

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of Ted A. Warren, Notice of	:	
Apparent Violation and Intent to Assess	:	Case No. 12-2100-TR-CVF
Forfeiture,	:	
	:	
Respondent.	:	

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**POST-HEARING BRIEF**  
SUBMITTED ON BEHALF OF THE STAFF OF  
THE PUBLIC UTILITIES COMMISSION OF OHIO

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**INTRODUCTION**

After the Ohio State Highway Patrol (“OSHP”) stopped the Respondent Ted Warren for following another vehicle too closely, Trooper Thomas observed in plain view drug paraphernalia that resulted in a lawful search of his vehicle and the seizure of marijuana. The commercial motor vehicle was registered to Mr. Warren, who was on duty and traveling alone in his vehicle at the time of the stop. Trooper Thomas observed a copper metal pipe with a burnt end sitting in the cup holder of the console in the power unit between the seats. The pipe was clearly visible to Trooper Thomas, who was positioned a few feet away inside the frame of the open passenger side door. Trooper Thomas believed this was an instrument to smoke marijuana and he confirmed his belief after smelling burnt marijuana residue on the end of the pipe. This gave Trooper Thomas reasonable suspicion and probable cause to have Mr. Warren’s vehicle searched.

The search uncovered marijuana inside a small tin container that was located on a shelf above the driver's side door. Both the pipe and marijuana were in the possession and physical reach of Mr. Warren while operating his vehicle.

49 C.F.R. 392.4(a) of the Federal Motor Carrier Safety Regulations ("FMCSR") provides that no driver shall be on duty and possess marijuana. Mr. Warren violated this regulation by possessing marijuana while he was operating a commercial motor vehicle on duty. The preponderance of the evidence and the governing law support this conclusion.

In sum, Staff met its burden. The Commission should uphold the violation.

## **STATEMENT OF FACTS**

On March 1, 2012 Trooper Meyers of the Ohio State Highway Patrol ("OSHP") contacted the West Jefferson Patrol Post to get another Trooper to assist him in working an air speed zone on Interstate 70 eastbound, just west of U.S. 42 in Madison County.<sup>1</sup> Trooper Thomas responded to the call and assisted in the operation.<sup>2</sup> The air speed zone was set up for eastbound traffic at Mile Posts 77 and 78 where lines were marked on the road.<sup>3</sup> The operation had a quarter of a mile increment setup with four traffic zones.<sup>4</sup>

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<sup>1</sup> Tr. at 17.

<sup>2</sup> *Id.* at 18.

<sup>3</sup> *Id.* at 17-18.

<sup>4</sup> *Id.* at 18.

Trooper Thomas was positioned on top of the ramp right at U.S. 40, just east of the air speed zone.<sup>5</sup>

Trooper Thomas was in contact with Trooper Meyers, who was flying the patrol plane.<sup>6</sup> Trooper Meyers was the pilot checking for traffic speeds, vehicles following too closely, or other violations passing through the speed zone.<sup>7</sup> Any traffic violations he observed were immediately communicated by radio from Trooper Meyers to Trooper Thomas with a description of the vehicles to be stopped and cited.<sup>8</sup>

At approximately 12:47 p.m. that day Trooper Meyers radioed Trooper Thomas about a driver of a commercial motor vehicle following too closely to another vehicle.<sup>9</sup> Trooper Meyers identified the vehicle as a blue conventional semi and he continued to track the vehicle until Trooper Thomas made the stop.<sup>10</sup> Trooper Meyers confirmed by radio to Trooper Thomas that he stopped the correct vehicle.<sup>11</sup>

After he stopped the vehicle, Trooper Thomas approached the passenger side of the truck and opened the passenger side door.<sup>12</sup> He made contact with Mr. Warren and

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<sup>5</sup> Tr. at 18.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 19.

<sup>10</sup> *Id.* at 22-23.

<sup>11</sup> *Id.* at 23-24.

