BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of Ted A. Warren, Notice of Apparent Violation and Intent to Assess Forfeiture.	)))	Case No. 12-2100-TR-CVF (OH3257001617D)

OPINION AND ORDER

The Commission, considering the applicable law and evidence of the record, and being otherwise fully advised, hereby issues its Opinion and Order in this matter.

APPEARANCES:

Mike DeWine, Ohio Attorney General, by John Jones and Ryan O'Rourke, Assistant Attorneys General, 180 East Broad Street, Columbus, Ohio 43215, on behalf of Staff of the Public Utilities Commission of Ohio.

Brent L. English, 820 West Superior Avenue, Suite 900, Cleveland, Ohio 44113-1818, on behalf of Ted A. Warren.

OPINION:

I. Nature of the Proceeding and Background

This case involves a violation for operating a commercial motor vehicle (CMV) while on duty and in possession, under the influence of, or using marijuana, which is a 21 C.F.R. 1308.11 Schedule 1 substance. On March 1, 2012, Trooper Mike Meyers, who was conducting aircraft compliance operations on Interstate Route 70 in Madison County, observed a CMV committing a violation for following another vehicle too close. Trooper Meyers contacted Trooper Thomas, who was in his Ohio State Highway Patrol (Patrol) vehicle, and Trooper Thomas stopped the CMV. The CMV was operated by Total Package Express, Inc. and driven by Ted A. Warren (Respondent). Upon entering the Respondent's CMV, Trooper Thomas observed what he believed to be paraphernalia for smoking marijuana and contacted Trooper Woodyard and Trooper Bays. Trooper Woodyard conducted a search of the Respondent's vehicle and discovered what he believed to be marijuana. Trooper Bays then conducted an inspection of the vehicle and cited the Respondent for operating a CMV while on duty and in possession, under the influence of, or using, a 21 C.F.R. 1308.11 Schedule 1 substance, which is an apparent violation of 49 C.F.R. 392.4(a).

On June 18, 2012, Staff timely served a Notice of Preliminary Determination (NPD) on the Respondent in accordance with Ohio Adm.Code 4901:2-7-12. In the NPD,

the Respondent was notified that Staff had decided not to assess a civil forfeiture for violating 49 C.F.R. 392.4(a). The parties, however, could not reach a settlement at an August 21, 2012 settlement conference. Thereafter, a hearing was conducted on October 10, 2013.

II. Applicable Law

The Commission adopted the Federal Motor Carrier Safety Rules pursuant to Ohio Adm.Code 4901:2-5-02(A), for the purpose of governing transportation by motor vehicle in the state of Ohio. The Federal Motor Carrier Safety Rules are found in 49 C.F.R. 40, 107 subparts (f) and (g), 367, 380, 382, 383, 385, 386, 387, and 390-397. In addition, Ohio Adm.Code 4901:2-5-02(B) requires all motor carriers engaged in interstate commerce in Ohio to operate in conformity with all rules of the United States Department of Transportation (USDOT). Further, R.C. 4923.99 authorizes the Commission to assess a civil forfeiture of up to $25,000 per day against any person who violates the safety rules adopted by the Commission when transporting persons or property in interstate commerce.

Ohio Adm.Code 4901:2-7-01 through 4901:2-7-22 govern all proceedings of the Commission to assess forfeitures and make compliance orders. These rules require that a respondent be afforded reasonable notice and the opportunity for a hearing where Staff finds a violation of the Federal Motor Carrier Safety Rules. Ohio Adm.Code 4901:2-7-20(A) also provides that, during the evidentiary hearing, Staff must prove the occurrence of the violation by a preponderance of the evidence.

III. Issues

The primary issue in this case is whether the Respondent was on duty and in possession, under the influence of, or using, a 21 C.F.R. 1308.11 Schedule 1 substance. Respondent also contests whether the stop and the search were lawful, as well as whether the evidence collected actually consisted of marijuana, which is a 21 C.F.R. 1308.11 Schedule 1 substance.

