

## THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF STEVEN J. DODSON,  
NOTICE OF APPARENT VIOLATION AND  
INTENT TO ASSESS FORFEITURE.

CASE NO. 18-1261-TR-CVF  
(OH1359002536D)

IN THE MATTER OF STEVEN J. DODSON,  
NOTICE OF APPARENT VIOLATION AND  
INTENT TO ASSESS FORFEITURE

CASE NO. 18-1347-TR-CVF  
(OH1359002536D)

### OPINION AND ORDER

Entered in the Journal on September 9, 2020

#### I. SUMMARY

{¶ 1} The Commission finds that Staff demonstrated, by a preponderance of the evidence, that Respondent violated the Commission's transportation rules by (1) not having a driver's record of duty status and (2) being on duty and in possession of a narcotic drug/amphetamine and directs Respondent to pay the related assessed \$350 forfeiture within 60 days of this Entry. The Commission further finds, however, that Staff has failed to demonstrate, by a preponderance of the evidence, that Respondent violated the Commission's transportation rules by being a driver on duty and under the influence of a narcotic drug/amphetamine, which renders the driver incapable of safe operation.

#### II. PROCEDURAL HISTORY

{¶ 2} On March 14, 2018, Trooper Rebecca Missig (Trooper Missig) with the Ohio State Highway Patrol stopped and inspected a vehicle operated by Chase Trucking, LLC and driven by Steven J. Dodson (Respondent or Mr. Dodson) in the State of Ohio. Upon inspection, Trooper Missig prepared a report citing Respondent for numerous violations of the Commission's transportation regulations. (Tr. at 9-10; Staff Ex. 2.)

{¶ 3} Commission Staff timely served Mr. Dodson with a Notice of Preliminary Determination (NPD) in accordance with Ohio Adm.Code 4901:2-7-02, alleging three violations. Specifically, the NPD notified Mr. Dodson that Staff intended to assess a civil forfeiture in the amount of \$100 for violation of 49 C.F.R. 395.8(a), no driver's record of duty status; a forfeiture in the amount of \$250 for violation of 49 C.F.R. 392.4(a), driver on duty

and in possession of a narcotic drug/amphetamine; and a forfeiture in the amount of \$1,000 for violation of 49 C.F.R. 392.4(a), driver on duty and under the influence of or using a narcotic drug/amphetamine, which renders the driver incapable of safe operation. (Staff Ex. 1.)

{¶ 4} On August 6, 2018, Attorney Colin Maher filed a request for an administrative hearing regarding the NPD in accordance with Ohio Adm.Code 4901:2-7-13 on behalf of Respondent. The filing was assigned Case No. 18-1261-TR-CVF. On September 5, 2018, Attorney Maher filed a notice of withdraw of counsel and requested that all further communications be directed to respondent.

{¶ 5} Meanwhile, on August 29, 2018, Attorney Michael J. Yemc, Jr., filed a separate request for an administrative hearing regarding the same NPD on behalf of Respondent. The August 29, 2018 filing was assigned Case No. 18-1347-TR-CVF.

{¶ 6} On October 29, 2018, the attorney examiner issued separate entries in each of the assigned case numbers scheduling the matters for a prehearing conference on December 18, 2018. The prehearing conference was later rescheduled and held on January 31, 2019, but the matter was not resolved.

{¶ 7} By Entries dated April 4, 2019, the attorney examiner scheduled an evidentiary hearing for May 21, 2019.

{¶ 8} At the beginning of the hearing, counsel for Mr. Dodson moved to consolidate both case numbers. Also, citing to Ohio Adm.Code 4901:2-7-02, Attorney Yemc moved to waive the requirement of Ohio Adm.Code 4901:2-7-13 that a respondent file a request for administrative hearing within 30 days following the service of the NPD. Staff voiced no objection, and the attorney examiner granted both motions on the record. (Tr. at 4-5.) Proceeding, Staff presented the testimony of Rod Moser, Trooper Missig, and Trooper Christopher Beyer (Trooper Beyer) with the Ohio State Highway Patrol. Mr. Dodson

testified on his own behalf. Counsel presented closing arguments in lieu of post-hearing briefs.

### **III. APPLICABLE LAW**

{¶ 9} R.C. 4923.04 provides that the Commission shall adopt rules applicable to the transportation of persons or property by motor carriers operating in interstate and intrastate commerce. Under Ohio Adm.Code 4901:2-5-03(A), the Commission adopted certain provisions of the Federal Motor Carrier Safety Regulations (FMCSR). Specifically, the Commission adopted 49 C.F.R. Sections 40, 367, 380, 382, 383, 385, 386, 387, and 390-397, to govern the transportation of persons or property in intrastate commerce within Ohio. Ohio Adm.Code 4901:2-5-03(C) requires all motor carriers engaged in interstate commerce in Ohio to operate in conformity with all federal regulations that have been adopted by the Commission. Further, R.C. 4923.99 authorizes the Commission to assess a civil forfeiture of up to \$25,000 per day, per violation, against any person who violates the safety rules adopted by the Commission when transporting persons or property, in interstate commerce, in or through Ohio.

