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**BEFORE**
**THE PUBLIC UTILITIES COMMISSION OF OHIO**

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| In the Matter of the Request of Sweeney Services, Inc., for an Administrative Hearing. | : : : | Case No. 09-607-TR-CVF |

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# POST-HEARING BRIEF
# SUBMITTED ON BEHALF OF THE STAFF OF THE PUBLIC UTILITIES COMMISSION OF OHIO

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**Richard Cordray**
Ohio Attorney General

**Duane W. Luckey**
Section Chief

**Stephen A. Reilly**
**Thomas G. Lindgren**
Assistant Attorneys General
Public Utilities Section
180 East Broad Street
Columbus, Ohio 43215
614.466.4395 (telephone)
614.644.8764 (fax)
stephen.reilly@puc.state.oh.us
thomas.lindgren@puc.state.oh.us

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## INTRODUCTION

Sweeney Services, Inc., the respondent in this matter, is contesting liability for the violation of the federal motor carrier safety regulations while transporting hazardous materials at issue in this proceeding. Based on the evidence of record, established precedent of the Public Utilities Commission of Ohio ("Commission"), and on sound public policy, the total monetary civil forfeiture of four hundred-fifty dollars ($450.00) should be imposed against Respondent.

## STATEMENT OF FACTS

### I. Procedural History of the Case

Respondent was sent a Notice of Preliminary Determination on July 6, 2009, as required and described in Section 4901:2-7-12 of the Ohio Administrative Code

("O.A.C.")[1] The Notice of Preliminary Determination cited a violation of Section 383.93(b)(3) of the federal motor carrier safety regulations.[2] Respondent then filed a request for a hearing in this matter. The hearing was conducted on December 1, 2009 before Attorney Examiner Gregory Price.

## II. Factual Background of the Violations at Issue in this Proceeding

On May 20, 2009, PUCO Hazardous Materials Specialist Tom Forbes conducted a roadside inspection of a vehicle operated by Sweeney Services, Inc. and driven by Adam M. Lemon. At the time of the inspection, the vehicle was carrying Class 3 hazardous materials. Specialist Forbes then prepared a report describing the results of the inspection. The report was introduced at the hearing as Staff Exhibit 1 and was admitted into evidence by the Examiner.

Specialist Forbes found one violation of the federal motor carrier safety regulations, as stated in his report. The violation was failure to have a tank vehicle endorsement on the driver's commercial driver's license (CDL) as required by 49 C.F.R. §383.93(b)(3).

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1 Ohio Admin. Code § 4901:2-7-12 (West 2010).

2 49 C.F.R. §383.93(b)(3) (2010).

## LAW AND ARGUMENT

### I. The driver of a tank vehicle is required to have a tank vehicle endorsement on his or her commercial driver's license.

Section 383.93(b) of the federal motor carrier safety regulations provides, in pertinent part, that "[A]n operator must obtain State-issued endorsements to his/her CDL to operate commercial motor vehicles which are . . . (3) tank vehicles." The evidence shows that Respondent did not comply with this requirement.

The inspection of Respondent's vehicle was conducted by an experienced officer who had been trained in federal motor carrier safety regulations and hazardous materials transportation requirements.[3] While on duty, the inspector observed that Respondent's vehicle was placarded for hazardous materials.[4] The inspector then stopped the Respondent's vehicle and conducted a roadside inspection.[5] In the course of the vehicle inspection, the inspector examined the shipping papers produced by the driver and determined that the vehicle was carrying petroleum distillate, which is a hazardous material.[6] He also examined the driver's CDL and observed that it did not have a tank endorse-

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3 Tr. at 7-8.

4 *Id.* at 8.

