 132 A.2d 506 (Pa. Commw. 2015), the lifetime ban on employing individuals with certain convictions in elder care settings was found to be overly broad and was struck down in its entirety. The Older Adult Protective Services Act was amended to prohibit persons with even one conviction of a list of enumerated crimes, which included felonies and misdemeanors, from being employed in the care of older adults.

The court in Peake explained that an employment ban must “relate the particular criminal conviction to particular employment,” and that an employment ban that treats a murder conviction the same as a misdemeanor theft conviction is not “fine-tuned” — misdemeanor convictions from decades ago operated the same as a recent murder conviction to bar employment of one so convicted. Because its prohibition was so broad, the Older Adult Protective Services Act’s prohibition was deemed unlawful.

Other cases prohibiting the enforcement of a lifetime ban either involved a great deal of time between a singular conviction and the employment, a lack of rational basis to apply such a ban to a minor crime given the nature of the employment, or its application to an employee who carried out their job responsibilities for years before the General Assembly made them ineligible based on a past conviction.

For instance, the court found no rational basis for a 1980 conviction for aggravated assault to bar a social caseworker from employment where the employee had been working as a caseworker without incident over a year when his employer discovered he was not eligible for employment in that position in 2002. Warren County Human Services v. State Civil Service Comm'n, 844 A.2d 70 (Pa. Commw. 2004). A telephone harassment conviction from Illinois which would have been a misdemeanor in Pennsylvania could not be the predicate for a lifetime ban on holding a CPA license. Ake v. Bureau of Professional and Occupational Affairs, State Board of Accountancy, 974 A.2d 514 (Pa. Commw. 2009). No rational basis existed to bar employment to school employee for thirty year old conviction for voluntary manslaughter who had worked for the school for several years before the lifetime ban on employment of those with homicide convictions was enacted. Johnson v. Allegheny Intermediate Unit, 59 A.3d 10 (Pa. Commw. 2012).

The Commission regulation at issue is inapposite to the employment bar in Warren County, Ake, and Johnson. The Commission regulation at issue in the instant matter contains a three-tiered system for barring employment based on criminal convictions, with each tier separately accounting for the remoteness in time of the conviction, the nature of the conviction, and its relation to driving a taxi. Perhaps most importantly, unlike the plaintiffs in Warren County, Ake, and Johnson, the former employees here are not subjected to lifetime bans on employment.

Both drivers who were illegally employed by Best Taxi and Good Cab had felony convictions for violations of The Controlled Substance, Drug, Device, and Cosmetic Act within seven years of their employment. People who use drugs attract trouble, can be a danger to others, and are accident prone when behind the wheel. Drug users tend to habitually, rather than recreationally, abuse their substance of choice. They tend to be

addicted to drugs and tend to use drugs in situations where they are not supposed to, such as prior to or at work. They may be desperate for money and may use dishonestly, deceit, or outright theft to obtain money or property to exchange for drugs.⁵

A person riding in a taxi is at the mercy of the driver. They may not know where they are at. They may be elderly or lower-income and rely on the taxi service for transportation. They may be by themselves. They may be inebriated. They cannot extricate themselves from any threatening situation because they are in a moving vehicle. All of these things make passengers of taxis easy marks for criminals.

To ensure that taxi drivers are not going to take advantage of their passengers, the Commission imposed a seven year ban on driving a taxi for those convicted of drug offenses. The seven year bar operates to ensure that an individual's criminal ways are well and truly behind them and that they will not present a threat to their passengers.

The Commission's interest in ensuring the safety and security of taxi passengers as well as the safe operation of taxi vehicles traversing public streets is rationally related to the seven year bar on employment of individuals with a felony conviction of The Controlled Substance, Drug, Device, and Cosmetic Act.

The employment bar here, for the Companies' respective employees convicted of felony drug offenses, is more analogous to the federal statutes noted above banning employment in certain fields, for a certain period of time, for specific crimes that are related to the responsibilities of the job.

⁵ See e.g. Dr. David N. Nurco DSW, Thomas E. Hanlon Ph.D., Timothy W. Kinlock M.A., "Recent Research on the Relationship Between Illicit Drug Use and Crime," *Behavioral Sciences & Law* 9 No. 3, 221-242 (Summer 1991) ("Major conclusions supported by the results of studies of the criminal activity of narcotic abusers are that both a higher prevalence and higher rates of crime are associated with more frequent use of heroin and/or cocaine, although addicts vary with regard to the type, amount, and severity of crime they commit.").

Because the Commission regulation at issue here bears a rational relationship to the interest the Commission aims to achieve, it is constitutional.

V. CONCLUSION

I&E respectfully requests that presiding ALJ Buckley and the Commission find that the Companies lack standing to challenge the Commission regulation or in the alternative that the Commission's regulation at 52 Pa. Code § 29.505(b)(1) is constitutional, the violations set forth in I&E's complaints are proper and its complaints should be sustained in their entirety.

Respectfully submitted,



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Dated: September 25, 2023

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	:	
Best Taxi, LLC	:	

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing document upon the parties, listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party).

Service by First Class Mail and Electronic Mail:

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Dated: September 25, 2023