IV. Discussion

At the hearing, Staff first presented Joe Turek, a Staff Attorney and Compliance Division Supervisor with the Transportation Department of the Staff (Tr. at 7). Mr. Turek testified that Staff initially served the Respondent with a Notice of Intent to Assess Forfeiture (Tr. at 8). Subsequently, Staff held a conference with the Respondent but the parties could not reach a resolution (Tr. at 8). Staff then issued an NPD, after which the Respondent requested an administrative hearing (Tr. at 8-9; Staff Ex. 1). Mr. Turek testified that the NPD assessed a $0.00 forfeiture (Tr. at 11; Staff Ex. 1).

Mr. Turek stated that, in his opinion, the Commission can order a different forfeiture amount than what was assessed in the NPD, pursuant to Ohio Adm.Code 4901:2-7-12 (Tr. at 12).

Staff then presented Trooper Todd Thomas, who is a State Trooper that has been with the Patrol for 24 years (Tr. at 15). Trooper Thomas testified that on March 1, 2012, he was near the West Jefferson Patrol Post and in radio contact with Trooper Mike Meyers, who was in an airplane watching below for violations (Tr. at 17-18). Trooper Meyers notified Trooper Thomas that he was observing the Respondent's truck following too close to another vehicle in violation of the law (Tr. at 22). Trooper Meyers gave Trooper Thomas a description of the vehicle and confirmed that Trooper Thomas had stopped the correct vehicle (Tr. at 22).

Trooper Thomas testified that after stopping the Respondent, he approached the passenger side of the truck and opened the passenger side door. Trooper Thomas then stepped into the truck and requested the Respondent's driver's license, registration, and insurance. Trooper Thomas stated that while he was advising the Respondent, he observed a copper pipe in the cup holder. (Tr. at 24-25.) Trooper Thomas said that he believed the pipe to be an instrument to smoke marijuana and asked the Respondent to hand him the pipe, which the Respondent eventually did (Tr. at 27-28). Trooper Thomas testified that the pipe smelled of marijuana and had burnt residue on the inside (Tr. at 28). Trooper Thomas indicated that he then placed the Respondent under investigative custody and contacted Trooper Travis Woodyard and Motor Carrier Inspector Unit (Inspector) Dennis Bays (Tr. at 28).

Trooper Thomas testified that he advised Trooper Woodyard, upon his arrival, that he had discovered a pipe that appeared to contain marijuana residue. Trooper Woodyard then left to conduct a search of the vehicle and returned with a lip balm container and an Altoid can containing a green leafy plant substance (Tr. at 29, 31). Based on his experience, Trooper Thomas concluded that the substance looked, smelled, and generally appeared to be marijuana (Tr. at 31). Trooper Thomas testified that he then placed the lip balm container and Altoid can in a bag until he could return to the West Jefferson Patrol Post to mail the items to the crime lab (Tr. at 32). Trooper Thomas then briefed Inspector Bays on his discovery of the pipe and the containers holding what appeared to be marijuana (Tr. at 32).

Trooper Thomas then returned to the Ohio State Highway Patrol post and performed a marijuana field test to determine the likelihood that the substance was marijuana (Tr. at 33, 41-42). He testified that the field test returned a positive result for marijuana and that he took photographs of the marijuana and the positive test result (Tr. at 42; Staff Ex. 5). Trooper Thomas also took photographs of the containers and the pipe (Staff Ex. 3; Staff Ex. 4). He then sealed the evidence and the property control form

in a unique postage box designed for mailing evidence and mailed it to the crime lab (Tr. at 49-50).

On cross-examination, Trooper Thomas testified that he opened the passenger side door and stepped up into the truck for his own safety (Tr. at 54.) He stated that he opened the door and stepped into the vehicle to determine if any other passengers were present or if the driver was in possession of a firearm (Tr. at 69). He testified that, upon stepping into the vehicle, he then observed the pipe in the cup holder and asked the Respondent three times what it was. He said that after asking the Respondent a third time, the Respondent handed him the pipe. (Tr. at 57-58.) Trooper Thomas then stated that he did not know if the pipe belonged to the Respondent or if the Respondent had ever used the pipe (Tr. at 59). Trooper Thomas also indicated that he did not participate or observe the search of the Respondent's vehicle (Tr. at 60). Further, Trooper Thomas testified that he did not observe the Respondent commit a traffic violation (Tr. at 52).