5 *Id.*

6 *Id.* at 9.

ment.[7] After completing the inspection, the inspector prepared an inspection report that was admitted into evidence as Staff Exhibit 1.[8]

Staff witness Forbes explained why the driver was required to a have a tank endorsement on his CDL. Respondent's vehicle had a tank with a capacity greater that 119 gallons and was permanently attached to the vehicle.[9] Specialist Forbes determined the tank's capacity by looking at the specification plate on the vehicle.[10] Thus, the tank on Respondent's vehicle meets the definition of cargo tank found in 49 C.F.R. §171.8. Therefore, the driver was required by 49 C.F.R. 383.93(b)(3) to have the proper endorsement on his CDL.

Respondent failed to rebut the evidence showing that the driver lacked the endorsement required to operate a tank vehicle. Respondent presented no witnesses at the hearing. The Staff has shown by a preponderance of the evidence that Respondent failed to comply with the requirements of 49 C.F.R. §383.93(b)(3). Accordingly, the Commission should find that Respondent violated this section of the federal motor carrier safety regulations while transporting hazardous materials.

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7 Tr. at 10.

8 *Id.* at 13.

9 *Id.* at 12

10 *Id.*

## II. The Commission should assess the civil forfeiture proposed by Staff because it is objective and fair and because results from the factors and procedure the Commission established to determine civil forfeitures.

The Public Utilities Commission of Ohio ("Commission") has statutory power to assess monetary forfeitures against drivers for non-compliance with motor carrier safety and hazardous materials transportation regulations.[11] The Legislature granted the Commission the authority to assess forfeitures for the violations of the hazardous materials transportation provisions.[12]

The Public Utilities Commission has authority to adopt safety rules applicable to hazardous materials transportation and has, in fact, adopted the federal motor carrier safety regulations and hazardous materials transportation regulations of the U.S. Department of Transportation in Title 49 of the C.F.R.[13] The Commission has also adopted civil forfeiture and procedural rules.[14] The Commission enforces the motor carrier safety regulations and hazardous materials transportation regulations for the State of Ohio.

The civil forfeiture Staff proposed in this case resulted from an objective evaluation of a multitude of factors.[15] The evaluation proceeded according to Staff's usual procedure.[16] Staff treated Respondent just like any one else in similar circumstances.[17]

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11 Ohio Rev. Code Ann. §§ 4919.99, 4921.99, 4923.99 (West 2010).

12 *Id.*

13 Ohio Admin. Code § 4901:2-5-02 (West 2010).

14 Ohio Admin. Code §§ 4901:2-7-01 through 4901:2-7-22 (West 2010).

15 Staff Ex. 3 (Forfeiture Assessment); Tr. at 32-40.

16 *Id.*

The evaluation was comprehensive and included consideration of: the nature gravity, the extent of the violation, the existence of actual harm and the existence of other circumstances that Staff believed should be considered.[18] The evaluation considered those factors in conjunction with the material hazard, Respondent's culpability and its history of prior violations.[19] In so doing, Staff considered initially all the factors the Commission identified for assessing civil penalties except Respondent's ability to pay.[20] As Mr. Canty explained, Staff cannot take Respondent's ability to pay into consideration when Staff initially evaluates a proposed civil penalty because it does not have any information to consider on that issue.[21] But, Mr. Canty elaborated: "That [Respondent's ability to pay] is something that is taken into consideration later on should Respondent raise the issue."[22] In other words, Respondent's ability to pay was considered if Respondent raised it. But, the record suggests Respondent's ability to pay is not an issue. The civil forfeiture Staff proposed is only $450.00.[23] This low amount suggests Respondent's ability to pay is not an issue. Moreover, nothing in the record contradicts that conclusion. Respondent did not present any evidence concerning its inability to pay.

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17 Tr. at 46.

18 Staff Ex. 3 (Forfeiture Assessment); Tr. at 36.

19 Staff Ex. 3 (Forfeiture Assessment); Tr. at 37-38.

20 *See*, Ohio Admin. Code § 4901:7-06 (West 2010).

