BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO

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| IN THE MATTER OF TED A. WARREN, Notice of Apparent Violation and Intent to Assess Forfeiture | ) | CASE NO.: 12-2100-TR-CVF (OH3257001617D) |
| | ) | ATTORNEY EXAMINER BRYCE A. MCKENNEY |

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**RESPONDENT, TED A. WARREN'S POST-HEARING BRIEF**

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## INTRODUCTION

On June 18, 2012 the "Staff" of the Public Utilities Commission of Ohio ("the Commission") served a "Notice of Preliminary Determination" upon the Respondent, Ted A. Warren. The Staff alleged that Respondent committed a "violation" of a commission rule or order on March 1, 2012 (Exh. 1, Tr. 10).[1] Specifically, he was alleged to have violated a Federal

[1]. The term "Staff" is defined in the Commission's rules to mean "those employees of the commission's transportation department to whom responsibility has been delegated for administering the provisions of sections 4905.83, 4919.99, 4921.99, and 4923.99 of the Revised

Motor Carrier Safety Regulations (FMCSR) – 49 C.F.R. § 392.04(a)(1) – by driving a commercial motor vehicle while being in possession of, using, or being under the influence of a drug or other substance defined in schedule I of 21 C.F.R. § 1391.[2] The Staff proposed to impose no forfeiture for the claimed violation.[3]

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Code, as applicable." Ohio Adm. Code 4901:2-01(J). Under the Commission's rules, the "staff" is a party to a proceeding such as the one in the case at bar. Ohio Adm. Code 4901:2-7-17.

[2]. In *B&T Express, Inc. v. Pub. Util. Comm*.,145 Ohio App.3d 656, 763 N.E.2d 1241 (10th Dist. 2001), the relationship between the FCMSRs and the Commission was set forth as follows: "The FMCSRs were promulgated pursuant to the Motor Carrier Safety Act of 1984, Sections 31131-31137, 31140-31144, 31146, 31147, Title 49, U.S. Code, which mandated that the Secretary of Transportation adopt regulations prescribing "minimum safety standards for commercial motor vehicles," Section 31136(a), Title 49, U.S. Code, and 'Government standards for inspection of commercial motor vehicles' on an 'annual or more frequent"'basis. Section 31142(b), Title 49, U.S. Code. *Natl. Tank Truck Carriers, Inc. v. Fed. Hwy. Adm. of United States Dept. of Transp*. (C.A.D.C.1999), 170 F.3d 203, 204. Although the FMCSRs were promulgated by the United States Department of Transportation, the individual states are given primary responsibility for enforcing the standards set forth in the FMCSRs through the Motor Carrier Safety Assistance Program ('MCSAP'). *Natl. Tank Truck Carriers* at 205; Section 350.201, Title 49, C.F.R. 'The MCSAP is a Federal grant program that provides financial assistance to States to reduce the number and severity of accidents . . . involving commercial motor vehicles . . . The MCSAP also sets forth the conditions for participation by States . . . and promotes the adoption and uniform enforcement of safety rules, regulations, and standards compatible with the . . . .(FMCSRs).' Section 350.101, Title 49, C.F.R. To this end, the MCSAP requires that participating states adopt and enforce 'State safety laws and regulations that are compatible with the FMCSRs.' Section 350.201, Title 49, C.F.R. In order to be deemed 'compatible' with the FMCSRs, state regulations must be 'identical to the FMCSRs . . . or have the same effect as the FMCSRs.' Section 350.105, Title 49, C.F.R. The state of Ohio participates in the MCSAP and chose, as most states have done, to simply adopt the substantive portions of the FMCSRs as its own rules, rather than develop entirely new rules having the 'same effect as the FMCSRs. In adopting the FMCSRs, Ohio, acting through the PUCO, promulgated Ohio Adm. Code 4901:2–5–02 . . ."

[3]. The Commission's rules provide that "[w]ithin ninety days of discovery of a violation, but no later than one year following the violation, the staff may serve a "notice of intent to assess forfeiture" for [a] violation upon one or more respondents." Ohio Adm. Code 4901:2-7-07(A). The rule further provides that "[i]n determining the amount of any forfeiture to be assessed, staff shall consider: (1) The nature and circumstances of the violation. (2) The extent and gravity of the violation. (3) The degree of the respondent's culpability. (4) The respondent's history of violations, including, but not limited to, prior "violations" as defined under this chapter and any

Respondent denied the allegation and filed a timely request for an administrative hearing on July 17, 2012 pursuant to Ohio Adm. Code 4901:2-7-13.[4]

The administrative hearing took place on October 10, 2013 before Attorney Examiner Bryce McKenny.

Following the hearing, the Attorney Examiner issued an order required simultaneous post-hearing briefs filed on, or before, November 25, 2013. This is Respondent's submission.

## OVERVIEW

The Commission has enacted a process to impose civil penalties upon those who violate the Commission's rules. See, Ohio Adm. Code 4901:2-7-01 *et seq*. A "violation" is defined in the Commission's Rules as "any conduct, act, or failure to act, prohibited by statute or commission rule or order." Ohio Adm. Code 4901:2-7-01.

