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)

ENTRY ON REHEARING

The Commission finds:

(1) On July 17, 2012, Ted Warren (Respondent) filed a request for an administrative hearing regarding an apparent violation of 49 C.F.R. 392.4(a) for being in possession of marijuana while on duty and operating a commercial motor vehicle (CMV).

(2) By Opinion and Order (Order) issued on March 26, 2014, the Commission found that Staff had proved, by a preponderance of the evidence, that the Respondent was in possession of marijuana while on duty and operating a CMV in violation of 49 C.F.R. 392.4(a) and assessed a civil forfeiture of $500.00.

(3) Pursuant to R.C. 4903.10, any party who has entered an appearance in a Commission proceeding may apply for rehearing with respect to any matters determined by the Commission, within 30 days of the entry of the order upon the Commission's journal.

(4) On April 25, 2014, the Respondent filed an application for rehearing in which he raises six assignments of error that are related to five areas: that the stop, search, and seizure were unlawful, that the Ohio Administrative Code does not apply to the Respondent, that Staff did not meet its burden of proof, that spoliation of evidence should have created a presumption in favor of the Respondent, and that the civil forfeiture was unreasonable.

I. SEARCH AND SEIZURE

(5) In his first assignment of error, the Respondent argues that the Order is unlawful or unreasonable because the evidence seized from the Respondent's truck should have been inadmissible. In addition, the Respondent argues that the stop 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 for the stop.

(6) We find no merit to the Respondent's first assignment of error. As we indicated in the Order, reasonable, articulable suspicion existed for the stop of the Respondent. Trooper Thomas stopped the Respondent, in the normal course of his duties as an Ohio State Highway Patrol trooper, pursuant to a radio communication from Trooper Meyers who was observing the Respondent following another vehicle too close. Following too close is an apparent violation of R.C. 4511.34 and 49 C.F.R. 392.2.

We note that a stop is lawful if facts relayed are sufficiently corroborated to furnish reasonable suspicion that a defendant, or in this instance the Respondent, was engaged in criminal activity. *Alabama v. White*, 496 U.S. 325, 329, 110 S.Ct. 2412, 110 L.Ed.2d 301 (1990). In determining that the statement was reliable, we considered the totality of the circumstances, including the quality and quantity of the information, and its reliability. We found that the statement made to Trooper Thomas was trustworthy and sufficient to establish reasonable suspicion for the stop. (Order at 5.)

Additionally, we noted that the reliability of the information provided to Trooper Thomas by Trooper Meyers was far more reliable than an anonymous tip or a call from dispatch. In this case, Trooper Meyers communicated to Trooper Thomas that a violation was occurring, the type of violation occurring, and the vehicle committing the violation. Trooper Meyers remained in radio contact with Trooper Thomas until the stop was made and confirmed that he had stopped the correct vehicle. (Tr. at 22.)

Finally, pursuant to R.C. 4923.06(C), inspectors and employees authorized to conduct inspections may stop motor vehicles to inspect those vehicles and drivers to enforce compliance with rules adopted under R.C. 4923.04. Therefore, we find that that the stop was lawful because reasonable, articulable suspicion existed for the stop. Further, the Respondent failed to provide

any evidence at hearing that the stop initiated by Trooper Thomas was not in accordance with all applicable Federal Motor Carrier Safety Regulations (FMCSR) and Commission rules. Accordingly, the Respondent's request for rehearing on this issue should be denied.

(7) In his second assignment of error, the Respondent asserts that the Order is unlawful and unreasonable because Trooper Thomas was not legally justified in entering the truck without the Respondent's consent. The Respondent also argues that the intrusion of entering the Respondent's truck to check for other passengers, check for firearms, and request the Respondent's driver's license, registration, and insurance, was a Fourth Amendment search for which Trooper Thomas was required to have probable cause or a warrant (See Tr. at 24-25).

(8) We find no merit to Respondent's second assignment of error, as we have already indicated in the Order (Order at 6). We find that there exists a legitimate and weighty interest in officer safety that outweighs the de minimis intrusion upon the lawfully stopped Respondent. *Pennsylvania v. Mimms*, 434 U.S. 106, 110-11, 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. While the intrusion of stepping up to the passenger side of the cab of a semi-truck may be greater than asking a driver to exit a vehicle, it is not so great as to overcome the legitimate and weighty interest in officer safety. It is also not so great as to overcome the pervasively regulated industry exception or the need for the Commission and authorized employees of the state of Ohio to conduct inspections.

