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)
	) **APPLICATION FOR REHEARING**	

* * * * *

Respondent-Applicant, Ted A. Warren, through his undersigned counsel of record, Brent L. English, respectfully applies for rehearing of the Public Utilities Commission of Ohio's (the "commission") March 26, 2014 Decision ("decision") concluding "the 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)" and further assessing a civil forfeiture of $500.00 (Opinion and Order at 9, Findings of Fact and Conclusions of Law Nos. 5 and 6).

This Application for Rehearing is made pursuant to R.C. 4903.10, which reads, in pertinent part as follows:

> After any order has been made by the public utilities commission, any party who has entered an appearance in person or by counsel in the proceeding may apply for a rehearing in respect to any matters determined in the proceeding. Such application

> shall be filed within thirty days after the entry of the order upon the journal of the commission . . . (B) . . . Such application shall be in writing and shall set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful. No party shall in any court urge or rely on any ground for reversal, vacation, or modification not so set forth in the application.[1]

In accordance with Ohio Adm. Code § 4901-1-35(A), the Applicant sets forth below the specific grounds upon which he considers the commission's order to be unreasonable and unlawful:

SPECIFIC GROUNDS FOR REHEARING

1. The Commission's conclusion that evidence seized from applicant's truck was admissible was unreasonable and unlawful because the seizure violated the Fourth Amendment to the United States Constitution and Article I, Section 14 of the Ohio Constitution because the arresting officer did not have reasonable, articulable suspicion that applicant or his truck were subject to seizure.

2. The Commission's decision that a state trooper was legally justified in entering applicant's vehicle without his consent was unreasonable and unlawful.

3. The Commission's *sub silentio* decision that its staff adduced sufficient evidence to show that applicant was subject to the commission's rules was unreasonable and unlawful.

4. The Commission's conclusion that its staff proved by a preponderance of the evidence that applicant possessed marijuana in his commercial vehicle was unreasonable and unlawful where serious evidentiary problems prevented that finding.

5. The Commission's conclusion that it was not relevant that all of the evidence of alleged marijuana was destroyed during the pendency of this case was unreasonable and unlawful. Further, the commission erred in not applying the doctrine of spoliation under the facts of this case.

6. The Commission's conclusion that Ted A. Warren should pay a $500.00 civil forfeiture to the State of Ohio under the facts of this case is unreasonable and unlawful.

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[1]. The secretary of the Commission entered the decision in the journal on March 26, 2014. Accordingly, this request for rehearing is timely if filed on Friday, April 25, 2014.

A memorandum setting forth an explanation of the basis for each ground for rehearing described above is attached hereto and incorporated herein by reference.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of Respondent-Applicant's Application for Rehearing with Memorandum Appended Thereto was served by first class U.S. Mail, postage prepaid, upon John H. Jones, Esq., Assistant Attorney General, Public Utilities Section, 180 East Broad Street, 6th Floor, Columbus, Ohio 43215-3793 and was also served by e-mail upon him at john.jones@puc.state.oh.us on this 25th day of April 2014.

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MEMORANDUM

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

The Commission found that Trooper Thomas "lawfully stopped the Respondent's vehicle for following too close to another vehicle." (Opinion and Order at p. 5). The Commission reasoned that Trooper Thomas – who was in a cruiser – and Trooper Meyers – who was in an aircraft – were "acting as a single unit and that collectively they had reasonable articulable suspicion to stop Respondent-Applicant's vehicle. We respectfully disagree and urge reconsideration.

In order for the traffic stop to be valid, *the arresting officer* has 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. *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); *Whren v. United States*, 517 U.S. 806, 809-810, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996).

However, an investigative stop of a motorist does not violate the Fourth Amendment if the officer has a reasonable suspicion that the individual is engaged in criminal activity. *Maumee v. Weisner*, 87 Ohio St.3d 295, 299, 720 N.E.2d 507 (1999), citing *Terry v. Ohio*, 392 U.S. 1, 22, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). The Staff claimed the traffic stop was justified by the purported observations of another police officer in an aircraft. However, that officer did not testify. However, over Respondent-Applicant's objection, the Commission's Attorney Examiner permitted Trooper Thomas to testify to what Meyers allegedly told him.

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."