As set forth in footnote 2, the Commission has adopted "the provisions of the motor carrier safety regulations of the U.S. department of transportation contained in 49 C.F.R. 40, 107, subparts f and g, 367, 380, 382, 383, 385, 386, 387 and 390 to 397, unless specifically excluded or modified by a rule of this commission." Ohio Adm. Code 4901:2-5-02. Those rules are applicable to all "motor carriers" as defined in Ohio Adm. Code 4901:2-5-01(A). They are also applicable to "owners and drivers of motor vehicles leased to motor carriers . . . during the periods covered by such lease agreements." *Id.*

Under 4901:2-7-04(C), any person having "statutory authority to take enforcement

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other available information concerning the respondent's safety of operations." Ohio Adm. Code 4901:2-7-07(B).

action" may report a violation to the Commission's staff.[5] Upon receiving a report of a violation, the Staff is obligated to identify the respondent(s) and serve a "Notice of Apparent Violation" upon him or her. Ohio Adm. Code 4901:2-7-05. That notice may be accompanied by a proposed notice of intent to assess a forfeiture. Ohio Adm. Code 4901:2-7-07 and 09. The notice must include "instructions regarding the manner in which the respondent may serve a timely request for conference to contest the violation" and a statement that "failure to contest the violation will conclusively establish the occurrence of the violation." Ohio Adm. Code 4901:2-7-05.

> The purpose of the conference is to give the respondent the opportunity to present reasons why the violation did not occur as alleged, mitigating circumstances regarding the amount of the forfeiture, reasons why the compliance order may be unjustified, or any other information relevant to the action proposed to be taken.

Ohio Adm. Code 4901:2-7-10(B).

If the matter is not resolved, the Staff has the right to issue and serve a "notice of preliminary determination" giving the respondent the right to request an administrative hearing. Ohio Adm. Code 4901:2-7-12. If a respondent timely requests an administrative hearing, a hearing officer is assigned by the Commission. The parties have the right to certain discovery. Ohio Adm. Code 4901:2-7-18.

The Staff must prove "the occurrence of a violation by a preponderance of the evidence."

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[5]. In R.C. 5503.34, the General Assembly created "in the department of public safety, division of state highway patrol, a motor carrier enforcement unit, to be administered by the superintendent of the state highway patrol. This unit shall be responsible for enforcement of commercial motor vehicle transportation safety and hazardous materials requirements . . . Employees of the motor carrier enforcement unit shall cooperate with the public utilities commission to enforce compliance with orders and rules of the commission, applicable laws under Chapters 4905., 4921., and 4923. of the Revised Code, and any other applicable laws or rules."

Ohio Adm. Code 4901:2-7-20(A).

## STATEMENT OF FACTS

On March 1, 2012, State Trooper Todd Thomas ("Thomas") was providing support to another state trooper (Trooper Myers) who was operating, as Thomas put it, in an "air speed zone" near U.S. 42 on Interstate 70 (Tr. 17-18; 23).[6] Thomas' job at the time was to interdict motorists allegedly observed by Meyers committing traffic offenses (Tr. 17-18 ). While Thomas admits he never saw Respondent commit any traffic offense, he testified (over Respondent's objection) that Meyers told him a "blue conventional semi" was following "too close to another vehicle in front of him." (Tr. 22.) Thomas got behind the semi tractor-trailer and stopped it (Tr. 22-23).

Thomas walked up on the passenger side of "blue conventional sem," climbed up two "rails," and opened the passenger side door (Tr. 24; 54-55; 69-70). He uninvitedly just stepped "inside the truck." (Tr. 24; 54-55.) Thomas' excuse for intruding into Respondent's truck was for "officer safety," saying that Respondent could have had a gun (Tr. 69-70).

Respondent provided Thomas with his driver license, registration and proof of insurance (Tr. 24). As he did so, Thomas claimed to have observed a "copper pipe with burnt residue on the end" in a cup holder about four feet away (Tr. 25; 57). Thomas claimed Respondent told him the device was used to let the air out of Respondent's tires (Tr. 26-27). Thomas also claimed that Respondent later told him that someone must have left the device – used in connection with his tires – in the cup holder (Tr. 26-27; 56).

Thomas surmised the item was used to smoke marijuana, even though he conceded that

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[6]. Meyers did not testify.

the "burnt residue" could actually have been dirt, grease and grime from using it on the truck tires (Tr. 27; 56). Thomas demanded to "see it." (Tr. 28). After Respondent gave it to him, Thomas concluded it smelled like marijuana (Tr. 28; 58). Despite the fact that he did not have any information to show that Respondent owned or controlled the device, he placed Respondent in "investigative custody" in the rear of his patrol car (Tr. 28; 59)

Thomas called for support from another trooper, Travis Woodyard. He also requested that a motor carrier investigator come to the scene because, as he put it, the latter has "federal regulations." (Tr. 28; 32; 60.)[7]

When Trooper Woodyard arrived at the scene, Thomas told him "what he had." (Tr. 28.) Woodyard testified that Thomas told him that a "brass pipe" with some "burnt residue in it" was found in Respondent's vehicle (Tr. 75). Woodyard smelled the device and confirmed it "smelled like burnt marijuana." (Tr. 75.) Woodyard interrogated Respondent about the item despite knowing Respondent was in "investigative custody" (Tr. 84). He also *Mirandized* him, after which he said that Respondent repeated that the device was used to check air pressure on his truck.

Woodyard then searched the interior of the tractor and found "a little bit of marijuana" in a mint container and "some marijuana residue" in a lip balm container (Tr. 77). He said the mint container was in a "cubby above the door," but did not recall where the lip balm container was found (Tr. 78). Woodyard said that the material in the containers looked and smelled like marijuana (Tr. 80). Woodyard undertook no field testing of the material claimed to be marijuana

[7]. Tar. Woodland testified that on the date of the incident (March 1, 2012) he was in a "drug interdiction unit and handled the canine." (Tr. 74.) The canine was not involved in any aspect of this case (Tr. 60; 88).