<sup>12</sup> *Id.* at 24.

requested his driver's license, registration and insurance, and advised him of the nature of the stop.<sup>13</sup> At that time, Trooper Thomas observed a copper pipe with burnt residue on the end located in a cup holder in the console, which is the center part of the truck.<sup>14</sup>

Trooper Thomas asked Mr. Warren what it was and he responded that it was an instrument to let the air out of the tires.<sup>15</sup> Trooper Thomas asked again what it was and Mr. Warren responded again that it was something to let the air out of the tires.<sup>16</sup>

Trooper Thomas asked a third time and Mr. Warren, changing his previous answers, stated his truck just got fixed and whoever repaired his truck must have left it in there.<sup>17</sup> Trooper Thomas, already believing the pipe was an instrument used to smoke marijuana, requested to see the pipe.<sup>18</sup> Trooper Thomas sniffed the pipe, which smelled like burnt marijuana residue, and observed residue in the pipe.<sup>19</sup>

Trooper Thomas then asked Mr. Warren to exit the vehicle; from there he placed him under investigative custody until he could find out more information.<sup>20</sup> After

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<sup>13</sup> Tr. at 24.

<sup>14</sup> *Id.* at 24-25.

<sup>15</sup> *Id.* at 26.

<sup>16</sup> *Id.* at 27.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 28.

<sup>20</sup> *Id.* at 28.

Trooper Thomas placed Mr. Warren in his patrol vehicle, he ran the registration of the vehicle Mr. Warren was driving and confirmed that it was Mr. Warren's vehicle.<sup>21</sup>

Trooper Thomas then called Trooper Woodyard, the canine unit working the area, and Inspector Bays to assist in the investigation.<sup>22</sup> Trooper Woodyard searched the vehicle and seized a small Altoids can and a small thing of lip balm.<sup>23</sup> Trooper Thomas opened the Altoids can, which contained a green leafy plant substance that smelled and appeared to be marijuana.<sup>24</sup> Trooper Thomas took custody of the pipe and marijuana and placed the items in a plastic bag until he got back to the Post where he could mail the items to the crime lab.<sup>25</sup>

Inspector Bays arrived on the scene and Trooper Thomas advised him that marijuana and a pipe were recovered from a search of Mr. Warren's vehicle and that he issued citations to Mr. Warren under the Ohio Revised Code.<sup>26</sup> Trooper Thomas advised Inspector Bays that he issued citations to Mr. Warren for following too closely, and possession of marijuana and paraphernalia.<sup>27</sup> Inspector Bays conducted a Level II inspection

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<sup>21</sup> Tr. at 28, 104.

<sup>22</sup> *Id.* at 28.

<sup>23</sup> *Id.* at 29, 31.

<sup>24</sup> *Id.* at 31, 80.

<sup>25</sup> *Id.* at 31-32.

<sup>26</sup> *Id.* at 32, 97, 99.

<sup>27</sup> *Id.* at 106, 130-131.

on Mr. Warren's vehicle.<sup>28</sup> Following his inspection, Inspector Bays issued Mr. Warren his inspection report which contained three violations of the FMCSRs that mirrored the citations Trooper Thomas issued.<sup>29</sup> Inspector Bays cited Mr. Warren as a driver on duty who was following too closely and in possession of paraphernalia and marijuana.<sup>30</sup> Inspector Bays placed Mr. Warren out-of-service for 24 hours for the violations.<sup>31</sup> The Staff of the Commission later served notice on Mr. Warren that it was pursuing only one charge: possession of marijuana while on duty as a driver.<sup>32</sup>

Trooper Thomas took the pipe and marijuana back to the West Jefferson Patrol Post to process the evidence.<sup>33</sup> At the Post, Trooper Thomas conducted a field NIK test, which tested positive for marijuana.<sup>34</sup> Trooper Thomas then took pictures of all of the evidence recovered from the search of Mr. Warren's vehicle.<sup>35</sup> Next, Trooper Thomas prepared a Property Control Form ("Staff Exhibit 2"), which contained a description of

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<sup>28</sup> Tr. at 97, 101.

<sup>29</sup> *Id.* at 104-105, 108-109, 129.

<sup>30</sup> Staff Ex. 7 (Driver Vehicle Examination Report (Mar. 1, 2012)); Tr. at 104-106.

<sup>31</sup> Tr. at 107-108.

<sup>32</sup> Staff Ex. 1 (Notice of Preliminary Determination (Jun. 18, 2012)); Tr. at 9-11, 108, 121.