"To justify a particular intrusion, the officer must demonstrate 'specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.'" *Weisner*, *supra* at 299, quoting *Terry*, *supra* at 21. Evaluating these facts and inferences requires the court to consider the totality of the surrounding circumstances. *State v. Freeman*, 64 Ohio St.2d 291, 294, 414 N.E.2d 1044 (1980), paragraph one of the syllabus. Therefore, "if the specific and articulable facts available to an officer indicate that a driver may be committing a criminal act, which includes the violation of a traffic law, the officer is justified in making an investigative stop." *State v. Hoder*, 9th Dist. No. 03CA0042, 2004-Ohio-3083, 2004 WL 1343573, ¶ 8, quoting *State v. Shook*, 9th Dist. Lorain No. 93CA005716, 1994 WL 263194, *2 (June 15, 1994).

We recognize that an informant tip may – but will not always – provide a basis for reasonable suspicion <u>if that tip possesses sufficient indicia of reliability</u>. *State v. Hansard*, 4th Dist. No. 07CA3177, 2008-Ohio-3349, 2008 WL 2612645 ¶ 20–23; *City of Maumee v. Weisner*, 87 Ohio St.3d at 299-300. Here, the informant was a state trooper in an aircraft. The record does not show what he could see from whatever elevation he was at, how he determined that Respondent-Applicant's truck was allegedly following too close to another vehicle, or any other facts which would indicate that the information was reliable.

The offense of "following too close" is described in R.C. 4511.34, which reads, in pertinent part, as follows:

> (A) The operator of a motor vehicle shall not follow another vehicle . . . *more closely than is reasonable and prudent, having due regard for the speed of such vehicle . . . and the traffic upon and the condition of the highway*. The driver of any truck when traveling upon a roadway outside a business or residence district shall maintain a sufficient space, *whenever conditions permit*, between such vehicle and another vehicle ahead so an overtaking motor vehicle may enter and occupy such space without danger. This paragraph does not prevent overtaking and passing nor does it apply to any lane specially designated for use by trucks. Outside a municipal corporation, the driver of any truck, or motor vehicle when drawing another vehicle, while ascending to the crest of a grade beyond which the driver's view of a roadway is obstructed, shall not follow within three hundred feet of another truck, or motor vehicle drawing another vehicle. This paragraph shall not apply to any lane specially designated for use by trucks . . .

No evidence exists in the record whether Respondent-Applicant's truck was following any other vehicle "more closely than is reasonable and prudent having due regard for the speed of such vehicle and he traffic upon and the conditions of the highway." Indeed, no evidence was adduced as to how close Respondent-Applicant's truck was to any vehicle. Further, no evidence exists in the record any other vehicle was attempting to occupy or enter Respondent-Applicant's lane and could not do so safely. Moreover, no evidence was offered regarding the condition of the roadway in the area of the purported violation so that the 300 foot rule relating to ascending a hill would be applicable.

Without at least some competent indicia of reliability – other than the informant was another police officer – the Commission's conclusion that Trooper Thomas had reasonable articulable suspicion to stop the truck cannot stand.

2. THE COMMISSION ERRED IN CONCLUDING TROOPER THOMAS WAS LEGALLY JUSTIFIED IN ENTERING THE TRUCK WITHOUT RESPONDENT-APPLICANT'S CONSENT.

The Commission concluded that the "legitimate and weighty" interest of officer safety outweighs any intrusion Trooper Thomas made on the Respondent" (Opinion and Order, p. 6.) The Commission cited *Pennsylvania v. Mimms*, 434 U.S. 106, 98 S.Ct. 330, 54 L.Ed.2d 331

(1977) for this proposition. However, *Mimms* stands for an entirely different proposition: "Once a motor vehicle has been lawfully detained for a traffic violation, the police officers may order the driver to get out of the vehicle without violating the Fourth Amendment." *Id*. at 111. This was justified by the government's "legitimate and weighty" interest in officer safety which, in such instances, outweighs the "*de minimis*" additional intrusion of requiring a driver, already lawfully stopped, to exit the vehicle. *Id*. at 110–111; See, also, *State v. Hoskins*, 8th Dist. No. 80384, 2002-Ohio-3451, 2002 WL 1453811 at ¶ 14; *State v. Travis*, 8th Dist. No. 98420, 2013-Ohio-581, 2013 WL 658240 at ¶ 14.

Not surprisingly, neither the Staff nor the Commission itself cited a single case supporting the novel and unlawful position that a police officer had the right to enter a vehicle for his or her own safety. Clearly such an intrusion was a Fourth Amendment search for which Trooper Thomas was required to have probable cause. 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*, 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.

Neither the Staff nor the Commission has suggested that the automobile exception to the Fourth Amendment's warrant requirement applied in this case. Clearly it does not. The

automotive exception to the Fourth Amendment's warrant requirement was described by the Supreme Court of Ohio as follows: "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).