(Tr. 89).

Thomas did not see Woodyard search the truck (Tr. 60). Thomas testified that Woodyard returned with a "small Altoid® can and [a] small thing of lip balm." (Tr. 31). According to Thomas, either the Altoid® can or the lip balm contained "a green leafy plant substance." (Tr. 31; 60.) He surmised the plant material in one or both of the containers was marijuana based on his "sense of smell and vision." (Tr. 31.) Thomas left the scene after the motor carrier inspector arrived (Tr. 61-62).

The motor carrier inspector was Dennis Bays, II (Tr. 95). His job is to do "safety checks" on commercial motor vehicles (Tr. 95). Bays testified that Thomas wanted him to do a "level II" inspection of the truck, which he described as a "walk-around inspection" including checking the "tires, lights, condition of the truck, load . . . just [a] basic safety check." (Tr. 97). Bays created Exhibit 7 at the scene (Tr. 99). This exhibit is a report of the safety inspection. (Tr. 99). Bays used a computer program called "ASPEN" which electronically transmits data to a national database called SAFERweb which is "monitored" by the Commission (Tr. 99-100; 105; 117).

Bays found no safety violations and he saw no saw no impermissible drugs at the scene (Tr. 104; 115; 127). However, he relied upon what Thomas told him in reporting several "violations" on his inspection report.[8]

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[8]. Two of the "violations" related to 49 C.F.R. § 392.4. One related to "possession" of a "narcotic drug/amphetamine" in violation of R.C. 2925.11(C) and the other related to possession of drug paraphernalia in violation of R.C. 2925.14(C)(1). See, Exhibit 7. As indicated above, possession of "drug paraphernalia" is not prohibited by 49 C.F.R. § 394.4. Moreover, no evidence was offered at the hearing that Respondent ever possessed, used, or was under the influence of a "narcotic drug/amphetamine." 49 C.F.R. § 392.4 prohibits possession, use, or being under the influence of "an amphetamine or any formulation thereof (including, but not limited, to 'pep pills,' and 'bennies.'"

Thomas took the items which Woodyard said were found in Respondent's truck to the patrol post in West Jefferson, Ohio (Tr. 33). Thomas photographed the items (Exhs. 3 and 4) (Tr. 37;62). He also listed the items on a "property control form" marked as Exh. 2 and referred, on several occasions throughout his testimony, as a "28" (Tr. 35; 49-50).[9] He sent all of the items to the State Highway Patrol's crime lab to be tested for the presence of marijuana (Tr. 35; Exh. 2).

Before doing so, however, Thomas said he subjected the plant material in the Altoid® can to a "NIK test" (Tr. 41). He claimed this test, which he conducted by releasing three ampules of "some kind of chemical" resulted in a purple color, which he claimed was "positive for marijuana." (Tr. 42.) However, Exhibit 5, a photograph of the test results, does not show the color purple (Tr. 64). Thomas explained that "pictures to real is two different things" (sic) (Tr. 64.) He conceded that Exhibit 5 showed bands of a red color, which he first said were actually purple when the test was done (Tr. 65). After being challenged on this contention, Thomas said that the "purple" was supposed to be at the bottom of the bag (Tr. 66). He conceded Exhibit 5 showed this material as black or dark in color: "I'm not saying black, brown or purple. It's dark." (Tr. 66).

Thomas put the items supposedly found in Respondent's truck in an "evidence" box and mailed them to the "crime lab" (Tr. 50; 67).

Kara L. Klontz, one of seven "criminalists" at the Crime La, testified about tests she performed on one of the items of "evidence" submitted by Thomas (Tr. 211). Klontz had worked in the drug chemistry section of the lab for about two and one-half years (Tr. 133-137).

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[9]. This is from the designation HP-28 on the bottom of the form.

Importantly, Klontz had no recollection of performing the analytical work she testified about (Tr. 176). She estimated she had performed approximately 1,800 tests for the presence of "controlled substances" during her time at the lab and said she had performed about 700 tests for the presence of marijuana (Tr. 134-136; 160).

The lab has a manual for drug chemistry which specifies policies and procedures for testing, for evidence handling, and for quality assurance (Tr. 137). That manual is not part of the evidence in this case.

Klontz testified that when "evidence" is received at the lab, it is given a "unique case number" and an accompanying "bar code." (Tr. 140.) This permits the lab to know where that "evidence" may be "at all times." *Id*.

Klontz identified a copy of an "internal chain of custody" form (Exhibit 9) for items assigned to case number 12-003046 (Tr. 140-141). This form showed that a laboratory worker named Montenaro received items "by hand" on March 7, 2012 and "relinquished" them to the "laboratory holding room" the same day.

Klontz testified that when "evidence" is received at the lab an "evidence receipt form" is created (Tr. 143-144). Exhibit 10 is such a form which someone created on March 7, 2012 that bears case number 12-003046 (Tr. 145). Klontz had no personal knowledge of the entries in Exhibit 9 which do not bear her name and she is not the records custodian for the lab (Tr. 177).

Klontz did not have personal knowledge of when the "evidence" at issue in this case was received at the lab (Tr. 201). However, Exhibit 11 shows that 39 "biologicals" and 70 "CSB[']s" were received at the lab.[10] Someone stamped No. 12-003046 on a form and time-stamped it

[10]. Kontz testified that "CSB" meant "controlled substances." (Tr. 201).

March 7, 2012 at 12:44 p.m. (Exhibit 10; Tr. 201).