{¶ 10} In this case, Staff alleges three specific violations of the FMCSR. Ohio Adm.Code 4901:2-7-20 requires that, at the hearing, Staff prove the occurrence of each violation by a preponderance of the evidence.

### **IV. ISSUE**

{¶ 11} At issue is whether Staff has satisfied its burden to show, by a preponderance of the evidence, that Respondent violated: (1) 49 C.F.R. 395.8(a), "No driver's record of duty status;" (2) 49 C.F.R. 392.4(a), "Driver on duty and in possession of a narcotic drug/amphetamine;" and (3) 49 C.F.R. 392.4(a), "Driver on duty and under the influence of, or using a narcotic drug/amphetamine, which renders the driver incapable of safe operation."

## V. SUMMARY OF EVIDENCE

{¶ 12} Staff opened the May 21, 2019 hearing with the testimony of Mr. Rod Moser, Chief of the Compliance Division within the Commission's Transportation Department (Tr. at 5). Mr. Moser explained that he oversees the issuance of NPDs and is responsible for administering the civil forfeiture process for the Commission (Tr. at 6). Mr. Moser identified Staff Ex. 1 as a copy of the NPD sent to Respondent on June 8, 2018. Referencing the NPD, Mr. Moser testified that the forfeiture amounts assigned are appropriate for the cited violations. (Tr. at 7.)

{¶ 13} Trooper Missig testified that she is North American certified in Part A, Part B, hazmat, passenger bus, and inspection of motor vehicles since February 2016 (Tr. at 8-9). Trooper Missig identified Staff Ex. 2 as a copy of the inspection report that she prepared after performing a driver-only inspection of Mr. Dodson on March 14, 2018 (Tr. at 9). Trooper Missig stated that she and Mr. Dodson were traveling eastbound on the Ohio Turnpike, and she stopped Respondent for inspection after witnessing two traffic violations: traveling in the left lane when signage instructed trucks and slow-moving vehicles to use the right lane and switching lanes from the left to the center lane without using a turn signal (Tr. at 14; Staff Ex. 2).

{¶ 14} Trooper Missig also testified as to the circumstances giving rise to the three violations cited in Staff Ex. 2 that are at issue in this proceeding. First, as to the cited violation of 49 C.F.R. 395.8(a), no driver's record of duty status—no log on 3/14/2018; no log for 7 days—Trooper Missig related that Mr. Dodson was unable to present current log pages when requested. Instead, the last entry in the logbook was February 28, 2018. She further explained that there were bills of lading in the truck that showed Mr. Dodson had been making pickups and deliveries in the period between his last log entry and the March 14, 2018 stop. Specifically, there was a bill of lading dated March 5, 2018, that was delivered on March 7, 2018, and a pickup for March 8, 2018, that was delivered on March 10, 2018. Trooper Missig explained that Mr. Dodson's logbook should have showed the days that he

picked up loads and dropped them off, as well as the city and state he was in, and, because it did not, he was not current on his logbook. (Tr. at 10-12.)

{¶ 15} Trooper Missig's testimony next addressed the two alleged violations of 49 C.F.R. 392.4(a) found on Staff Ex. 2: driver on duty and in possession of a narcotic drug/amphetamine (in this case, less than 100 grams of marijuana) and driver on duty and under the influence of or using a narcotic drug/amphetamine, which renders the driver incapable of safe operation (in this case, driver under the influence of marijuana). Trooper Missig stated that, when she walked up to the vehicle and asked Mr. Dodson for his license, registration, logbook, and bills of lading, Mr. Dodson was coming out of the sleeper area drinking from a bottle of water (Tr. at 12-13). At that time, Trooper Missig smelled marijuana in the vehicle, and she could see that Mr. Dodson had a green, leafy material in his teeth and on his tongue. Having smelled marijuana as she approached the vehicle, Trooper Missig called for backup, as troopers do not search vehicles alone. Trooper Missig related that once the other officer showed up, Mr. Dodson was removed from the vehicle; after he was advised of his Miranda rights, Mr. Dodson admitted that he ate marijuana. (Tr. at 13.) Continuing, Trooper Missig stated that she cited Respondent for being a under the influence "[b]ecause he ate the marijuana, he was under the influence while he was on duty." (Tr. at 14.) Further explaining, she testified that a driver is still on duty in the middle of an inspection: during a stop, a driver moves from driving status to on-duty status – when the inspection is occurring – and then back to either driving status or to off-duty when the driver is given his or her paperwork and the inspector leaves (Tr. at 14, 16-17).