<sup>33</sup> Tr. at 33.

<sup>34</sup> *Id.* at 33, 42.

<sup>35</sup> *Id.* at 37-41.



the evidence he mailed to the lab for testing.<sup>36</sup> The evidence was packaged and mailed to the crime lab by Trooper Thomas following an established process and protocol.<sup>37</sup>

The OSHP Crime lab received the evidence on March 7, 2012, as recorded by the Evidence Receipt form.<sup>38</sup> On that form the lab generated and assigned a case number to track the custody chain within the lab to identify everyone handling the evidence.<sup>39</sup> The number (12-3046) was then placed on an Internal Chain of Custody Report that had to be logged each time an employee in the lab handled the evidence.<sup>40</sup> On June 5, 2012, according to the report, Criminalist Kara Klontz retrieved the evidence from the Drug Chemistry Holding Room and placed it in her possession.<sup>41</sup> The evidence sealed in a plastic bag had a Property Control Form with it that was prepared by Trooper Thomas, who included the form with the evidence when he mailed it to the lab.<sup>42</sup>

On June 11, 2012, Ms. Klontz analyzed the evidence that Trooper Thomas sent to the crime lab.<sup>43</sup> Ms. Klontz limited her testing and analysis to the plant material in the

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<sup>36</sup> Tr. at 35-37, 43-44.

<sup>37</sup> *Id.* at 45-52.

<sup>38</sup> Tr. at 144-145; Staff Ex. 10 (Evidence Receipt Form (Mar. 7, 2012)).

<sup>39</sup> Tr. at 146.

<sup>40</sup> Tr. at 140-141; Staff Ex. 9 (Internal Chain of Custody Report).

<sup>41</sup> Tr. at 147.

<sup>42</sup> *Id.* at 149-151, 154-155.

<sup>43</sup> *Id.* at 152.

metal Altoids tin.<sup>44</sup> While working the case, Ms. Klontz completed a Controlled Substance Worksheet to record the types of testing she performed on the evidence and a description of her findings.<sup>45</sup> The tests performed by Ms. Klontz on the evidence were consistent with the national accreditation standards prescribed by the Scientific Working Group in Drug Chemistry (“SWGDRUG”) to determine the presence of marijuana.<sup>46</sup>

The first test she conducted was the “Macroscopic” test.<sup>47</sup> This is a visual test to look at the morphological characteristics of the plant material to determine if they appeared to be marijuana.<sup>48</sup> Ms. Klontz looked at features like leaf shape, stems, and things that she could see with the naked eye.<sup>49</sup> Ms. Klontz concluded that the morphological characteristics were consistent with characteristics you would see in marijuana.<sup>50</sup> She indicated a positive result for this exam on her Controlled Substance Worksheet.<sup>51</sup>

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<sup>44</sup> Tr. at 154-155, 157, 167.

<sup>45</sup> Tr. at 152-154; Staff Ex. 12 (Controlled Substance Worksheet (Jun. 11, 2012)).

<sup>46</sup> Tr. at 157.

<sup>47</sup> *Id.* at 154.

<sup>48</sup> *Id.* at 155.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 158.

<sup>51</sup> *Id.*

The second test she performed was a color test called the “Duquenois-Levine” to test for the presence of THC on the plant material.<sup>52</sup> This is a three-part test that includes three different reagents.<sup>53</sup> The results of the second test were consistent with a positive test for marijuana.<sup>54</sup> The third test Ms. Klontz performed was the “Thin Layer Chromatography” test.<sup>55</sup> The results of the third test showed positive for marijuana.<sup>56</sup> Ms. Klontz scanned an image of the glass plate used to perform the Thin Layer Chromatography test and included it with her data and worksheet.<sup>57</sup>

Each of the three tests indicated the presence of marijuana, but when the three tests were combined it was Ms. Klontz’s opinion, to a reasonable degree of scientific certainty, that the plant material was, in fact, marijuana.<sup>58</sup> Ms. Klontz recorded her findings in a “Report of Analysis” in the lab’s LIM System, where the submitting agency could access the information.<sup>59</sup> When she completed her testing and analysis, Ms. Klontz sealed the evidence back into the plastic bag and returned it to the Long-Term Security

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<sup>52</sup> Tr. at 155, 159.