According to Klontz, she "went to the drug holding room" on June 5, 2012 and retrieved "the evidence" in a sealed manila envelope and which may have contained a "sealed plastic bag." (Tr. 146-148). A document called a "property control form" (Exhibit 11) was attached to the envelope (Tr. 148-149). The property control form described three items and bore case number 12-003046 (Tr. 150). She placed this "evidence" in a locked cabinet to which only she has access (Tr. 151).

On June 11, 2012 she subjected one piece of this "evidence" to analysis and then transferred the items to the "long term security room" (Tr. 151-152; 203; Exhibit 9). Klontz completed a "controlled substances worksheet" as she did her "analysis." (Tr. 152-153; Exhibit 12). While Klontz had no memory of doing any analysis of "the evidence" at issue, she testified that, from her review of the records, the only thing she analyzed was part of the plant material found in an Altoid's® can (Tr. 167; 176). She had no idea whether the other objects submitted contained marijuana (Tr. 199).

The total mass of the plant material in the can was a mere .68 grams (Tr. 155). Klontz undertook three "tests" on this plant material to determine "the presence of marijuana." (Tr. 157). She said that while each test "indicates the presence of marijuana . . . unless you combine all three of them, <u>you cannot confirm the identify of marijuana; so the three tests combined together are what give the result, marijuana</u>." (Emphasis supplied.) (Tr. 168.)

The first test was a "macroscopic test" which means she looked at the "morphological characteristics" of the plant material without amplification to see if it appeared to be marijuana (Tr. 155; 191). The second test was a "color test" called the Duquenois-Levine modified test.

The third was a "thin layer chromotography" test (Tr. 155). We address each "test" separately.

1. Visual Test

According to Klontz, the "morphological characteristics" of the plant material in the Altoid's® can was "consistent with characteristics you would see in marijuana." (Tr. 158). She said she ordinarily looked for leaf shape, stem structure, seeds that can be present, flowering tops that you can see with the naked eye (Tr. 208). However, on cross-examination, she could not identify which of those characteristics, if any, were present in this instance: "I can't tell you which specific features I did . . . notice to indicate that [the sample] would be positive [for marijuana]." (Tr. 192-193.) She further conceded that she had no "recollection of what [she] actually saw: "Of this piece of evidence, I only have my notes." (Tr. 198).

2. Color Test

According to Klontz, a "color test" is designed to test for the "presence of THC, the cannabinoid in marijuana." (Tr. 159). This color test is qualitative, not quantitative (Tr. 193). This test is "presumptive only" for the presence of marijuana (Tr. 193).

The test involves subjecting the plant material to three different reagents. *Id.* The first – the Duquenois-Levine reagent – is prepared by a "criminalist" in the laboratory (Tr. 159; 196-197). Klontz testified that the records for creation of this reagent are kept in a "reagent book" somewhere in the laboratory (Tr. 195). However, she did not have the book with her and she had not even looked at the book to ensure that the reagent had been properly prepared (Tr. 195). And she did not know who prepared the reagent or when (Tr. 195-196). The reagent book was not introduced into evidence.

Klontz said that the procedure she was supposed to follow for the "color test" was to take

a “small amount” of the plant material, put it in a test tube, and then put a milliliter of Duquenois-Levine reagent into it (Tr. 159). The tube should be “vortexed” for 15 seconds. *Id*. The liquid is then to be poured off into a separate test tube into which another milliliter of concentrated hydrocholoric acid was to be added. *Id*. If “it’s positive, it will turn a deep purple color.” *Id.*

However, the test is not complete until a milliliter of chloroform is added to the same test tube. *Id*. at 159-160. Because the chloroform is heavier, it sinks to the bottom of the test tube (Tr. 160). The chloroform is supposed to turn lavender. *Id.* If there is dark purple on top and lavender on the bottom . . . that is indicative of marijuana. *Id.*

Klontz marked Exhibit 12 as “positive.” (Tr. 161.) However, she had no recollection of ever doing the test or seeing one or more purple colors as the test was done: “Correct. I have no personal recollection of this piece of evidence.” (Tr. 196-197).

3. Thin Layer Chromotography

The last test which should have been performed is called the “thin layer chromatography test” or “TLC.” (Tr. 161.) This test involves taking a “small amount” of plant material and putting it into a test tube and adding an organic solvent – hexane – to “pull off any THC that we want to use.” (Tr. 162.) A small amount of the hexane, a volatile liquid, is then “spot[ed] on a thin-layer plate, which is like a glass square with a silica coating on it” where it dries “very quickly.” (Tr. 162; 189.)

The material is then compared to a “known standard” (but not a known concentration) of THC, which she testified was the “sychoactive ingredient in marijuana, also called “tetrahydrocannabinol.” (Tr. 162; 182.) About five microliters of a “known standard” is placed

on the plate (Tr. 209). In addition, a "spot" of hexane (about five microliters) which has not touched any plant material is also put on the plate (Tr. 182)).

The plate is then put in a hexane and diethelamine mixture (called a "TJ solution") and as the "plate is put in, a small amount of liquid hits the surface of the plate and moves up the plate similar to if you would put a paper towel in water. The water kind of wicks up, and when that happens, the solvent moving up the plate takes with it, based on its affinity for the solvent, any components of what I just spotted on it." (Tr. 162-163). Klontz said she then "compare[s] the level at which the sample [she] placed on the plate and the THC standard move and see if they move at the same rate, same time." (Tr. 163.)