Trooper Thomas had a duty to request the Respondent's license, registration, medical certificate, and proof of insurance. Commercial trucking is a highly regulated industry where drivers are required under the FMCSR to have a commercial driver's license, valid registration, requisite medical qualifications, and proof of insurance. Pursuant to R.C. 4923.06(B), authorized employees of the state highway patrol may conduct inspections of motor vehicles and drivers. Further, pursuant to R.C. 4923.06(C) and (D), the state highway patrol may stop motor vehicles to inspect those vehicles

and drivers to enforce compliance with rules adopted under R.C. 4923.04. In this case, it was reasonable for Trooper Thomas, after having initiated the stop of the CMV driven by the Respondent, to open the passenger side door of the CMV and step up to the cab for officer safety to determine if a firearm or additional occupant was present, as well as to speak to the Respondent (Tr. at 54, 69). Therefore, the actions of Trooper Thomas did not rise to the level of a Fourth Amendment search. Accordingly, the Respondent's request for rehearing on this issue should be denied.

II. APPLICATION OF THE OHIO ADMINISTRATIVE CODE

(9) In his third assignment of error, the Respondent argues that the Order is unlawful or unreasonable because the record in this case does not support the Commission's finding that the Ohio Administrative Code applies to the Respondent. The Respondent argues that there is no record evidence that the Respondent was driving for either an interstate or intrastate motor carrier at the time of the stop.

Additionally, the Respondent avers that, even if the Respondent was driving for a motor carrier, this does not mean that the Commission's rules apply to the Respondent. The Respondent argues that pursuant to Ohio Adm.Code 4901:2-5-01(A), the Commission's rules apply to owners and drivers of motor vehicles leased to motor carriers during the periods covered by such lease agreements. In addition, the Respondent asserts that there is no record evidence that the Respondent was leased to any motor carrier or that he was driving a CMV during a period covered by such a lease agreement at the time of the purported violation.

(10) We find no merit to the Respondent's third assignment of error. The Commission finds that rehearing on this assignment of error should be denied. Ohio Adm.Code 4901:2-5-01 indicates that a motor carrier includes all officers, agents, representatives, and employees of carriers by motor vehicle responsible for the management, maintenance, operation, or *driving* of motor vehicles. Further, Ohio Adm.Code 4901:2-5-02(A) and (B) states that all motor carriers operating in intrastate or interstate commerce within Ohio shall conduct

their operations in accordance with the FMCSR, and the provisions of Ohio Adm.Code Chapter 4901:2-5. These rules then indicate that a violation of a federal regulation by any motor carrier engaged in interstate commerce in Ohio constitutes a violation of the Commission's rules.

Additionally, we note that evidence was presented at hearing to support the Respondent's status as a driver of a CMV for a motor carrier. The Driver/Vehicle Examination Report, introduced as a hearing exhibit by Staff, indicates that the Respondent was driving a CMV in which a load of steel was being transported in commerce for the carrier Total Package Express, Inc. and the shipper AK Steel (Staff Ex. 7). Accordingly, the Commission finds that the Ohio Administrative Code applies to the Respondent. Accordingly, the Respondent's request for rehearing on this issue should be denied.

III. BURDEN OF PROOF

(11) In his fourth assignment of error, the Respondent argues that the Order is unlawful or unreasonable because Staff did not meet its burden of proving, by a preponderance of the evidence, that the Respondent possessed marijuana. The Respondent asserts that the field test conducted by Trooper Thomas, and the photo of the results of the field test, do not demonstrate that it provided a positive result for marijuana. Additionally, the Respondent argues that Ms. Klontz, who conducted the analysis of the marijuana at the state crime lab, had no independent recollection of conducting the tests and analyses of the marijuana. Therefore, the Respondent avers, Staff did not adduce competent, credible evidence showing that the material tested by Ms. Klontz contained marijuana. Further, the Respondent asserts that, even if a test, on its own, demonstrated a positive result for marijuana, the positive test is only presumptive.

Finally, in regards to this same assignment of error, the Respondent contends that Staff had the burden to demonstrate beyond a preponderance of the evidence that the marijuana contained a hallucinogenic substance. The Respondent notes that 49 C.F.R. 392.4(a) provides that no driver shall be on duty

and possess any 21 C.F.R. 1308.11 Schedule 1 substance. The Respondent then argues that the substances listed under 21 C.F.R. 1308.11(d) are hallucinogenic substances; therefore, Staff must prove beyond a preponderance of the evidence that the marijuana contains a hallucinogenic substance.

(12) We find no merit to the Respondent's fourth assignment of error. We found in the Order that Staff had met its burden and demonstrated by a preponderance of the evidence that the Respondent was in possession of marijuana while on duty in violation of 49 C.F.R. 392.4(a) (Order at 8). We found that the testimony of Trooper Thomas, the testimony of Ms. Klontz, and the numerous tests conducted on the marijuana demonstrate that it was marijuana (Order at 7; Tr. at 31, 77, 155). Even if a single positive result for marijuana is only presumptive, in this case there were four positive test results and multiple witness opinions that the material was marijuana (Tr. at 42, 155; Staff Ex. 5). Additionally, not a single negative test result for marijuana was presented at hearing and no person testified that the material was not marijuana or could not definitively be determined to be marijuana. While the burden of proof rests with Staff, it may be recognized that there was little evidence presented to sufficiently incline our fair and impartial minds to the other side of this issue.