Staff then presented Trooper Woodyard, who is also a State Trooper working for the Patrol. He testified that he has been with the Patrol for 20 years (Tr. at 71). Trooper Woodyard indicated that when he arrived at Trooper Thomas's location, he observed the pipe and could see and smell burnt residue on it. He confirmed that the pipe and the burnt residue smelled like marijuana. (Tr. at 75-76.) Trooper Woodyard then Mirandized the Respondent and informed the Respondent that he would search the vehicle based upon the pipe and the marijuana residue on it (Tr. at 77). Trooper Woodyard stated that he conducted a search of the vehicle and found the Altoid can containing marijuana in a compartment above the driver's side door. He testified that he also found a lip-balm container with marijuana residue in it. (Tr. at 77.) Trooper Woodyard then testified that after conducting the search and turning over the evidence to Trooper Thomas, he left the location (Tr. at 80).

Staff next presented Inspector Bays, a Motor Carrier Inspector working for the Patrol (Tr. at 95). Inspector Bays has been with the Patrol for nine years (Tr. at 96). Inspector Bays testified that he conducted a Level 2 inspection of the vehicle and then completed an inspection report (Tr. at 97-99). Inspector Bays stated that he found no violations with the vehicle, so the only violation was for the marijuana (Tr. at 104-105). Inspector Bays and the Respondent each signed the inspection report (Tr. at 107; St. Ex. 7). Inspector Bays then placed the Respondent out-of-service for 24 hours and drove him to a truck stop (Tr. at 108). On cross-examination, Inspector Bays confirmed that he never saw the marijuana or the pipe (Tr. at 127). Inspector Bays testified that he had no personal knowledge of the Respondent possessing marijuana (Tr. at 128).

Staff's final witness was Kara Klontz, a Criminalist with the Ohio State Highway Patrol (Tr. at 133-134). Ms. Klontz testified that the evidence in this case was received at the crime lab and given a unique identification number (Tr. at 139, 141). Ms. Klontz

testified that she filled out a property control form that was associated with the evidence (Tr. at 149). Ms. Klontz stated that she also filled out a controlled substance worksheet to indicate what kind of testing she conducted and the test results (Tr. at 152). She indicated that she performed three laboratory tests to determine whether the material was a controlled substance. Ms. Klontz first conducted a macroscopic test, which is a general observation of the evidence including leaf shape, stems, and other features that can be plainly observed. She then performed a Duquenois-Levine modified test. Finally, she performed a thin-layer chromatography test. (Tr. at 155.) Ms. Klontz testified that the results of all three tests were positive for marijuana (Tr. at 155). Ms. Klontz indicated that she then completed a report of analysis, which is a finalized report of the test results (Tr. at 169-170; St. Ex. 14). She noted that the internal chain of custody and the property control form each indicate that when she completed the tests and her analysis, the evidence was moved to the destroy container and destroyed on November 8, 2012 (Tr. at 173).

V. Commission Conclusion

After a review of the testimony and evidence submitted in this case, the Commission finds that Staff has demonstrated by a preponderance of the evidence that Respondent was in possession of marijuana while on duty in violation of 49 C.F.R. 392.4(a). The Respondent raised several arguments regarding the activities of the Patrol officers involved in this case, none of which we find have merit.