In the case at bar, Klontz testified that the "spot that was from the sample I tested in this case and the spot of the THC correlate to one another." (Tr. 163.) In other words, she determined that the spot she placed on the plate had "THC in it." (Tr. 166.)

However, Klontz conceded she had no recollection of conducting the thin layer chromatography test on any of the "evidence" attributed to the Respondent (Tr. 199). Her handwriting on the exhibits did not help her refresh her recollection either (Tr. 199).

Moreover, Klontz testified that she never personally tested the allegedly "known source" of THC that she used to confirm that it, in fact, contained THC (Tr. 183). She said that the "known standard" (which comes in a bottle) contained about five millilters of material (Tr. 209-210). Klontz said she would have used a capillary tube to remove about five microliters of the presumed "known standard" from the bottle to spot onto the glass plate (Tr. 209).[11]

When the "known standard" comes to the lab (usually from a company called Cerilliant)

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[11]. There are one thousand microliters in one milliliter (Tr. 209). Thus, the bottle of the "known standard," containing about 5 milliliters, could be used for many tests (Tr. 210).

it contains a "known concentration." (Tr. 183; 206.) Klontz said it was customary for the lab to test the material to ensure it had THC in it (Tr. 184). However, she did not know if this had been done with this particular standard and she did not know who, if anyone, had done so, if anyone (Tr. 184). She conceded that if the "known sample" used to do the thin layer chromatography test was not correct, then the conclusion she drew from using it compared to the sample extracted from the plant material in the Altoid's® can would also not be correct (Tr. 184).

Klontz scanned an image of the plate used for the TLC test (Exhibit 13) (Tr. 163-164). However, this exhibit contains "multiple samples." (Tr. 165; 181, sixteen (16) separate samples; 186; 189.) Klontz said should would have etched the plate by hand with the case number for each line (Tr. 166; 185-186; 190). She conceded that she would have had to correlate the case she was working on with case number she supposedly etched into the plate, allowing that "there's always a chance" she mixed up a case number on the plate (which she destroyed) (Tr. 185-186).

Klontz typed the case numbers on the left side of the image of the plate to make them "easier to read." (Tr. 186). She had an electronic image of the plate itself (with the etched numbers, none of which are visible on Exhibit 13), but failed to bring it to the hearing (Tr. 187). She likewise conceded that as she was typing the case numbers she could have put the wrong number on the wrong line (Tr. 188).

Klontz emphasized that the thin layer chromatography test was a "presumptive technique." (Tr. 190).

Based upon the results of the three tests, Klontz concluded, to a reasonable scientific certainty, that the "evidence" was, in fact, marijuana (Tr. 169.) She said as much in her "report"

which was identified as Exhibit 14 (Tr. 169-171).

When Klontz was done with her analysis, she put the items in a "heat-sealed plastic bag" and transferred them to the "long-term security holding room." (Tr. 172.) Exhibit 9, the "internal chain of custody form" shows that the evidence was then moved to the "destroy container" and was destroyed on November 8, 2012 (Tr. 173-175 Exhibit 9; 11; and 15). Klontz testified she had nothing to do with the destruction of the evidence (Tr. 181).

## ARGUMENT

### 1. THE EVIDENCE SEIZED FROM THE RESPONDENT'S TRUCK IS NOT ADMISSIBLE BECAUSE THE SEIZURE VIOLATED THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 14 OF THE OHIO CONSTITUTION.

Trooper Thomas's traffic stop of Respondent's vehicle violated the Fourth Amendment because he did not have a valid factual or legal basis to do so. In order for the traffic stop to be valid, the arresting officer had to have a reasonable articulable suspicion to believe, prior to stopping or detaining defendant, that the driver was operating a motor vehicle in violation of the law. This rule of law rests upon the Fourth Amendment to the United States Constitution which requires a police officer to have articulable and reasonable suspicion that a vehicle or its occupant is subject to seizure *prior to stopping the vehicle*. *Delaware v. Prouse*, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979); *Brown v. Texas*, 443 U.S. 47, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1947). A Fourth Amendment seizure occurs "when there is a governmental termination of freedom of movement through means intentionally applied." (Emphasis omitted.) *Browere v. County of Inyo*, 489 U.S. 593, 597, 109 S.Ct. 1378, 103 L.Ed.2d 628 (1989).

In the case at bar, the Staff claimed that the traffic stop was justified by the purported observations of another police officer in an aircraft. However, that officer did not testify in this

case. Nevertheless, the Attorney Examiner, over Respondent's objection, permitted Thomas to testify about what Meyers told him. This is the rankest of hearsay and is entirely unfair to the Respondent.

In *State v. Chatton*, 11 Ohio St.3d 59, 61, 463 N.E.2d 1237 (1984), *citing Terry v. Ohio*, 392 U.S. 1, 21-22; 88 S.Ct. 1868, 20 L.Ed.2d 889 (1963), the Supreme Court of Ohio held that the ". . . detention of an individual by a law enforcement officer must, at the very least, be justified by 'specific and articulable factors' indicating that the detention was reasonable." Accord: *State v. Freeman*, 64 Ohio St.2d 291, 294, 414 N.E.2d 1044 (1980).

**2. EVEN IF TROOPER THOMAS WAS LEGALLY JUSTIFIED IN STOPPING AND DETAINING THE RESPONDENT, HE WAS NOT JUSTIFIED IN ENTERING RESPONDENT'S VEHICLE WITHOUT RESPONDENT'S CONSENT.**

For a search or seizure to be reasonable under the Fourth Amendment, it must be based upon probable cause and executed pursuant to a warrant. *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 514,19 L.Ed.2d 576 (1967); *State v. Brown* (1992), 63 Ohio St.3d 349, 350, 588 N.E.2d 113 (1992). This requires a two-step analysis. First, there must be probable cause. If probable cause exists, then a search warrant must be obtained unless an exception to the warrant requirement applies.