{¶ 16} On cross-examination, Trooper Missig testified that Mr. Dodson's vehicle was searched, but no marijuana was found in the truck. She could not recall whether any packaging that contained or appeared to previously contain marijuana was found, but indicated that the troopers would not have confiscated something containing marijuana residue. Trooper Missig also stated that she did not perform any field sobriety tests and did not have Mr. Dodson submit any blood or urine tests. (Tr. at 16.)

{¶ 17} Similar to Trooper Missig, Staff's final witness, Trooper Beyer, testified as to his professional duties and credentials. Trooper Beyer's duties and powers as a state trooper include assisting motorists, investigating traffic crashes, and enforcing violations of the Ohio Revised Code; he is also Part A certified, which consists of logbook violations and driver credentials (Tr. at 18). Trooper Beyer then stated that he became involved in Mr. Dodson's inspection stop when Trooper Missig requested assistance in her search of a vehicle. When Trooper Beyer arrived at the scene, Trooper Missig informed him that the odor of marijuana indicated a probable-cause search of the vehicle; the search was conducted, but no marijuana was found in the vehicle. (Tr. at 19.)

{¶ 18} Trooper Beyer testified that, from his training and experience in seeing the occurrence many times over his years, a person will sometimes ingest marijuana to eliminate any evidence of having it. Trooper Beyer also testified that, after searching the vehicle, he approached Mr. Dodson, read him Miranda rights, and talked to Mr. Dodson. (Tr. at 19.) Trooper Beyer stated that he asked Mr. Dodson why he would have ingested marijuana; that there was an admission that he did swallow the marijuana, though the trooper did not write a report on it and did not recall the exact words; and that, as Trooper Beyer talked with him, Mr. Dodson had marijuana in his teeth and on his tongue. Trooper Beyer explained that he identified the substance he saw as marijuana based on his training and experience. Trooper Beyer clarified that the better half of his 15 years of experience as a trooper has been associated with a criminal patrol program, including three years as a certified canine handler with the Ohio patrol. More recently, working with criminal patrol enforcing mainly quality of life violations, which consist of drug violations, means he has a great amount of experience with marijuana. (Tr. at 20.)

{¶ 19} Continuing, Trooper Beyer confirmed that there was an odor of marijuana at the scene. He noticed the odor coming from the vehicle as the search was performed. Trooper Beyer also said that, as he spoke to Mr. Dodson, he noticed the odor coming off his breath in addition to seeing the physical evidence in his mouth. (Tr. at 21.)

{¶ 20} On cross-examination, Trooper Beyer reaffirmed that he saw marijuana on Mr. Dodson's tongue and teeth. Trooper Beyer did not ask Mr. Dodson to spit the marijuana out in order to have a sample. Further, he stated that the conversation with Mr. Dodson occurred in the back seat of the patrol car, so it was not captured on video. (Tr. at 22.) And, when asked why he did not have Mr. Dodson submit to a field sobriety test, Trooper Beyer answered that it was not his position to do so because he was not the stopping officer (Tr. at 22-23).

{¶ 21} Speaking on his own behalf, Mr. Dodson testified that, before the stop, he was traveling westbound from the Pennsylvania Turnpike entering Ohio when he passed Trooper Missig, who was facing the opposite oncoming traffic on the highway. He stated that Trooper Missig then turned around and followed him for three to four minutes before she pulled him over. (Tr at 24-25.) Mr. Dodson further stated that he was in the left lane with his blinker on attempting to switch lanes (Tr. at 24-25, 34). Mr. Dodson denied having seen any signs that said no trucks in the left lane until the area in which he saw the trooper (Tr. at 24-25).

{¶ 22} Regarding his logbook, Mr. Dodson testified that he had a paper log because he did not have an electronic logbook yet, except for some electronic records on his phone from the Penske rental he was driving (Tr. at 25). Mr. Dodson averred that his logbook was up to date until the date of the stop, but not hour-to-hour for that day (Tr. at 25-26). Mr. Dodson confirmed that he had deliveries between March 5, 2018, and March 10, 2018, but repeated that, to his knowledge, his paper logbook was up to date, less the hours he had been driving that day (Tr. at 29-31, 33-34). Mr. Dodson testified that he believed he was supposed to have electronic logs at the time he was pulled over and that he tried to show Trooper Missig his cell phone to view his electronic log, but she did not look at it (Tr. at 32-33).

{¶ 23} Mr. Dodson proceeded to discuss the events of the stop. He stated that, when the trooper approached his vehicle he was in the driver's seat (Tr. at 26). Respondent detailed that Trooper Missig snatched his passenger-side door open and asked for his license, insurance, and logbooks (Tr. at 25). He went back into the cab of the truck to get his wallet, which contained his driver's license (Tr. at 26). Mr. Dodson reported that Trooper Missig went back to her vehicle with his paperwork while he was retrieving his wallet; there was no mention of an odor of marijuana prior to Trooper Beyer appearing at the scene (Tr. at 26-27).