21 Tr. at 48.

22 *Id.*

23 Staff Ex. 5 (Notice of Preliminary Determination).

Accordingly, the record supports only the conclusion that Respondent has the ability to pay the civil forfeiture. All of this means the civil forfeiture Staff proposed resulted from a comprehensive assessment of factors and complied with the Commission's rule for determining civil penalties.

Additionally, Staff's method for computing the proposed civil forfeiture was objective and fair. According to its procedures, Staff used multiple charts to compute the proposed civil forfeiture this case.[24] Staff computed the proposed civil forfeiture through assigning values to the various considerations contained in the assessment matrix.[25] Staff took these number values from an assessment chart which groups the violation into various categories by point value.[26] For example, the Staff identified the value for the violation's nature gravity by consulting the assessment chart that provided a value for the violation.[27] The assessment matrix reveals that only 3 factors affected the point total and, hence, the proposed civil forfeiture in this case: nature gravity, material hazard, and amount of material.[28] The values for all these factors came from charts Staff maintains and uses to objectively compute proposed civil forfeitures.[29] This means that Staff proposed the same civil forfeiture in this case that it would have proposed in any case pre-

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24 Tr. at 32-33.

25 Staff Ex. 3 (Forfeiture Assessment); Tr. at 32-40.

26 Tr. at 33.

27 *Id.*

28 Staff Ex. 3 (Forfeiture Assessment).

29 Tr. at 33, 37.

senting the same circumstances. The method is objective, even-handed and consistent. Accordingly, that method resulted in a fair proposed civil forfeiture.

The process the Commission established to assess civil forfeitures also is fair; it is the process followed in this case. The process provided Respondent with multiple notices of the intent to assess a civil forfeiture and multiple opportunities for Respondent to present its position.[30] The Commission's rules direct Staff to notify a Respondent of an apparent violation and Staff's intent to assess a civil for feature.[31] At this time, Staff also offers a respondent an opportunity for a settlement conference.[32] After the conference, Staff notifies the respondent of Staff's position through a notice of preliminary determination that also notifies a respondent of its ability to request an administrative hearing.[33] This was the procedure followed in this case. Staff notified Respondent of the Notice of Apparent Violation and Staff's Intent to Assess a Forfeiture of $450.00.[34] It notified Respondent that it could pay the proposed civil forfeiture or request a settlement conference.[35] Respondent requested a conference but the matter was not resolved. Staff notified the Respondent of that result and told Respondent of its options to pay the civil

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30 *Id.* at 42-45.

31 Ohio Admin. Code § 4901:2-7-05 (West 2010).

32 *Id.*

33 Ohio Admin. Code §§ 4901:2-7-07, 4901:2-7-10 (West 2010).

34 Staff Ex. 4 (Notice of Apparent Violation and Intent to Assess Forfeiture); Tr. at 42.

35 Tr. at 42.

for feature or seek the administrative hearing in this case.[36] As the record shows, Respondent requested the administrative hearing.[37] In all, Staff followed the Commission's rules and offered Respondent multiple notices and opportunities to present Respondent's position. The process is fair and Respondent took full advantage of it.

The civil forfeiture involved in this case resulted from the application of a fair and objective method as well as fair and objective procedures. The methods and procedures employed are those established by the Commission. The civil forfeiture should be assessed.

## III. The inspection in this case complied with the Public Utilities Commission of Ohio rule authorizing and defining an inspection program. That inspection program satisfied constitutional requirements for warrantless searches.

At the end of the hearing, Respondent moved to dismiss the violation because he claimed to have an "impeccable record" and because Mr. Forbes, the inspector, did not have knowledge of a violation prior to the stop.[38] Respondent did not explain why the Commission should dismiss the violation even if Respondent's claims were true and he did not provide a legal basis for the dismissal.[39] The Attorney Examiner rightly denied the motion.[40] Simply, Respondent's violation record and the inspector's knowledge of a

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36 Staff Ex. 5 (Notice of Preliminary Determination); Tr. at 42-43, 45.