If the evidence does not satisfy either step, the evidence seized in the unreasonable search must be suppressed. *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961); *AL Post 763 v. Ohio Liquor Control Comm.*, 82 Ohio St.3d 108, 111, 694 N.E.2d 905, 908 (1998) *State v. Moore*, 90 Ohio St.3d 47, 2000-Ohio-10, 734 N.E.2d 804.

Generally, an investigatory stop must last no longer than required to issue a citation or check the detainee's record. *State v. Mootoosammy*, 9th Dist. No. 3150-M, 2001 WL 833479

(July 25, 2011) at *3. Indeed, courts will not condone "intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches [.]" *Terry v. Ohio*, 392 U.S. 1, 22, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). However, if during the limited scope and duration of the initial stop an officer encounters additional specific and articulable facts that give rise to a reasonable suspicion of criminal activity beyond that which prompted the stop, the officer may continue to detain the defendant to investigate those new concerns. *State v. Fry*, 9th Dist. No. No. 23221, 2007-Ohio-3240, 2007 WL 1827578*; State v. Shook*, 9th Dist. No. 93CA005716, 1994 WL 263194 (June 15, 1994), at *3, citing *State v. Chatton, supra* at 63 (holding that a driver may not be detained to investigate an issue other than that which precipitated the traffic stop absent some specific and articulable facts).

However, "once a law enforcement officer has probable cause to believe that a vehicle contains contraband, he or she may search a validly stopped motor vehicle based upon the well-established automobile exception to the warrant requirement." *State v. Moore* , 90 Ohio St.3d 47, 51, 2000-Ohio-10, 734 N.E.2d 804 (2000), citing *Maryland v. Dyson*, 527 U.S. 465, 466, 119 S.Ct. 2013, 144 L.Ed.2d 442 (1999).

"[T]he concept of exigency underlies the automobile exception to the warrant requirement." *Moore* at 52. Furthermore, "the 'automobile exception' has no separate exigency requirement." *Dyson* at 466; *United States v. Ross*, 456 U.S. 798, 809, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982) ("In this class of cases, a search is not unreasonable if based on facts that would justify the issuance of a warrant, even though a warrant has not actually been obtained").

In the case at bar, Thomas conceded that he had no basis to enter Respondent's truck other than an alleged fear for "officer safety." (Tr. 69-70). He climbed up two rails on the

passenger side of the truck, through the door open and entered the cab. *Id.* Respondent never invited Thomas into his truck (Tr. 54-55).

It was only after Thomas entered the truck without justification that he saw what he thought was a copper pipe in a cup holder (Tr. 25; 57). The item was clearly not in plain view until after Thomas illegally entered the truck.

Thomas then impermissibly used this "discovery" to induce another trooper to search the cab of the truck leading to the alleged discovery of marijuana in the truck.

It is clear that Thomas had no legal basis to enter Respondent's truck. Accordingly, all evidence seized as a result of the illegal seizure should not be considered in this proceeding.

**3. THE STAFF ADDUCED NO EVIDENCE TO SHOW THAT RESPONDENT WAS SUBJECT TO THE COMMISSION'S RULES.**

The Staff presumed, but failed to prove with any competent, credible evidence, that Respondent was subject to the Commission's Rules at the time of the purported violations. This failure is fatal to the Staff's case because it clearly had the burden to prove "the occurrence of a violation by a preponderance of the evidence." Ohio Adm. Code 4901:2-7-20(A).

We do not dispute that the Commission has adopted

> the provisions of the motor carrier safety regulations of the U.S. department of transportation contained in 49 C.F.R. 40, 107, subparts f and g, 367, 380, 382, 383, 385, 386, 387 and 390 to 397, unless specifically excluded or modified by a rule of this commission, and those portions of the hazardous materials transportation regulations contained in 49 C.F.R. 171 to 180, as are applicable to transportation or offering for transportation by motor vehicle, as effective on the date referenced in paragraph (G) of this rule.

Ohio Adm. Code 4901:2-5-02.

The Commission's rules provide that "[a]ll **motor carriers** operating in intrastate commerce within Ohio [are required to] conduct their operations in accordance with those

regulations and the provisions of this chapter . . .” (Emphasis supplied.) Ohio Adm. Code 4901:2-5-02(A). Moreover, the Commissions rules also require all

> **motor carriers** engaged in interstate commerce in Ohio [to] operate in conformity with all regulations of the U.S. department of transportation, which have been adopted by this commission. Violation of any such federal regulation by any motor carrier engaged in interstate commerce in Ohio shall constitute a violation of this commission’s rules. (Emphasis supplied.)

Ohio Adm. Code 4901:2-5-02(B).

Furthermore, the Commission’s rules provide that “[o]wners and drivers of motor vehicles leased to motor carriers are subject to these rules and regulations during the periods covered by such lease agreements. (Emphasis supplied.) Ohio Adm. Code 4901:2-5-01(A). Bays testified that the truck and trailer were owned by Respondent (Tr. 104). Thus, if Respondent was working for either of these companies, he would have done so as a lessee.