{¶ 24} Five to ten minutes later, Trooper Beyer appeared at the scene, came to Mr. Dodson's truck, pulled him out, searched him, and searched the vehicle (Tr. at 35, 38-39). After getting him out of the truck, Trooper Beyer searched Mr. Dodson and put him in handcuffs. Trooper Beyer informed him that the search was being performed because it smelled like marijuana in his vehicle. (Tr. at 44.) Mr. Dodson recalled that a total of four or five officers were at the scene and that, after they had searched his vehicle, the group was standing in a circle around him with everybody yelling at and questioning him (Tr. at 43-45). He believes they looked into his background, made assumptions, and asked him about marijuana due to a prior possession charge (Tr. at 45-46). For example, Mr. Dodson testified that Trooper Beyer asked him whether he knew where the heavyweight drugs were or if anything else was coming down the highway (Tr. at 45).

{¶ 25} Mr. Dodson indicated that Trooper Missig pressured him into admitting he had marijuana. Specifically, he stated that when the trooper wrote him up for the logbook and riding in the left lane, "she proceeded to work a deal with me saying, 'If you just admit to having marijuana, 100 grams or less, I will give a \$100 ticket because the state law just passed in Ohio, if you get pulled over for marijuana, you just pay a \$100 fine.'" (Tr. at 27, 36, 46.) Mr. Dodson testified that he told her five times that he didn't have any marijuana at all; he was upset; he was in handcuffs; everyone was grabbing his arm and irately yelling at him that he did have marijuana, despite his protestations to the contrary (Tr. at 27, 36).



Then, “[a]nd I was kind of being sarcastic. I said, okay, all right, I have it.” (Tr. at 28). On cross-examination, Mr. Dodson again specified that Trooper Missig essentially bullied him into admitting that he ate marijuana, saying: “She really just threw it in the air and said, ‘You ate it. You ate it, didn’t you? I said no. To me that was bullying me. Say you ate it. Say you ate it.’” (Tr. at 41). Respondent reiterated that Trooper Missig offered to “do away with” the other violations (lane, turn signal, and logbook) if he just admitted to eating some marijuana (Tr. at 46). This, Respondent testified, together with the tenseness of the interaction, caused him to sarcastically admit to the accused action of eating marijuana (Tr. at 47).

{¶ 26} Rather than marijuana, Mr. Dodson testified that he had been eating peanuts, by which he later specified he meant pistachios, and candy prior to and at the time of the stop (Tr. at 28, 39-40). He was also drinking water (Tr. at 28, 39-40). Respondent reiterated that he had no marijuana and did not think his vehicle smelled like marijuana, but he had previously smoked a Black & Mild cigar (Tr. at 40). Ultimately, Mr. Dodson’s testimony is that he never had marijuana in his vehicle; did not have marijuana in his mouth; his tongue was not green; he did not have marijuana in his teeth, but if he did, the troopers could easily have taken some for evidence; and, if he had just drank water, there wouldn’t be anything in his mouth (Tr. at 28, 46-47).

{¶ 27} Both troopers presented rebuttal testimony. Trooper Missig reiterated that she noticed the smell of marijuana—not the smell of a cigarette or Black & Mild cigar—when she first approached Mr. Dodson’s vehicle (Tr. at 48-49). She did not recall if there were pistachios or any other food products in the vehicle when she stopped Respondent (Tr. at 48). Trooper Missig denied that Respondent was coerced into admitting he swallowed marijuana (Tr. at 49). She stated that, after she asked Mr. Dodson for his paperwork, she stayed next to the vehicle and did not return to her car. She spoke with Mr. Dodson until Trooper Beyer appeared at the scene, but did not mention her suspicion regarding the marijuana because she typically waits for backup before discussing narcotics. (Tr. at 49.)

Trooper Missig clarified that she did not write any citations before Trooper Beyer was on the scene (Tr. at 49-50).

{¶ 28} Next, Trooper Missig testified that Trooper Beyer arrived at the scene, and they asked Mr. Dodson to step out of the vehicle. Trooper Beyer walked Mr. Dodson back to the patrol car, handcuffed him, and read him his Miranda rights. Trooper Missig stated that Mr. Dodson was first questioned about marijuana after being read his Miranda rights and that she did not question Mr. Dodson about the marijuana. (Tr. at 50.) Though Mr. Dodson was placed in handcuffs, Trooper Missig denied that Mr. Dodson was ever harmed, grabbed, or physically assaulted during the stop; nor was he shaken in order to elicit a confession to swallowing marijuana (Tr. at 54-55). Trooper Missig stated that there were three troopers at the scene: her, Trooper Beyer, and a Sergeant Hoffman (Tr. at 55). She reiterated that Mr. Dodson's tongue was green and that there was an odor of marijuana coming from him, but she did not think to take a picture of his tongue or mouth (Tr. at 55-56).