In this case, the warrantless search of the truck resulted in the discovery, whether – intentionally or inadvertent is respectfully not the question (cf. Opinion and Order, p. 8) – yielded a discovery of a possible marijuana pipe, which was then used to justify a search of the truck.

The Commission also found the search was justified by the "pervasively regulated industry exception" to the warrant requirement for administrative searches (Opinion and Order p. 7). This conclusion is unjustified, both factually and legally.

This exception to the warrant requirement was first recognized in *New York v. Burger*, 482 U.S. 691, 107 S. Ct. 2636, 96 L.Ed.2d 601 (1987). The pervasively regulated industry exception is narrowly crafted, and should be limited as much as possible. *See v. City of Seattle*, 387 U.S. 541, 543, 87 S.Ct. 1737, 18 L.Ed.2d 943 (1967).

We do not dispute that commercial trucking is a pervasively regulated industry. The myriad federal and state statutes that govern commercial trucking place it squarely within the class of industries to which *Burger* applies. *United States v. Fort,* 248 F.3d 475, 480 (5th Cir. 2001). Whether a traffic stop and a subsequent search of a commercial vehicle is permissible under the pervasively regulated industry exception turns on whether the last two prongs of the *Burger* test are satisfied – that is: (1) whether the stop was necessary to further the State of

Ohio's regulatory scheme, and (2) whether that scheme provides a constitutionally adequate substitute for a warrant. See, *U.S. v. Castelo*, 415 F.3d 407 (5th Cir. 2005).

It is clear that Respondent-Applicant's truck was not stopped to further the State of Ohio's regulatory scheme but, rather for an alleged traffic offense (following too close). It is likewise clear the truck was not searched by Trooper Woodyard pursuant to any scheme that was a constitutionally adequate substitute for a warrant. To satisfy the latter requirement, *Burger* requires that a regulatory regime (1) advise the owner of the regulated business that the inspection is being made pursuant to law; and (2) limit the discretion of the inspecting officers. *Id*. at 703. No evidence in the record supports such a conclusion.

Furthermore, the claimed exception on which the Commission relied was not briefed by the parties. It is fundamentally unfair for the Commission to reach this conclusion without at least giving Respondent-Applicant the opportunity to challenge both the factual and legal basis for the conclusion. Thus, the Commission should order rehearing at least on this issue.

It has been repeatedly stated that 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). Of course, 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).

In the case at bar, Thomas conceded that he had no basis to enter Respondent-Applicant's truck other than his 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-Applicant 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 (Tr. 25). Thus, the Commission's justification of the search by virtue of the pipe in the cup holder was unsupportable as a matter of fact and law.

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.

Because Trooper Thomas had no legal basis to enter Respondent-Applicant's truck, all evidence seized as a result of the illegal seizure should have been rejected.

3. THE COMMISSION FAILED TO DIRECTLY ADDRESS RESPONDENT-APPLICANT'S CONTENTION THAT NO EVIDENCE WAS ADDUCED TO SHOW THE COMMISSION'S RULES APPLIED TO HIM ON THE DATE OF THE INCIDENT.

No evidence is in the record that Respondent-Applicant was driving for either an interstate or an intrastate motor carrier at the time of the purported violation. Inspector Bays testified that Respondent-Applicant, based upon his review of documents and from a discussion with Respondent-Applicant, was 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-Applicant was purportedly working in some capacity – Total Package Express, Inc. – (Tr. 102; 112), as either an interstate or intrastate "motor carrier."

Even if AK Steel and/or Total Package Express, Inc. were "motor carriers" and notwithstanding the Federal Motor Carrier Safety Regulations apply, *inter alia*, to drivers (49 C.F.R. § 392.1), this does not mean that the Commission's rules – under which Respondent-Applicant was charged with having violated – applied to him. Specifically, the Commission's rules only 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 record does not show that Respondent--Applicant 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.*

Because no evidence was offered on this issue, the Staff failed to prove with any evidence, much less by a preponderance of the evidence that Respondent-Applicant was subject to the Commission's rules, by virtue of being leased to a motor carrier on March 1, 2012, the charge should have been dismissed.

4. THE COMMISSION ERRED IN CONCLUDING THE STAFF PROVED BY A PREPONDERANCE OF THE EVIDENCE THAT RESPONDENT-APPLICANT POSSESSED MARIJUANA.