First, the Respondent challenged the lawfulness of the initial stop. Upon review, we find no merit to this argument. The Commission finds that Trooper Thomas lawfully stopped the Respondent's vehicle for following too close to another vehicle. At all times during the stop, Trooper Thomas was in contact with Trooper Meyers and the stop was made while both Trooper Meyers and Trooper Thomas were observing the vehicle (Tr. at 17-18). The Troopers were acting as a single unit and reasonable, articulable suspicion existed for the stop. The Commission notes that Troopers must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion. *Terry v. Ohio*, 392 U.S. 1, 20 L. Ed. 2d 889, S. Ct. 1868 (1968). In evaluating reasonable suspicion, the Commission must consider the content of information and its degree of reliability. Both factors, the quantity and quality, are considered in the totality of the circumstances. *See Alabama v. White*, 496 U.S. 325, 328, 110 L. Ed. 2d 301, 110 S. Ct. 2412 (1990). In this instance, we find that the information relied upon by Trooper Thomas to establish reasonable suspicion to stop the Respondent was reliable as it was communicated to him from another Trooper while the violation was being observed. Further, the keys to a statement's trustworthiness is the spontaneity of the statement and the proximity to the event. *Cox v. Oliver Machinery Co.*, 41 Ohio App.3d 28, 35, 534 N.E.2d 855 (12th Dist.

1987). In our view, this communication bears a high degree of trustworthiness because Trooper Meyers made the statement while he was observing the event.

Further, the content of the information relied upon by Trooper Thomas in making the stop included the nature of the violation, a description of the vehicle, and confirmation that Trooper Thomas had stopped the correct vehicle (Tr. at 22). While the Commission recognizes that the Respondent objected to the communication to Trooper Thomas as hearsay, the Commission notes that it is not strictly bound by the Ohio rules of evidence, and that it believes the information communicated in this instance was specific and reliable. In our view, if an anonymous tip from a confidential informant is sufficient to establish reasonable suspicion for a search, then a communication from another Trooper indicating a violation, while it is being observed, is also sufficient to establish reasonable suspicion for a stop. *See Alabama* at 330-331. The Commission believes that the testimony provided by Trooper Thomas is reliable and that reasonable, articulable suspicion existed for the stop.

Secondly, the Respondent argued on brief that it was unreasonable for Trooper Thomas to open the passenger-side door and step into the vehicle. We find no merit to this argument. The United States Supreme Court has held that there exists a legitimate and weighty interest in officer safety that outweighs any de minimis intrusion of requiring a driver, already lawfully stopped, from exiting a vehicle. *Pennsylvania v. Mimms*, 434 U.S. 106, 110-111, 98 S. Ct. 330, 54 L. Ed. 2d 331; *Berkemer v. McCarty*, 468 U.S. 420, 429, n. 29, 104 S. Ct. 3138, 82 L. Ed. 2d 317; *Michigan v. Long*, 463 U.S. 1032, 1047, 103 S. Ct. 3469, 77 L. Ed. 2d 1201. Similarly, in this instance, we believe the legitimate and weighty interest of officer safety outweighs any intrusion Trooper Thomas made on the Respondent. Trooper Thomas opened the door and stepped into the vehicle for his own safety to determine if there were any other passengers in the vehicle or if the driver was in possession of a firearm (Tr. at 69). In light of the legitimate and weighty interest in officer safety, the Commission believes that Trooper Thomas acted lawfully and reasonably.

Third, the Respondent asserted on brief that the search of the Respondent's vehicle was unlawful and unreasonable. We find no merit to this assertion. The evidence shows that the pipe sitting in the cup holder of the Respondent's CMV was sitting in plain view and inadvertently discovered, which created probable cause for a search. *See Horton v. California*, 496 U.S. 128, 110 S. Ct. 2301, 110 L. Ed. 2d 112. The Commission believes that Trooper Thomas has the experience and training necessary to recognize a pipe, as well as the look and smell of burnt marijuana residue (Tr. at 15-16, 27-28). Furthermore, we believe Trooper Thomas's discovery of the pipe was inadvertent, as he observed it in the cup holder of the truck before the Respondent handed it to him (Tr. at 58). Pursuant to inspecting the pipe, Trooper Thomas placed the Respondent into investigative custody and remained with the Respondent while

Trooper Woodyard conducted the search of the Respondent's vehicle (Tr. at 28). The Commission believes that there was probable cause for the search based upon Trooper Thomas's inadvertent discovery of the pipe in plain view. Further, we believe that Trooper Woodyard's warrantless search of the Respondent's vehicle was permissible under the pervasively regulated industry exception to the warrant requirement for administrative searches. *United States v. Biswell*, 406 U.S. 311, 317, 92 S.Ct. 1593, 32 L.Ed.2d 87 (1972); *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 90 S.Ct. 774, 25 L.Ed.2d 60 (1970).