{¶ 29} Regarding Mr. Dodson's logbook, Trooper Missig reiterated that he had a paper log (Tr. at 50-51). Trooper Missig testified that her normal practice upon being handed a paper log is to look at the last page and, if it is not current, take a picture of that last page to show there is nothing after it (Tr. at 51). Per that procedure, she took a picture of the last page in Mr. Dodson's logbook, which picture was marked and admitted into evidence as Staff Ex. 3 (Tr. at 51-52, 60). The last page shows the date of either February 26 or February 28, 2018 (Tr. at 51-52; Staff Ex. 3). Trooper Missig denied that Mr. Dodson ever mentioned anything about an electronic logbook or offered to show her his phone (Tr. at 53-54). Trooper Missig also contradicted Mr. Dodson's testimony that he was westbound at the time of the stop; instead, she states that he was travelling eastbound from Buffalo, Iowa to Alliance, Ohio (Tr. at 53; Staff Ex. 2).

{¶ 30} Finally, Trooper Missig stated that she did not order a field sobriety test because “at the time I saw the green material in his mouth, he had just eaten it” (Tr. at 56). Further explaining, Trooper Missig asserted that she was not going to let Mr. Dodson drive and was not placing him under arrest to take him into custody for driving under the influence of a narcotic (Tr. at 56).

{¶ 31} Trooper Beyer confirmed that before he spoke with Mr. Dodson about the odor and possible possession of marijuana, the trooper first conducted a probable-cause search of his person and then placed him in handcuffs (57-58). Trooper Beyer then moved him to the back of the patrol car and inquired as to why Mr. Dodson ingested marijuana (58). Trooper Beyer stated that Mr. Dodson did admit to swallowing the marijuana there in the back of the car (58). Trooper Beyer denied that Mr. Dodson was surrounded by officers pressuring a confession or otherwise assaulting him (58-59). Trooper Beyer also denied that Mr. Dodson ever said he was or had been eating pistachios (59). On the other hand, Trooper Beyer confirmed that he did, in fact, ask Mr. Dodson about shipments of drugs on the highway. Trooper Beyer expounded on the situation, saying that it is common knowledge in the trucking industry that drugs are potentially shipped in semis, and he wanted to know if Mr. Dodson had any knowledge of such activity. (Tr. at 59-60.)

## VI. COMMISSION CONCLUSION

### A. 49 C.F.R. 395.8(a): “No driver’s record of duty status.”

{¶ 32} Ohio Adm.Code 4901:2-7-20 requires that Staff prove the occurrence of a violation by a preponderance of the evidence at hearing. The Commission finds, based on a preponderance of the evidence, that Staff has proven that Mr. Dodson violated 49 C.F.R. 395.8(a).

{¶ 33} As is applicable, 49 C.F.R. 395.8(a)(2) specifies that a driver operating a CMV must record the driver’s duty status using one of the methods under paragraph (a)(1) of this section, i.e., using an electronic logging device, an automatic on-board recording device, or

in a manual log. Other paragraphs of 49 C.F.R. 395.8 provide additional guidance in our consideration of this case. For example, 49 C.F.R. 395.8(b) lists the four possible duty statuses: off duty, sleeper berth, driving, or on duty not driving. And, 49 C.F.R. 395.8(c) specifies that for each change of duty status, the driver must record the name of the city, town, or village, and the state abbreviation. Additionally, entries are to be current, with a driver keeping his or her record of duty status current to the time shown for the last change of duty status. 49 C.F.R. 395.8(f)(1). Finally, a driver must retain a copy of each record of duty status for the previous seven consecutive days which shall be in his or her possession and available for inspection while on duty. 49 C.F.R. 395.8(k)(2).

{¶ 34} Staff presented the testimony of Trooper Missig, who stated that, when she asked Respondent for his logbook, he was unable to present current log pages (Tr. at 10). Instead, the last entry in the logbook was not later than February 28, 2018 – 14 days prior to the March 14, 2018 stop (Tr. at 10, 51-52; Staff Ex. 3).<sup>1</sup> Mr. Dodson suggests that he had a more complete electronic log on his phone, but Trooper Missig denies Respondent ever mentioning an electronic log or offering to show her anything on his phone (Tr. at 25, 33; Tr. at 53-54). More significantly, however, Mr. Dodson's suggestion contradicts his own testimony, which was that "[he] had a paper log because we didn't have the electronic logs yet" and that "[he] had [his] logbook up to date until [the date of inspection]" (Tr. at 25). Furthermore, Mr. Dodson admits that he had deliveries between March 5, 2018, and March 10, 2018 (Tr. at 30). Yet, there was no record of his duty status during those trips, despite Mr. Dodson's insistence that his log was up to date.<sup>2</sup>

{¶ 35} Given the record in this case, the Commission finds that the evidence overwhelmingly establishes that Mr. Dodson had no record of his duty status for March 14,

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<sup>1</sup> There is some question as to whether the last date of the paper logbook was February 26, 2018, or February 28, 2018. Because the last date was not the date of the stop, this discrepancy is of no consequence.