<sup>53</sup> *Id.* at 159-160.

<sup>54</sup> *Id.* at 161.

<sup>55</sup> *Id.* at 161-163.

<sup>56</sup> *Id.* at 163, 166-167.

<sup>57</sup> Tr. at 163-166; Staff Ex. 13 (Image of Slide with Case 12-003046).

<sup>58</sup> Tr. at 168-169.

<sup>59</sup> Tr. at 169-171; Staff Ex. 14 (Report of Analysis).

Holding Room.<sup>60</sup> The evidence was subsequently destroyed on November 8, 2012 pursuant to a written “Request for Destruction of Evidence” from the agency that submitted the evidence to the lab.<sup>61</sup>

Mr. Warren presented no evidence to counter Staff’s evidence nor did he take the stand to testify.<sup>62</sup>

### **APPLICABLE LAW**

Under Rule 4901:2-5-02(A), O.A.C., the Public Utilities Commission of Ohio (Commission) has adopted provisions of the motor carrier safety regulations contained in 49 C.F.R. 390 to 397, among other parts. That rule further states that all motor carriers operating in intrastate commerce within Ohio shall conduct their operations in accordance with those regulations and the provisions of this chapter. The scope of Part 392 of the FMCSRs applies to every motor carrier, its officers, agents, representatives, and employees responsible for the management, maintenance, operation, or driving of commercial motor vehicles pursuant to 49 C.F.R. 392.1

The Commission also adopted the civil forfeiture and compliance proceeding rules contained in Rules 4901:2-7-01 through 4901:2-7-22, O.A.C. These rules were properly applied and followed in this case.

The violation that Staff charged against Mr. Warren is:

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<sup>60</sup> Tr. at 171-172.

<sup>61</sup> *Id.* at 173-175; Staff Ex. 15 (Property Destruction Form)

<sup>62</sup> *Id.* at 224.

- 1) 49 C.F.R. 392.4(a)(1) – driver on duty and having possession of marijuana – No driver shall be on duty and possess, be under the influence of, or use, any of the following drugs or other substances: any 21 C.F.R. 1308.11 Schedule I substance.

Mr. Warren, while on duty, possessed marijuana as a controlled substance found under 21 C.F.R. 1308.11- Schedule I. (d) Hallucinogenic substances (25) Marijuana.

## **ARGUMENT**

### **A. Mr. Warren possessed marijuana while on duty as a driver.**

On March 1, 2012, Mr. Warren was stopped by Trooper Thomas for following another vehicle too closely on Interstate 70 in Madison County.<sup>63</sup> Mr. Warren was on duty as a driver for Total Package Express Inc. (Carrier) transporting a shipment for AK Steel from Middletown, Ohio to Wooster, Ohio.<sup>64</sup> He was operating a commercial motor vehicle with a gross vehicle weight rating of 50,000 pounds for the power unit and 80,000 pounds for the trailer.<sup>65</sup> Mr. Warren was transporting steel as his cargo.<sup>66</sup>

At approximately 12:47 p.m. Trooper Meyers observed the traffic violation and reported it to Trooper Thomas while the event was occurring or in close temporal prox-

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<sup>63</sup> Tr. at 102; Staff Ex. 7 (Driver/Vehicle Examination Report (Mar. 1, 2012)).

<sup>64</sup> Tr. 102-103; Staff Ex. 7 (Driver/Vehicle Examination Report (Mar. 1, 2012)).

<sup>65</sup> Tr. at 104; Staff Ex. 7 (Driver/Vehicle Examination Report (Mar. 1, 2012)).

<sup>66</sup> Staff Ex. 7 (Driver/Vehicle Examination Report (Mar. 1, 2012)).

imity to the event. Trooper Thomas quickly made visual contact on Mr. Warren's vehicle, based on Trooper Meyers' description and confirmation of the vehicle involved in the traffic violation.<sup>67</sup> Trooper Thomas then stopped the vehicle.<sup>68</sup>