Additionally, we find no merit to the Respondent's argument that Staff must prove by a preponderance of the evidence that the marijuana contained a hallucinogenic substance. As we noted previously, the Commission has adopted the Federal Motor Carrier Safety Regulations, and 49 C.F.R. 392.4(a) provides that no driver shall be on duty and possess any 21 C.F.R. 1308.11 Schedule 1 substance. Marijuana is then listed as a Schedule 1 substance at 21 C.F.R. 1308.11(d)(23). It is not the Staff's or the Commission's responsibility to determine whether marijuana contains a hallucinogenic substance and then rewrite the law to include or exclude it from the list of Schedule 1 substances. The law provides that marijuana is a hallucinogenic substance and lists it as such in 21 C.F.R. 1308.11(d)(23). Accordingly, the Respondent's request for rehearing on this issue should be denied.

IV. SPOLIATION OF EVIDENCE

(13) In his fifth assignment of error, the Respondent argues that the Order is unlawful or unreasonable because it did not find that spoliation was relevant or the resulting doctrine was overcome by other evidence in the record. Additionally, the Respondent asserts that the Commission erred by indicating that the Respondent's failure to testify could give rise to an adverse inference against the Respondent.

(14) We find no merit to the Respondent's fifth assignment of error. As we indicated in the Order, no prejudice exists where evidence was destroyed pursuant to good faith and where there was no immediate request for preservation (Order at 7). *State v. Fuller*, 2nd Dist. Ohio No. 18994, 2002-Ohio-2055 (April 26, 2002); *also citing, State v. Tarleton*, 7th Dist. Ohio No. 02-HA-541, 2003-Ohio-3492 (June 30, 2013). Additionally, we indicated 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 for the destruction of the evidence (Order at 7). We still find that the tests, photos, and testimony were sufficient to rebut and overcome any presumption that would arise in favor of the Respondent.

Additionally, we indicated in the Order that, while there may exist a rebuttable presumption in favor of the Respondent; the Respondent's failure to testify or present any witness testimony may also give rise to an adverse inference against the Respondent (Order at 8). However, we clarify that while there *may* exist an adverse inference against the Respondent, we did not actually hold an adverse inference against him. Accordingly, the Respondent's request for rehearing on this issue should be denied.

V. CIVIL FORFEITURE

(15) In his sixth assignment of error, the Respondent argues that the Order is unlawful or unreasonable because a $500.00 civil forfeiture is an unreasonable amount to be imposed under the facts of this case. The Respondent asserts that the Commission improperly relied upon the Commercial Motor Vehicle Safety

Alliance's (CVSA) maximum fine schedule. Additionally, the Respondent contends that even if the Respondent possessed marijuana, there is no indication that the Respondent was under the influence of marijuana. Finally, the Respondent avers that adopting a zero tolerance policy is arbitrary and capricious, and that such a policy should be adopted pursuant to a rule-making proceeding and not a post hoc declaration made in an opinion and order.

(16) We find no merit to the Respondent's sixth assignment of error. The Commission initially notes that its reliance on the maximum fine schedule published by the CVSA is reasonable because R.C. 4923.99(A)(1) directs the Commission to use, to the extent practicable, a system comparable to the recommended civil-penalty adopted by the CVSA. The Commission finds that relying on the CVSA fine schedule was not only lawful but in strict compliance with the plain language of the statute.

Additionally, while the Respondent argues that there is no evidence that he was under the influence of marijuana, the Commission found that he possessed marijuana, which is sufficient for a violation of 49 C.F.R. 392.4(a) (Order at 8). There is no requirement for the Commission to find that the Respondent was under the influence of marijuana and we made no such finding.

Finally, the Commission notes that its adoption of a zero tolerance policy towards all violations regarding 21 C.F.R. 1308 Schedule 1 substances is reasonable, as the Commission appropriately takes a zero tolerance policy towards any violation of the law. In this case, our indication that we would adopt a zero tolerance policy towards the 21 C.F.R. 1308 substances was to provide a general indication to the industry that our previously adopted zero tolerance policy regarding violations for alcoholic beverages would extend to all unlawful substance. *See In re James Martindale*, Case No. 97-143-TR-CVF, Opinion and Order (July 3, 1997). Therefore, the Respondent's request for rehearing on this issue should be denied.

It is, therefore,

ORDERED, That application for rehearing filed by the Respondent be denied. It is, further,

ORDERED, That a copy of this Entry on Rehearing be served upon each party of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Thomas W. Johnson, Chairman

Steven D. Lesser

Lynn Slaby

M. Beth Trombold

Asim Z. Haque

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Entered in the Journal

MAY 21 2014

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Secretary