<sup>2</sup> Although the incomplete history was noted and discussed, Mr. Dodson was not issued a separate citation for violation of 49 C.F.R. 395.8(k)(2). The Commission notes the absence only as further evidence supporting the conclusion that Respondent violated 49 C.F.R. 395.8(a).

2018, which is what is required by 49 C.F.R. 395.8(a). Accordingly, the Commission finds that Staff satisfied its burden in proving this violation. Furthermore, Mr. Moser's testimony establishes that the \$100 civil forfeiture imposed is appropriate for the violation.

**B. 49 C.F.R. 392.4(a): *"Driver on duty and in possession of a narcotic drug/amphetamine."***

{¶ 36} Mr. Dodson was also cited for a violation of 49 C.F.R. 392.4(a), which states in relevant part that "[n]o driver shall be on duty and possess, be under the influence of, or use \* \* \* any 21 C.F.R. 1308.11 Schedule 1 substance." 49 C.F.R. 392.4(a)(1). In this matter, Trooper Missig issued the following violation: "driver on duty and in possession of a narcotic drug/amphetamine: did possess less than 100 grams of marijuana" (Staff Ex. 2). Here, again, the Commission finds that Staff has proven the violation by a preponderance of the evidence.

{¶ 37} Initially, the Commission notes that Trooper Missig testified that Mr. Dodson was on duty at all relevant times (Tr. at 16-17). The Commission additionally notes that marijuana is listed as a Schedule 1 substance under 21 C.F.R. 1308.11. Further, "'possession' means having control over a thing or substance \* \* \*." R.C. 2925.01(K). There can be little question that, if Mr. Dodson swallowed marijuana immediately preceding or during the stop as alleged, he possessed that substance. Thus, the issue the Commission must decide is whether Mr. Dodson swallowed/possessed a substance that was marijuana.

{¶ 38} Upon consideration, the Commission finds that a preponderance of the evidence supports the conclusion that Mr. Dodson did eat or swallow marijuana and, therefore, Staff has carried its burden of proving the violation. Both troopers testified as to odor of marijuana emanating from the cab of Mr. Dodson's CMV and from his person (Tr. at 13, 21, 49, 55, 58). Both troopers testified to seeing a green, leafy substance in Respondent's mouth, whether in his teeth, on his tongue, or both, and further identified that substance as marijuana (Tr. at 13, 20-22, 55-56). And, both troopers testified that Mr. Dodson admitted to having eaten marijuana (Tr. at 13, 20, 23, 47, 58-59).

{¶ 39} Mr. Dodson denies that he possessed or ingested marijuana, denies that an odor of marijuana was present, denies that his tongue was green, and denies that there was any substance in his teeth (Tr. 28, 46-47). Mr. Dodson, instead, promotes the conclusion that any odor would have come from a Black & Mild cigar he had smoked earlier in the day and that anything seen in his mouth was from having eaten pistachios (Tr. at 40, 47). Both troopers, however, unequivocally identified the substance they saw in Mr. Dodson's mouth as marijuana. (Tr. at 13, 20-22, 55-56). Trooper Beyer, in fact, specifically stated, "I could see through my training experience it was marijuana. It was nothing else other than marijuana." (Tr. at 20.) Moreover, Trooper Missig plainly testified that the odor she detected was not consistent with any of the alternatives suggested by Mr. Dodson, i.e., nuts or cigars (Tr. at 48-49). Here, it is worth noting that both Trooper Beyer and Trooper Missig testified as to their training and experience in general, as well as to their experience in identifying marijuana, including Trooper Beyer's three-years as a certified canine handler and criminal patrol dealing mainly with quality of life, i.e., drug, violations (Tr. at 13, 20). This cumulative training and experience in encountering and identifying marijuana in the field further persuades the Commission that the lack of a sample for professional testing is not fatal to Staff's case.

{¶ 40} Also informative to our conclusion that the preponderance of the evidence supports a finding that Mr. Dodson ate, and therefore possessed, marijuana is Mr. Dodson's admission to having done so. As stated above, both troopers testified that Mr. Dodson admitted to having ingested marijuana (Tr. at 13, 20, 23, 47, 58-59). Mr. Dodson counters this testimony by affirming the statement, but then attempting to excuse the admission by claiming to have uttered it sarcastically or as the result of physical or psychological coercion (Tr. at 27-28, 36, 41, 46-47). The Commission does not find credible Mr. Dodson's assertion that he was coerced into a false confession, as many details of Mr. Dodson's account were soundly, consistently, and independently countered by the troopers' testimony. For example, Mr. Dodson insists that Trooper Missig suggested he agree to a possession citation in exchange for not writing up the other possible violations, but Trooper Missig denied