Trooper Thomas approached the vehicle from the passenger side door of the vehicle, opened the door for his safety, and made contact with Mr. Warren who he identified from his license and registration.<sup>69</sup> In the course of discussing the nature of the stop with Mr. Warren, Trooper Thomas observed a copper pipe with burnt residue on the end in plain view in the console area.<sup>70</sup> Based on his 24 years of experience as a state Trooper on the road, Trooper Thomas believed the copper pipe was an instrument to smoke marijuana.<sup>71</sup> Trooper Thomas confirmed his opinion and suspicion after he requested to see it and smelled burnt marijuana residue on the end of the pipe<sup>72</sup>

Trooper Thomas questioned Mr. Warren about the pipe several times and he gave inconsistent answers regarding its ownership and purpose. Mr. Warren claimed ownership of the pipe and stated it was to let the air out of the tires.<sup>73</sup> Mr. Warren then changed his story by stating he just got his truck fixed and whoever repaired it must have left the

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<sup>67</sup> Tr. at 22-23.

<sup>68</sup> *Id.* at 24.

<sup>69</sup> *Id.* at 24-26.

<sup>70</sup> *Id.* at 24-25.

<sup>71</sup> *Id.* at 27.

<sup>72</sup> *Id.* at 27-28.

<sup>73</sup> *Id.* at 27.

pipe there in the console.<sup>74</sup> These are inconsistent statements by Mr. Warren that negatively reflect upon his veracity and credibility. Trooper Woodyard subsequently examined the pipe and agreed that it looked and smelled like a pipe that was used to smoke marijuana.<sup>75</sup> Trooper Woodyard had 19 years of experience and most of that experience was dealing with drug and criminal interdiction, and seizing this type of paraphernalia over the years.<sup>76</sup> Trooper Woodyard also observed that the pipe had nothing inside, like a measuring device or gauge for checking air pressure.<sup>77</sup> Trooper Woodyard corroborated Trooper Thomas, based on their substantial experience in law enforcement, in opinion and belief that the pipe was clearly paraphernalia used to smoke marijuana.

Trooper Thomas had probable cause and reasonable suspicion to have a warrantless search done on Mr. Warren's vehicle. Trooper Thomas was lawfully in position to see the pipe, which was immediately apparent to him from his experience to be drug paraphernalia. He lawfully seized the pipe and confirmed its incriminating nature.

Trooper Thomas placed Mr. Warren in investigative custody until he could find out more information.<sup>78</sup> Trooper Thomas then confirmed, through running Mr. Warren's

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<sup>74</sup> Tr. at 27.

<sup>75</sup> *Id.* at 75-77, 80.

<sup>76</sup> *Id.* at 76.

<sup>77</sup> *Id.* at 76-77.

<sup>78</sup> *Id.* at 28.

registration, that he owned the vehicle.<sup>79</sup> He then contacted Trooper Woodyard and Inspector Bays to come to the scene.<sup>80</sup>

Trooper Woodyard arrived first and was briefed as to the circumstances and told to perform a search of the vehicle by Trooper Thomas.<sup>81</sup> Trooper Woodyard performed the search and seized a mint container from a compartment above the door on the driver's side.<sup>82</sup> He opened the container and found what appeared to be marijuana, marijuana stems, and some residue in it.<sup>83</sup> He also seized a lip balm container, which also had what appeared to be marijuana residue in it as well.<sup>84</sup>

Trooper Woodyard gave the containers to Trooper Thomas, who opened them up and saw a green leafy substance.<sup>85</sup> Based on his training and experience, Trooper Thomas believed the substance was marijuana.<sup>86</sup> Trooper Thomas placed the evidence in a bag and took custody of the evidence.<sup>87</sup>

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<sup>79</sup> Tr. at 28.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 29.

<sup>82</sup> *Id.* at 77.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 77-78.

<sup>85</sup> *Id.* at 31, 40-41, 79-80.

<sup>86</sup> *Id.* at 31.

<sup>87</sup> *Id.* at 32.