37 Staff Ex. 6 (July 20, 2009 Letter from D. Ferris).

38 Tr. at 53-54.

39 Tr. at 53.54.

40 Tr. at 57.

violation do not preclude inspections.[41] Probable cause to believe a violation exists is not a pre-condition to a warrantless inspection in a closely regulated industry such as commercial trucking.[42] The United States Supreme Court has upheld inspections where the inspection scheme did not require any level of suspicion.[43] Accordingly, Respondent's rationale for its motion does do not support dismissal, as the Attorney Examiner found. Moreover, the Commission's rules authorized the inspection in this case. Mr. Forbes inspected Respondent's vehicle as authorized by that rule.

### A. The Commission rule providing for the Commission's commercial motor vehicle inspection program, Ohio Administrative Code § 4901:2-5-13, authorized the inspection in this case and the inspection complied with that rule.

The inspection in this case was authorized by the Commission's transportation inspection program rule, O.A.C. 4905:2-5-13, and the inspection complied with that rule.

The General Assembly authorized the Commission to adopt rules applicable to commercial motor vehicle transport, including transport of hazardous, flammable materials such as Respondent transported in this case.[44] Among those rules, the Commission proscribed an inspection program applicable to Respondent and other carriers.[45]

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41 Ohio Admin. Code § 4901:2-5-13.

42 *Id.*

43 *New York v. Burger*, 482 U.S. 691, 694 n.1, 107 S.Ct. 2636, 2639 n.1, 96 L.Ed. 2d 601 (1987); *United States v. Dominguez-Prieto*, 923 F.2d 464, 469 (6th Cir., 1991).

44 Ohio Rev. Code Ann. §§ 4921.04, 4923.03 (West 2010).

45 Ohio Admin. Code § 4901:2-5-13 (West 2010).

O.A.C. 4901:2-5-13 authorizes Mr. Forbes, and other employees of the Commission's transportation department, to inspect commercial motor vehicles.[46] The rule authorizes compliance inspections of commercial motor vehicles and their cargo when located on "any public roadway, public property or private property open to the public."[47] In this case, Respondent transported its cargo on state route 664, a public roadway, when Mr. Forbes inspected its vehicle.[48] Accordingly, O.A.C. 4901:2-5-13 authorized the inspection if circumstances satisfied certain criteria imposed by the inspection program and that limit an inspector's discretion.

The inspection program limits the motor vehicles subject to inspection by criteria.[49] Inspectors may inspect only commercial motor vehicles meeting one of five criteria.[50] One criterion includes commercial motor vehicles on public roadways that are "designated by the headquarters staff of the commission's transportation department as 'special interest.'"[51] Headquarters staff has designated all motor vehicles transporting hazardous materials as a headquarters "special interest," (HINT).[52] In this case, Mr. Forbes inspected Respondent's vehicle while it was transporting a flammable, hazardous

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46 *Id.*

47 Ohio Admin. Code § 4901:2-5-13(B)(2) (West 2010).

48 Staff Ex. 1 (Driver/Vehicle Examination Report); Tr. at 8-9.

49 Ohio Admin. Code § 4901:2-5-13(C) (West 2010).

50 *Id.*

51 Ohio Admin. Code § 4901:2-5-13(C)(4) (West 2010).

52 Tr. at 27.

material cargo on a public roadway.[53] Mr. Forbes inspected the vehicle because he saw placards on the outside announcing its hazardous material cargo.[54] Accordingly, the Commission's inspection program rule authorized the inspection.