being the officer who questioned Mr. Dodson about marijuana (Tr. at 27-28, 36, 50). Trooper Beyer's testimony supports Trooper Missig's denial (Tr. at 58-59). Additionally, Mr. Dodson spoke of being surrounded by at least four, maybe five, officers questioning him, grabbing him, and yelling at him to admit he had and ate marijuana (Tr. at 27, 36, 43). But, Trooper Missig stated only three officers—herself and Trooper Beyer included—reported to the scene, and Trooper Beyer stated that Mr. Dodson was not assaulted and was not surrounded by officers (Tr. at 55, 58-59). Finally, at the time of the stop, Mr. Dodson recalled that he was travelling from Pennsylvania into Ohio (Tr. at 24, 38), but both troopers testified to the stop having occurred while Mr. Dodson traveled eastbound, a fact that is supported by the investigation report (Tr. at 14, 19; Staff Ex. 2).

{¶ 41} In short, the Commission concludes that the greater weight of credible evidence demonstrates that Mr. Dodson did possess marijuana while on duty, in violation of 49 C.F.R. 392.4(a)(1). Additionally, Mr. Moser's testimony verifies that the forfeiture amount of \$250 imposed for this violation is appropriate. Accordingly, the Commission finds that Staff satisfied its burden in proving this violation and the related forfeiture.

C. *49 C.F.R. 392.4(a): "Driver on duty and under the influence of, or using a narcotic drug/amphetamine, which renders the driver incapable of safe operation."*

{¶ 42} Finally, Mr. Dodson was cited for a second, separate violation of 49 C.F.R. 392.4(a), this one for "driver on duty and under the influence of or using a narcotic drug/amphetamine, which renders the driver incapable of safe operation: driver under the influence of marijuana" (Staff Ex. 2). Unlike the first two cited violations, the Commission finds—based on a preponderance of the evidence—that Staff did not prove that Mr. Dodson was under the influence of marijuana.

{¶ 43} When asked why she cited Mr. Dodson for this violation, Trooper Missig stated, "Because he ate the marijuana, he was under the influence while he was on duty. Because we were in the middle of an inspection, he was still on duty." She described Mr. Dodson as cooperative. (Tr. at 14.) Trooper Missig did not perform any field sobriety tests

(Tr. at 16). Trooper Missig later explained that she did not perform such tests because “he had just eaten it[,] [she] was not going to permit him to drive anyway, and [she] was not placing him under arrest to take him into custody for driving under the influence of a narcotic.” (Tr. at 56.) Trooper Beyer did not perform any field sobriety tests, explaining that, because he was not the stopping officer, it was not his position to do so (Tr. at 22-23). Similarly, Mr. Dodson was not asked to submit to any urine or blood tests (Tr. at 16).

{¶ 44} After reviewing all the evidence, the Commission finds that there is an insufficient showing that Mr. Dodson was under the influence of marijuana while on duty. While we find it credible that Mr. Dodson ate marijuana upon being stopped for the inspection, the record is devoid of any evidence that he was under the influence of the substance. The reason given for the violation was simply “[b]ecause he ate the marijuana” while on duty (Tr. at 14). There was no testimony that eating marijuana immediately, or over the time period of the inspection (after which Mr. Dodson was no longer on duty), renders one under the influence. No field sobriety tests were performed (Tr. at 16, 22-23, 56). No blood or urine test was ordered or performed, which removes the possibility of judging the level of marijuana in Mr. Dodson’s system against the presumptive levels in R.C. 4511.19 (Tr. at 16). Neither trooper testified that Mr. Dodson exhibited any signs of being under the influence, such as glassy eyes or slurred speech. On the contrary, the only characterization of Mr. Dodson’s actions or demeanor during the stop was that he was cooperative (Tr. at 14).

{¶ 45} Given the evidence before us, the Commission cannot find that it is more likely than not that Mr. Dodson violated 49 C.F.R. 392.4(a) by being a driver on duty and under the influence of marijuana. To be clear, the Commission’s finding that Staff did not meet its burden of proof as delineated in Ohio Adm. Code 4901:2-7-20 does not mean that we find that Respondent was not affected by ingesting raw marijuana. The Commission’s opinion is limited to the finding that insufficient evidence has been presented to conclude that Respondent was under the influence of marijuana while on duty in violation of 49 C.F.R.



492.4(a). And, because we cannot find that a preponderance of the evidence demonstrates a violation occurred, the civil forfeiture of \$1,000 should not be assessed against Mr. Dodson.