Fourth, the Respondent argued that Staff did not demonstrate that the green leafy material actually consisted of marijuana. The Commission finds that this argument has no merit. The Commission finds that Staff demonstrated by a preponderance of the evidence that the evidence seized was marijuana, which is a 21 C.F.R. 1308.11 Schedule 1 substance. Numerous tests were conducted on the evidence in this case and each resulted in positive results for marijuana. Further, Troopers trained and qualified may identify marijuana without laboratory testing as long as there is sufficient foundation laid to establish familiarity. *State v. Maupin*, 42 Ohio St.2d 473, 480 (1975). We believe that Trooper Thomas, Trooper Woodyard, and Ms. Klontz each had sufficient training and familiarity with marijuana to recognize it, and each indicated that the green leafy material was marijuana (Tr. at 31, 77, 155). Trooper Thomas also conducted a marijuana field test that displayed a positive result for marijuana (Tr. at 42; St. Ex. 5). Further, Ms. Klontz conducted a Duquenois-Levine test and a thin-layer chromatography test and each confirmed positive results for marijuana (Tr. at 155). Additionally, while Staff is not required to establish a perfect chain of custody, we find that Staff demonstrated an unbroken chain of custody and that the evidence tested was the same evidence found in the Respondent's vehicle. *State v. Brooks*, 3rd Dist. No. 5-11-11, 2012-Ohio-5235, ¶39; *State v. Gross*, 97 Ohio St.3d 121, 2002-Ohio-5524, 776 N.E.2d 1061, ¶ 57, citing *State v. Keene*, 81 Ohio St.3d 646, 662, 693 N.E.2d 246 (1998); *See also State v. Hunter*, 169 Ohio App. 3d 65, 2006-Ohio-5113, 861 N.E.2d 898, ¶ 16 (6th Dist.).

Finally, the Respondent asserted on brief that Staff had a duty to preserve the evidence and that Staff's failure to preserve the evidence gives rise to a rebuttable presumption that the Respondent was prejudiced by the destruction of the evidence. However, we find that this argument has no merit, as we believe the numerous positive tests for marijuana, the photos, and the substantial testimony regarding the marijuana rebut any presumption that would arise in favor of the Respondent. Additionally, no prejudice exists where evidence was destroyed pursuant to good faith and where there was no immediate request for preservation. *State v. Fuller*, 2nd Dist. Ohio No. 18994, 2002-Ohio-2055 (April 26, 2002); *State v. Tarleton*, 7th Dist. Ohio No. 02-HA-541, 2003-Ohio-3492 (June 30, 2003). We believe that the evidence was destroyed in good faith and there has been no demonstration of a request for preservation. Further, while the

Respondent asserts that the destruction of the evidence may give rise to a rebuttable presumption in favor of the Respondent, the Respondent's failure to testify or present any witness testimony at hearing may give rise to an adverse inference against the Respondent. *State ex rel. Verhovec v. Mascio*, 81 Ohio St.3d 334, 337 (1998), citing *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976).