Inspector Bays then arrived on the scene and was briefed by Trooper Thomas of the circumstances of the search and seizure of evidence believed to be marijuana and the pipe, and advised him that Mr. Warren was ticketed and gave him copies of those tickets.<sup>88</sup> Inspector Bays conducted an inspection of Mr. Warren's vehicle and then prepared his report, which contained violations that mirrored the citations Trooper Thomas had cited Mr. Warren.<sup>89</sup> The violations Inspector Bays noted in his report were for following too closely, and possession of marijuana and drug paraphernalia.<sup>90</sup> But after the report was transmitted to the Public Utilities Commission of Ohio the only violation pursued by its Staff was the possession of marijuana.<sup>91</sup>

Trooper Thomas transported the evidence to the West Jefferson Patrol Post to process the evidence and mail it to the crime lab.<sup>92</sup> At the Post, Trooper Thomas conducted a NIK test of the plant material.<sup>93</sup> He also took pictures of the pipe, tin container, and lip balm container.<sup>94</sup> Trooper Thomas also prepared a "Property Control Form" to accompany the evidence being sent to the crime lab to preserve the integrity of the chain of

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<sup>88</sup> Tr. at 32, 97.

<sup>89</sup> *Id.* at 99-107.

<sup>90</sup> *Id.* at 105-107.

<sup>91</sup> Tr. at 9-10, 107-108; Staff Ex. 1 (Notice of Preliminary Determination (Jun. 28, 1012)).

<sup>92</sup> Tr. at 33.

<sup>93</sup> *Id.* at 33.

<sup>94</sup> Tr. at 33-35, 37; Staff Ex. 3 (Photograph of Altoids can, lip balm, pipe, ruler); Staff Ex. 4 (Photograph, close-up of contents of Altoids can); Staff Ex. 5 (Photograph of NIK Test).

custody.<sup>95</sup> The evidence and form were then sealed inside a package for mailing to the crime lab.<sup>96</sup>

Ms. Klontz, Criminalist with the OSHP crime lab, tested the evidence received from the West Jefferson Patrol Post and Trooper Thomas for the presence of a controlled substance. Ms. Klontz is a qualified and experienced Forensic scientist in analyzing evidence for the presence of controlled substances.<sup>97</sup> Ms. Klontz was also qualified to discuss and explain the “Internal Chain of Custody Report” and procedures in place at the lab to preserve the integrity of the chain of custody for the evidence.<sup>98</sup>

Ms. Klontz testified that the package containing the evidence and property form Trooper Thomas mailed for testing was received by the lab on March 7, 2012 pursuant to the lab’s “Evidence Receipt Form” that was prepared when this mail was received by the lab.<sup>99</sup> The crime lab assigned lab number 12-003046 to the “Property Control Form” that Trooper Thomas sent with the evidence to continue the chain of custody over the evidence.<sup>100</sup>

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<sup>95</sup> Tr. at 33; Staff Ex. 2 (Property Control Form (Mar. 1, 2012)).

<sup>96</sup> Tr. at 46-51; Staff Ex. 6 (Specimen Box, Ohio State Highway Patrol Crime Lab) (demonstrative exhibit not admitted).

<sup>97</sup> Tr. at 135-138; Staff Ex. 8 (C.V. of Kara L. Klontz).

<sup>98</sup> Tr. at 139-144; Staff Ex. 9 (Internal Chain of Custody Report).

<sup>99</sup> Tr. at 144-148; Staff Ex. 10 (Property Control Form (Mar. 7, 2012)).

<sup>100</sup> Tr. at 148-151; Staff Ex. 11 (Property Control Form (Mar. 1, 2012)).

On June 5, 2012, Ms. Klontz transferred the property to her custody or locked cabinet from the Long-Term Security Room and returned the evidence back to the Long-Term Security Room on June 11, 2012.<sup>101</sup> Ms. Klontz did her analysis on June 11, 2012 and in the process she prepared a “Controlled Substance Worksheet” to indicate the type of testing done along with a description of the evidence tested.<sup>102</sup> The only evidence tested was the plant material in the Altoids tin.<sup>103</sup> Ms. Klontz performed three tests to indicate the presence of marijuana and they were: 1) Macroscopic test, 2) Duquenois-Levine test, and 3) the Thin Layer Chromatography test.<sup>104</sup> Ms. Klontz did scan an image of the actual physical plate used to conduct the Thin Layer Chromatography test, which charts the THC standard in comparison to the samples tested to indicate the presence of marijuana.<sup>105</sup>

Ms. Klontz testified that each test performed indicates the presence of marijuana, but unless you combine all of them, you cannot confirm the identity of marijuana.<sup>106</sup> As an expert in her field, Ms. Klontz gave an opinion to a reasonable degree of scientific

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<sup>101</sup> Tr. at 151-152.