{¶ 46} Based on the foregoing, the Commission finds that Staff demonstrated, by the preponderance of the evidence, that Mr. Dodson possessed marijuana while on duty, in violation of 49 C.F.R. 392.4(a)(1), and had no record of his duty status for March 14, 2018, in violation of 49 C.F.R. 395.8(a). With these findings, the Commission determines that Respondent should be assessed a \$250 forfeiture for the former violation and a \$100 forfeiture for the latter violation. Respondent should pay the total forfeiture amount of \$350 within 60 days from the date of this Opinion and Order. Ohio Adm.Code 4901:2-7-22 provides that payment of the forfeiture amount shall be made by check or money order payable to “Treasurer, State of Ohio” and mailed or delivered to the Public Utilities Commission of Ohio, Attention: CF Processing, 180 East Broad Street, 4th Floor, Columbus, Ohio 43215-3793. Case number 18-1261-TR-CVF and inspection number OH1359002536D should be written on the face of the check or money order.

{¶ 47} On the other hand, the Commission finds that Staff has failed to prove, by a preponderance of the evidence, that Respondent was under the influence of marijuana while on duty in violation of 49 C.F.R. 392.4(a). Accordingly, that citation and the related assessed forfeiture should be dismissed and the citation removed from Respondent’s history of violations.

## **VII. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

{¶ 48} On March 14, 2018, Trooper Rebecca Missig with the Ohio State Highway Patrol stopped and inspect a vehicle driven by Mr. Steven J. Dodson. As a result of the inspection, Trooper Missig issued three citations: no driver’s record of duty status, a violation of 49 C.F.R. 395.8(a); driver on duty and in possession of a narcotic drug/amphetamine, a violation of 49 C.F.R. 392.4(a); and driver on duty and under the

influence of or using a narcotic drug/amphetamine, which renders the driver incapable of safe operation, a separate violation of 49 C.F.R. 392.4(a).

{¶ 49} Mr. Dodson was timely served with a Notice of Preliminary Determination alleging the same violations. The NPD further notified Mr. Dodson of Staff's intent to assess a civil monetary forfeiture of \$100 for the violation of 49 C.F.R. 395.8(a), of \$250 for the first violation (possession) of 49 C.F.R. 392.4(a), and of \$1,000 for the second violation (under the influence) of 49 C.F.R. 392.4(a).

{¶ 50} Through counsel, Respondent participated in a prehearing telephone conference on January 31, 2019.

{¶ 51} An evidentiary hearing was conducted on May 21, 2019.

{¶ 52} Ohio Adm.Code 4901:2-7-20 requires that, at hearing, Staff prove the occurrence of a violation by a preponderance of the record.

{¶ 53} Based upon the record in this proceeding, the Commission finds that Staff has proven, by a preponderance of the evidence, that Respondent violated 49 C.F.R. 395.8(a) – no driver's record of duty status – and 49 C.F.R. 392.4(a) – driver on duty and in possession of a narcotic drug/amphetamine. Accordingly, Respondent should be assessed a total civil forfeiture of \$350, and he should pay that forfeiture within 60 days from the date of this Opinion and Order.

{¶ 54} However, also based on the record in this proceeding, the Commission finds that Staff has failed to prove, by a preponderance of the evidence, that Respondent violated 49 C.F.R. 392.4(a) by being a driver on duty and under the influence of or using a narcotic drug/amphetamine, which renders the driver incapable of safe operation.

### **VIII. ORDER**

{¶ 55} It is, therefore,

{¶ 56} ORDERED, That Respondent pay a total civil forfeiture of \$350 for violating 49 C.F.R. 395.8(a) and 49 C.F.R. 392.4(a) within 60 days of this Opinion and Order. Payment shall be made by check or money order payable to the “Treasurer, State of Ohio” and mailed or delivered to the Public Utilities Commission of Ohio, Attention: CF Processing, 180 East Broad Street, 4th Floor, Columbus, Ohio 43215-3793. Case number 18-1261-TR-CVF and inspection number OH1359002536D should be written on the face of the check or money order. It is, further,

{¶ 57} ORDERED, That the alleged violation of 49 C.F.R. 392.4(a) – driver on duty and under the influence of or using a narcotic drug/ amphetamine, which renders the driver incapable of safe operation – be dismissed and removed from Respondent’s history of violations. It is, further,

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

COMMISSIONERS:

*Approving:*

Sam Randazzo, Chairman  
M. Beth Trombold  
Lawrence K. Friedeman  
Daniel R. Conway  
Dennis P. Deters

PAS/hac

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**Case No(s). 18-1261-TR-CVF, 18-1347-TR-CVF**

Summary: Opinion & Order finding that Staff demonstrated, by a preponderance of the evidence, that Respondent violated the Commission's transportation rules by (1) not having a driver's record of duty status and (2) being on duty and in possession of a narcotic drug/amphetamine and directs Respondent to pay the related assessed \$350 forfeiture within 60 days of this Entry. The Commission further finds, however, that Staff has failed to demonstrate, by a preponderance of the evidence, that Respondent violated the Commission's transportation rules by being a driver on duty and under the influence of a narcotic drug/amphetamine, which renders the driver incapable of safe operation.  
electronically filed by Kelli C. King on behalf of The Public Utilities Commission of Ohio