Accordingly, the Commission finds that Staff has met its burden and demonstrated by a preponderance of the evidence that Respondent was in possession of marijuana while on duty in violation of 49 C.F.R. 392.4(a). Given the seriousness of such a violation to the safety of this driver, as well as drivers of other CMVs and drivers and passengers of noncommercial vehicles, we believe that a civil forfeiture is warranted.[1] We note that the Commission is statutorily authorized to assess a forfeiture of up to $25,000 for any violation of the commercial motor vehicle safety regulations. Further, pursuant to R.C. 4923.99, the amount of a forfeiture should not be incompatible with the requirements of the United States department of transportation, and, to the extent practicable, should utilize a system comparable to the recommended civil penalty adopted by the Commercial Motor Vehicle Safety Alliance (CVSA). Under the most current CVSA fine schedule, the recommended fine for possession of drugs and other substances by a driver of a CMV is $500.00. We believe that, based on the evidence and facts of this case, a forfeiture of $500.00 is appropriate and should be assessed against the Respondent. Accordingly, the Respondent shall pay the $500 civil forfeiture to the Commission by check or money order, made payable to "Treasurer, State of Ohio" and mailed or delivered to the Public Utilities Commission of Ohio, Attention: Fiscal Department, 180 East Broad Street, 4th Floor, Columbus, Ohio 43215-3793. Case No. 12-2100-TR-CVF and Inspection Report No. OH3257001617D should be written on the check. Payments shall be made within 30 days of the Opinion and Order.

Further, we note that the Commission has adopted a zero tolerance policy that an alcoholic beverage, not listed on the cargo manifest, should not be carried anywhere on the vehicle, from the front bumper of the tractor to the taillights of the trailer. *In re James Martindale*, Case No. 97-143-TR-CVF, Opinion and Order (July 3, 1997). In this case, we similarly find that a zero tolerance policy should be applied to all 21 C.F.R. 1308 Schedule 1 substances, including marijuana, which is prohibited by the FMCSA. The intent of this zero tolerance policy is to forbid the carrying of any substance on a CMV that could result in impairment of the driver. We find that these substances should not be carried anywhere on the vehicle and that a zero tolerance policy should be adopted.

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1 While Staff had indicated on the NPD that it agreed not to assess a civil forfeiture for violating 49 C.F.R. 392.4(a), such an indication is only a recommendation and does not bind the Commission.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

(1) On July 17, 2012, Respondent filed a request for an administrative hearing regarding the apparent violation of 49 C.F.R. 392.4(a).

(2) A prehearing conference was held on August 21, 2012.

(3) A hearing was held on October 10, 2013.

(4) Ohio Adm.Code 4901:2-7-20 requires that, at hearing, Staff prove the occurrence of a violation by a preponderance of the evidence.

(5) Based upon the record in this proceeding, the Commission finds that Staff has proven, by a preponderance of the evidence, that the Respondent was in possession of marijuana while on duty and operating a commercial motor vehicle in violation of 49 C.F.R. 392.4(a).

(6) The Commission finds it reasonable that the Respondent be assessed a civil forfeiture of $500.00.

ORDER:

It is, therefore,

ORDERED, That the Respondent be assessed a $500.00 civil forfeiture. It is, further,

ORDERED, That the Attorney General of Ohio take all legal steps necessary to enforce the terms of this Opinion and Order. It is, further,

ORDERED, That a copy of this Opinion and Order be served upon each party of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Todd A. Snitchler, Chairman

Steven D. Lesser

Lynn Slaby

M. Beth Trombold

Asim Z. Haque

BAM/sc

Entered in the Journal

MAR 26 2014

Barcy F. McNeal

Barcy F. McNeal
Secretary

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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)

CONCURRING AND DISSENTING OPINION OF COMMISSIONER LYNN SLABY

I concur in part, and dissent in part.

I concur that the Respondent violated 49 C.F.R. 392.4(a), being in possession of marijuana while on duty.

I dissent on our finding that a fine of $500 would be appropriate in this case. We note the seriousness of the offense and establish a zero tolerance for such violations. Pursuant to R.C. 4923.99(A)(1), the Commission is statutorily empowered to impose a forfeiture of "not more than twenty-five thousand dollars," and "to the extent practicable, shall utilize a system *comparable*" to the recommendations adopted by the commercial vehicle safety alliance. I also recognize that the CVSA's North American Uniform Out-of-Service Criteria Reference to Uniform Maximum Fine schedule provides for the $500 fine. Based upon our statutory authority, in this case, I do not believe that a $2,500 or more fine, for this type of violation, is incompatible with the civil penalty guidelines.

Lynn Slaby, Commissioner

LS/sc

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MAR 26 2014

Barcy F. McNeal

Barcy F. McNeal
Secretary