The Staff had the burden had the burden to prove by a preponderance of the evidence that Respondent-Applicant possessed "marijuana" as defined in 21 C.F.R. § 1308.11, Schedule I (d)(23). See, Ohio Adm. Code 4901:2-7-20(A). We do not dispute that "marijuana," is, in fact, a Schedule I drug under 21 C.F.R. § 1308.11. We likewise do not doubt that 49 C.F.R. § 392.4, *inter alia*, prohibits any driver from "be[ing] on duty and possess[ing]. . . any 21 C.F.R.1308.11 Schedule I substance."

Trooper Woodyard searched Respondent-Applicant's truck and found two containers allegedly containing "small amounts" of "marijuana" (Tr. 77-78.) He gave these containers to Trooper Thomas who took them to his patrol post where he performed a "field test" on only a sample of the material taken from the Altoid® can (Tr. 41). The results of this field test were supposedly "positive for marijuana." (Tr. 33.)

Thomas testified 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 other evidence was presented that the purple color meant that marijuana present.

What's more, Exhibit 5 belies Thomas' claim that the resulting solution was purple. In fact, that exhibit does not show any purple at all in the material at the bottom of the test kit, which Trooper 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 Altoid® can contained marijuana.

Trooper Thomas testified that he packaged up all of the "evidence" and sent it to the State Highway Patrol's crime lab (Tr. 67). The analysis of one of these pieces of "evidence" sent to the lab did not show that marijuana were present. First, the analyst (Ms. Kara Klontz) did not recall doing any analysis on the materials (Tr. 192-193; 196-197; 199; 201). Rather, she could only go by documents she was involved in creating, but which she said those documents did not refresh her recollection (Exhibits 12 and 13, Tr. 175-176).

According to Klontz, three tests were required 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 the reagent 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). Although 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 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 Trooper 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 "marijuana." As Klontz emphasized, the three tests combined <u>are required to "confirm the identify of marijuana" and each of the tests, standing alone, are merely "presumptive.</u>" (Tr. 168; 190; 193; 198).

The Commission glossed over the clear evidentiary issues presented with respect to the chemical test performed by Klontz and concluded, instead, that the officers – and Klontz for that matter – had sufficient and familiarity with marijuana to recognize it. However, 21 C.F.R. § 1308.11, Schedule I (d), defines "[h]allucinogenic substances" as follows:

> 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 . . .(23) Marihuana.

Thus, it was absolutely necessary for the Staff to prove that the material in question contained at lease some quantity a hallucinogenic substance. Thus, even if the Commission credits the two trooper's observations or even those of Klontz about what the material looked like, no competent credible evidence exists in the record that this material contained "any quantity" of a hallucinogenic substance.

Ohio law defines marijuana differently than the Federal Motor Carrier Safety Regulations. In R.C. 3719.01, "marijuana" is defined as follows:

> 'Marihuana' means all parts of a plant of the genus cannabis, whether growing or not; the seeds of a plant of that type; the resin extracted from a part of a plant of that type; and every compound, manufacture, salt, derivative, mixture, or preparation of a plant of that type or of its seeds or resin. 'Marihuana' does not include the mature stalks of the plant, fiber produced from the stalks, oils or cake made from the seeds of the plant, or any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks, except the resin extracted from the mature stalks, fiber, oil or cake, or the sterilized seed of the plant that is incapable of germination.

The Commission's reliance upon *State v. Maupin*, 42 Ohio St. 473, 480, 330 N.E.2d 708 (1975) is thus ill-advised. In that case, the Supreme Court concluded that an arresting officer had been on a Cincinnati vice squad for 14 years and had made "hundreds of

arrests, including those for the possession and use of marijuana; and in the course of past drug investigations he had occasion to see and observe marijuana." *Id*. at 480. While perhaps the same could be true to some extend for the two troopers in this case, the fact is that in order to prove the charge against Respondent-Applicant, the Staff had to provide that there was some quantity of a hallucinogenic substance in the alleged marijuana, something it decidedly did not do.

5. THE COMMISSION ERRED IN FINDING THAT SPOLIATION WAS EITHER NOT RELEVANT OR THAT A PRESUMPTION RESULTING FROM THE DOCTRINE WAS OVERCOME BY OTHER EVIDENCE IN THE RECORD.

There is no doubt the Staff had, and breached, its duty to preserve the purported evidence on which it based its charge in this case. *Loukinas v. Roto-Rooter Servs. Co.*, 167 Ohio App.3d 559, 2006-Ohio-3172, 855 N.E.2d 1272, ¶ 18. We have already briefed that the Staff's failure to do so gives rise to a rebuttable presumption that Respondent-Applicant was prejudiced by the destruction of relevant evidence. *Holiday v. Ford Motor Co.*, 8th Dist. No. 86069, 2006–Ohio–284, 2006 WL 178011 at ¶ 21. While the Staff could have attempted to show there was reasonable possibility that Respondent-Applicant was prejudiced, it offered no evidence in this regard at all.