The Staff adduced no evidence that Respondent was driving for either an interstate or an intrastate motor carrier at the time of the purported violations. Inspector Bays testified that Respondent, based upon his review of documents and from a discussion with Respondent, was allegedly carrying freight from AK Steel in Middletown, Ohio to Wooster, Ohio (Tr. 102-103). However, no witness testified what that freight was, or whether there was even freight on the truck (Tr. 86-87).

Bays did not identify AK Steel or the company for which Respondent was purportedly working in some capacity – Total Package Express, Inc. – (Tr. 102; 112), as either interstate or intrastate “motor carriers.” However, even if the evidence showed that either company, or both of them, were “motor carriers,” it clearly did not show that the Commission’s rules applied to Respondent since those rules apply to “owners and drivers of motor vehicles leased to motor

carriers are subject to these rules and regulations [only] during the periods covered by such lease agreements. (Emphasis supplied.) Ohio Adm. Code 4901:2-5-01(A). The Staff did not demonstrate that Respondent was "leased" to any motor carrier or that he was driving a commercial vehicle during "a period[] covered by" such a lease agreement" at the time of the purported violations. *Id.* Thus, the Staff failed to prove by a preponderance of the evidence that Respondent was subject to the Commission's Rules.

**4. EVEN IF RESPONDENT WAS SUBJECT TO THE COMMISSION'S RULES, INCLUDING SECTION 392.4 OF THE FEDERAL MOTOR CARRIER SAFETY REGULATIONS WHICH HAVE BEEN ADOPTED BY THE COMMISSION, THE STAFF FAILED TO PROVE THAT HE POSSESSED MARIJUANA.**

49 C.F.R. § 392.4 reads as follows:

> (a) No driver shall be on duty and possess, be under the influence of, or use, any of the following drugs or other substances:
>
> (1) Any 21 C.F.R.1308.11 Schedule I substance;
>
> (2) An amphetamine or any formulation thereof (including, but not limited, to "pep pills," and "bennies");
>
> (3) A narcotic drug or any derivative thereof; or
>
> (4) Any other substance, to a degree which renders the driver incapable of safely operating a motor vehicle.
>
> (b) No motor carrier shall require or permit a driver to violate paragraph (a) of this section.
>
> (c) Paragraphs (a) (2), (3), and (4) do not apply to the possession or use of a substance administered to a driver by or under the instructions of a licensed medical practitioner, as defined in § 382.107 of this subchapter, who has advised the driver that the substance will not affect the driver's ability to safely operate a motor vehicle.
>
> (d) As used in this section, "possession" does not include possession of a substance which is manifested and transported as part of a shipment. (Emphasis supplied.)

The Staff's burden was to prove by a preponderance of the evidence that Respondent

possessed, used, or was under the influence of a Schedule I drug set forth in 21 C.F.R. § 21 C.F.R. § 1308.11. See, Ohio Adm. Code 4901:2-7-20(A).[12]

The Staff contends that Respondent possessed "marijuana" on March 12, 2012 while on duty in a commercial vehicle. However, marijuana is not a listed Schedule I drug in 21 C.F.R. § 1308.11. Under the law, a Schedule I drug

> consist(s) of the drugs and other substances, by whatever official name, common or usual name, chemical name, or brand name designated, listed in this section. Each drug or substance has been assigned the DEA Controlled Substances Code Number set forth opposite it.

21 C.F.R. § 1308.11(a).

Amongst the many drugs in Schedule I are "hallicinogenic substances." The regulations reads, in pertinent part, as follows:

> (d) Hallucinogenic substances. Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation, which contains any quantity of the following hallucinogenic substances, or which contains any of its salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation (for purposes of this paragraph only, the term "isomer" includes the optical, position and geometric isomers):
>
> * * *
>
> (31) Tetrahydrocannabinols [DEA 7370] [m]eaning tetrahydrocannabinols naturally contained in a plant of the genus Cannabis (cannabis plant), as well as synthetic equivalents of the substances contained in the cannabis plant, or in the resinous extractives of such plant, and/or synthetic substances, derivatives, and their isomers with similar chemical structure and pharmacological activity to those substances contained in the plant, such as the following: 1 cis or trans tetrahydrocannabinol, and their optical isomers[;] 6 cis or trans tetrahydrocannabinol, and their optical isomers[;] 3, 4 cis or trans tetrahydrocannabinol, and its optical isomers (Since nomenclature of these substances is not internationally standardized, compounds of these structures, regardless of numerical designation of atomic positions covered.)

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[12]. The Staff does not allege that possession of drug paraphernalia while on duty in a commercial truck is a violation of the FMCSR. Indeed, it is not.

Thus, the State had the burden of providing that Respondent possessed, used, or was under the influence of "tetrahydrocannabinols" as defined in 21 C.F.R. § 1308.11(d)(31) on March 1, 2012.

Trooper Woodyard searched Respondent's truck and found two containers that allegedly contained "small amounts" of "marijuana" (Tr. 77-78.) He gave these containers to Thomas who took them to his patrol post where he performed a "field test" on only a sample of the material taken from the Algoid® can (Tr. 41).

The results of this field test were supposedly "positive for marijuana." (Tr. 33.) However, no evidence was adduced that this test showed the presence of "tetrahydrocannabinols" as defined in 21 C.F.R. § 1308.11(d)(31). Thomas testified that he performed a "NIK test" by subjecting a small amount of the plant material to three groups of chemicals (Tr. 41-42). Someone had told him that if the resulting solution was "purple," then marijuana was present (Tr. 42). No evidence was presented that the purple color meant that "tetrahydrocannabinols" as defined in 21 C.F.R. § 1308.11(d)(31) was present.