<sup>102</sup> Tr. at 152-163, 166-169; Staff Ex. 12 (Controlled Substance Worksheet (Jun. 11, 2012)).

<sup>103</sup> Tr. at 154-155, 157, 167.

<sup>104</sup> *Id.* at 154-163.

<sup>105</sup> *Id.* at 163-166.

<sup>106</sup> *Id.* at 168.

certainty that when you take these three tests combined together she can, in fact, confirm that the identity of this plant material was marijuana.<sup>107</sup>

Based on the totality of the evidence, the Staff has met its burden by the greater weight of the evidence that Mr. Warren did, in fact, possess marijuana while on duty as a driver operating a commercial motor vehicle on March 1, 2012. The Staff established that the stop, and search and seizure of evidence in this case were all legal. Staff also established the chain of custody for the green leafy plant material in the Altoids container that was seized from the driver's side of Mr. Warren's vehicle and later tested at the OSHP crime lab. And, Staff established through expert analysis and testimony that the plant material was confirmed by Ms. Klontz to be a controlled substance, to wit marijuana, under 21 C.F.R. 1308.11- schedule I.

The probative value of this evidence stands unrebutted. Mr. Warren presented no evidence of his own to counter Staff's evidence nor did he take the stand to testify.<sup>108</sup> Where, as here, a civil defendant fails to testify in response to probative evidence presented against him, the tribunal is empowered to draw an adverse inference against the defendant.<sup>109</sup> The Commission should draw an adverse inference here and conclude that Mr. Warren's testimony, had he taken the stand, would have been adverse to his interests.

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<sup>107</sup> Tr. at 168-169, Staff Ex. 14 (Report of Analysis)

<sup>108</sup> Tr. at 224.

<sup>109</sup> *State ex rel. Verhovec v. Mascio*, 81 Ohio St.3d 334, 337 (1998) (citing *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976)).

**B. The Staff served Mr. Warren with a Notice of Preliminary Determination.**

The Staff presented evidence that Mr. Warren was served a notice of preliminary determination.<sup>110</sup> The notice provides \$.00 forfeiture to be assessed.<sup>111</sup> However, pursuant to rule 4901:2-7-21, O.A.C., the Commission is not restricted by the amount of the forfeiture its Staff provided in the notice if the Commission believes a greater amount is justified by the evidence from the hearing.

**CONCLUSION**

The OSHP made a stop of Mr. Warren's commercial motor vehicle for following another vehicle too closely in an air speed zone they were monitoring for traffic violations. Once stopped, the OSHP observed drug paraphernalia in plain view when making contact with the driver Mr. Warren. The OSHP has the requisite expertise and experience to identify contraband in plain sight. Having probable cause and reasonable suspicion to believe there may be more contraband in the vehicle the OSHP conducted a warrantless search of Mr. Warren's vehicle. As a result, the OSHP recovered plant material in a tin container that the OSHP crime lab later confirmed was marijuana. Mr. Warren was on duty as a driver and in possession of marijuana, which was a controlled substance under 21 C.F.R. 1308.11 – Schedule I (d) (25). The Staff proved by the greater weight of the evidence that Mr. Warren violated 49 C.F.R. 392.4(a)(1).

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<sup>110</sup> Tr. at 9-13; Staff Ex. 1 (Notice of Preliminary Determination (Jun. 18, 2012)).

<sup>111</sup> Staff Ex. 1 (Notice of Preliminary Determination (Jun. 18, 2012)).

Respectfully submitted,

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### **PROOF OF SERVICE**

I hereby certify that a true copy of the foregoing **Post-Hearing Brief** submitted on behalf of the Staff of the Public Utilities Commission of Ohio, was served this 25th day of November, 2013, via electronic mail upon the Respondent's counsel, Brent L. English, Esq., at [benglish@englishlaw.com](mailto:benglish@englishlaw.com), and via U.S. Mail at The 820 Building, 820 West Superior Avenue, 9<sup>th</sup> Floor, Cleveland, Ohio, 44113-1818.

*/s/ John H. Jones* \_\_\_\_\_

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PUCO