In fact, the record shows that all of the physical evidence which could have been inspected and tested by the Respondent-Applicant to disprove the Staff's contentions was destroyed during the pendency of this case (Tr. 173-175; Exhibits 9, 11 and 15). No justification for this conduct was offered. Thus the Commission's finding that the destruction was done in "good faith" is hard to justify.

The Commission's Opinion and Order noted the spoliation argument merely in passing. However, it rejected it on the basis that 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." However, as we pointed out above, a critical issue was whether the material actually contained a hallucinogenic substance, a *sine qua non* of the definition of "marijuana" under 21 C.F.R. § 1308.11, Schedule I. Thus, it is not as simple as saying that someone believed there was "marijuana" present in the truck and thus it did not matter that the purported substance was destroyed.

Lastly, the Commission's reference to a possible adverse inference that could be drawn against Respondent-Applicant because he did not testify at the hearing in this matter is seriously misplaced. Respondent-Applicant is fully aware of *State ex rel. Verhovec v. Mascio*, 81 Ohio St. 3d 334, 691 N.E.2d 282 (1976), the cases cited therein, and its progeny. That case considered whether a criminal defendant had a constitutional right not to testify in a civil case and, in that context, the Supreme Court of Ohio said:

> In other words, 'the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them . . . ' *Baxter v. Palmigiano*, 425 U.S. 308, 318, 96 S.Ct. 1551, 47 L.Ed.2d 810 (1976). See, also, 4 Rotunda & Nowak, *Treatise on Constitutional Law* (2 Ed.1992) 666, Section 23.23 ("[T]he protection against self-incrimination was not necessarily designed to protect witnesses from every prejudicial effect resulting from their own testimony; the protection was designed to limit the coercive power of government."); but, cf., 5 Wright & Miller, *Federal Practice and Procedure* (1990) 515–516, Section 1280.

Mascio is not applicable in this case because Ted Warren did not refuse to testify or assert a Fifth Amendment right not to testify. Rather, he simply did not testify. Certainly no adverse presumption can be drawn from a party not testifying but relying upon cross-examination of an adverse party's witnesses when the adverse party has the burden of proof.

The Commission clearly erred in finding the Staff overcame presumption that Respondent-Applicant was prejudiced by the ill-advised destruction of the evidence. It should

order rehearing or remand with instructions to dismiss the charge.

6. THE COMMISSION'S POSITION THAT A $500.00 CIVIL FORFEITURE SHOULD BE IMPOSED UNDER THE FACTS OF THIS CASE IS UNREASONABLE.

The Commission correctly noted that the Staff recommended no civil forfeiture in this case (Opinion and Order, p. 8, fn. 1). Nevertheless, relying upon the Commercial Motor Vehicle Safety Alliance, a "international not-for-profit organization comprised of local, state, provincial, territorial and federal motor carrier safety officials and industry representatives from the United States, Canada, and Mexico," the Commission decided to punish Mr. Warren with a $500.00 civil forfeiture.[2] It appears from an internet search that the "**maximum fine schedule"** revised as of February 2011[3] for "drug possession" is $500.00.

It should be noted that even if the Commission's conclusion that Mr. Warren possessed a minute quantity of marijuana and that the traffic stop and subsequent search were proper, and that the rules of the Commission applied to Mr. Warren, absolutely no evidence exists that Mr. Warren was under the influence of marijuana or any other drug.

Adopting a "zero tolerance" policy under these circumstances is a bridge too far and is both arbitrary and capricious. If the Commission intends to take this position in the future, it should adopt rules, after notice and comment, to this effect, not make a *post hoc* declaration of the sort it made in the Opinion and Order in this case. Further, if the Commission is going to rely upon a non-profit organization's fine schedule, at the very least drivers of commercial vehicles should be made aware of this in advance.

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[2]. See, http://www.cvsa.org/about/ (last accessed April 24, 2014).

[3]. "This is a recommended *maximum* fine schedule." (CVSA 1996, rev. 1/2011 at p. 2).

CONCLUSION

For all of the foregoing reasons, Ted A. Warren respectfully requests that the Court grant his Application for Rehearing, dismiss the case, or order a new hearing.

Respectfully submitted,

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Summary: Application for Rehearing electronically filed by Mr. Brent L. English on behalf of Warren, Ted A Mr.