Moreover, while Thomas said he performed NIK test, and supposedly found a purple color, Exhibit 5 belies this claim. That exhibit does not show any purple at all in the material at the bottom of the test kit, which Thomas said was the relevant material to examine (Tr. 66). Even if a purple color had been achieved, this claim was clearly insufficient to prove that the material in the Algoid® can contained any concentration of "tetrahydrocannabinols" as defined in 21 C.F.R. § 1308.11(d)(31).

Thomas testified that he packaged up all of the "evidence" and sent it to the State Highway Patrol's crime lab (Tr. 67).

The evidence adduced by the Staff regarding the analysis of one of the pieces of "evidence" sent to the lab by Thomas did not show that tetrahydrocannabinols were present. First, the analyst did not recall doing any analysis on the materials (Tr. 192-193; 196-197; 199; 201). Rather, she could only go by documents that she played a hand in creating but which she said did not refresh her recollection (Exhibits 12 and 13, Tr. 175-176).

According to Klontz, she had to conduct three tests to conclusively prove the existence of marijuana (Tr. 168). While she wrote down that all three tests were positive (Exhibit 12), she had no recollection of doing any of them (Tr. Tr. 192-193; 196-197; 199).

First, she could not remember what "morphological" characteristics of the plant material suggested that it was marijuana (Tr. 12-193).

Second, while Klontz claimed that the color test was "positive" for marijuana, she could not establish that the critical reagent – the Duquenois-Levine reagent – was actually prepared in accordance with any standard or even when, who, or how it was prepared (Tr. 195-196). No evidence was offered to show that the reagent was prepared properly or what it actually contained. Moreover, Klontz could not remember what the color distribution, if any, was when the sample was analyzed (Tr. 196-197).

Third, Klontz had no recollection of performing the thin layer chromatography test (Tr. 199). While she described how the test was supposed to have been done, she could not establish that the test was done as she had been trained. She did not know whether the "known standard" supposedly containing THC in fact contained THC and no evidence was offered by the Staff to demonstrate that it did (Tr. 209-210). While Kontz said that it was customary for the laboratory to test such materials, she did not know if this had been done when the "known standard" she

used for the test was received by the lab or what the results may have been (Tr. 183; 184; 206) Furthermore, she conceded that if the known standard was wrong, then the conclusions she drew from testing the sample of the "evidence" submitted by Thomas would be wrong (Tr. 184).

The Staff, therefore, did not adduce competent, credible evidence showing that the material tested by Klontz in fact contained "tetrahydrocannabinols." As Klontz emphasized, the three tests combined are required to "confirm the identify of marijuana" and each of the tests, standing alone, are merely "presumptive." (Tr. 168; 190; 193; 198).

The field test result was insufficient to establish possession of tetrahydrocannabinols as were the perceptions of the two troopers. Since the drug test results were not shown to be reliable, there is simply no evidence that any of the materials seized from the truck contained a Schedule I drug prohibited by 49 C.F.R. § 392.4. Accordingly, Respondent was not shown to have violated any of the Commission's rules on March 1, 2012.

**5. THE STAFF'S POSITION IS UNDERMINED BY THE FACT THAT ALL OF THE EVIDENCE WAS DESTROYED DURING THE PENDENCY OF THIS CASE.**

It has been recognized that "[e]ven prior to the commencement of any litigation, a plaintiff is under a duty to preserve evidence which it knows or reasonably should know is relevant to the action." (Citations and quotations omitted.) *Loukinas v. Roto–Rooter Servs. Co.*, 167 Ohio App.3d 559, 2006-Ohio-3172, 855 N.E.2d 1272, ¶ 18. "[W]here evidence is intentionally or negligently spoiled or destroyed by a plaintiff or his expert before the defense has an opportunity to examine that evidence for alleged defects, a court may impose a sanction." *Holiday v. Ford Motor Co.*, 8th Dist. No. 86069, 2006–Ohio–284, 2006 WL 178011 at ¶ 21. "'Although there is a rebuttable presumption that a defendant was prejudiced by the destruction of relevant evidence, a plaintiff can still persuade the court that there was no reasonable

*possibility that the defendant was prejudiced.' " Id. at ¶ 22, quoting State Auto Ins. Cos. v. Troll*, 8th Dist. No. 84284, 2005-Ohio-877, 2005 WL 488380.

In the case at bar, the evidence shows that all of the physical evidence should could have been inspected and tested by the Respondent to disprove the Staff's contentions was destroyed during the pendency of this case (Tr. 173-175; Exhibits 9, 11 and 15). Respondent is therefore entitled to a rebuttable presumption that the physical evidence did not contain "tetra-hydrocannabinols" as defined in 21 C.F.R. § 1308.11(d)(31). The Staff cannot and has not overcome that presumption and, thus, the Staff cannot prove a requisite element of its case.

**CONCLUSION**

Based upon the foregoing, the Staff did not meet its burden of proof in this case. Accordingly, the claimed violation(s) against the Respondent should be dismissed, with prejudice.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and complete copy of Respondent, Ted A. Warren's Post-Hearing Brief was served by first class U.S. Mail, postage prepaid, upon John H. Jones, Assistant Attorney General of Ohio, Public Utilities Section, 180 East Broad Street, 6th Floor, Columbus, Ohio 43215-3793 and was further served by e-mail john.jones@puc.state.oh.us on this 25th day of November 2013.

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Summary: Brief Respondent, Ted A. Warren's Post-Hearing Brief electronically filed by Mr. Brent L. English on behalf of Warren, Ted A Mr.