The inspection program also describes the permissible scope of an inspection of a commercial motor vehicle such as the one Mr. Forbes inspected.[55] Relevant to this case, the permissible scope includes an examination of the driver's license to operate the commercial motor vehicle, and an inspection of the vehicle for compliance with motor carrier safety regulations and hazardous material requirements.[56] That inspection revealed the violation in this case. Mr. Forbes' inspection revealed the commercial motor vehicle was a tank truck carrying a flammable, hazardous cargo.[57] The Commission rules require the driver of such a truck have a tank endorsement on his commercial driver's license.[58] Mr. Forbes' inspection of the driver's commercial driver's license revealed the driver did not have the required tank endorsement on his commercial driver's license.[59] Mr. Forbes' inspection was within the scope authorized by the Commission's inspection program.[60]

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53 Staff Ex. 1 (Driver/Vehicle Examination Report); Tr. at 9.

54 Tr. at 8.

55 Ohio Admin. Code § 4901:2-5-13(D) (West 2010).

56 *Id.*

57 Staff Ex. 1 (Driver/Vehicle Examination Report); Tr. at 9, 12-13, 16.

58 Staff Ex. 1 (Driver/Vehicle Examination Report); Tr. at 12.

59 Tr. at 10.

60 Ohio Admin. Code § 4901:2-5-13(D) (West 2010).

Simply, the Commission's rule authorized the inspection and the inspection complying with the rule revealed the violation.

### B. The Commission's rule providing the inspection program satisfies constitutional requirements for warrantless searches.

#### 1. Commercial trucking is a pervasively regulated industry and warrantless searches in such industries are proper.

An exception to the warrant requirement of the Fourth Amendment to the United States Constitution exists in pervasively regulated industries.[61] The Court in *New York v. Burger* explained that the business owners and operators in pervasively regulated industries have "a reduced expectation of privacy" and because of that reduced expectation of privacy "the warrant and probable-cause requirements, which fulfill the traditional Fourth Amendment standard of reasonableness for a government search, ... have less application."[62] Accordingly, the *Burger* Court concluded "where the privacy interests of the owner are weakened and the government interests in regulating particular businesses are concomitantly heightened, [as in a pervasively regulated industry] a warrantless inspection of commercial premises may well be reasonable within the meaning of the Fourth Amendment."[63] The *Burger* Court found a warrantless search of a pervasively regulated business is reasonable when 3 criteria are present:

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61 *Burger*, 482 U.S. 691, 701, 107 S. Ct. 2636, 2643.

62 *Burger* , 482 U.S. 691, 702, 107 S. Ct. 2636, 2643-2644.

63 *Burger* , 482 U.S. 691, 702, 107 S. Ct. 2636, 2643-2644.

1. First, there must be a substantial government interest that informs the regulatory scheme pursuant to which the inspection is made.

2. Second, warrantless inspections must be necessary to further the regulatory scheme.

3. Finally, the inspection program must perform the two basic functions of a warrant: it should advise the owner of commercial premises that the search is made pursuant to law and has a properly defined scope, and the inspection program should limit the discretion of the inspecting officer. [64]

Commercial trucking is a pervasively regulated industry and these three criteria were satisfied in the present case. Mr. Forbes' inspection was proper.

Commercial trucking is a pervasively regulated industry.[65] Both federal and state governments extensively regulate it.[66] As the federal Sixth Circuit Court of Appeals explained:

> The federal regulations governing the commercial trucking industry are extensive. Regulations cover driver's qualifications, motor vehicles' parts and accessories, reporting of accidents, drivers' hours of service, inspection, repair and maintenance of motor vehicles, recording of itineraries, transportation of hazardous materials, and other safety issues. Not only is there comprehensive regulation of the common carriers in the trucking industry by the federal government, but

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64 *Burger*, 482 U.S. 691, 702-703, 107 S. Ct. 2636, 2644; *Benson v. Ohio Racing Commission*, 2004 WL 1405321, ¶37, (Ohio App. 10th Distr., 2004) (unreported decision) (see Attachment A).

65 *United States v. Steed*, 548 F.3d 961, 968 (11th Cir., 2008); *Owner-Operator Independent Drivers Assn., Inc. v. McFadden*, 124 F. 3d 199 (Table) (6th Cir., 1997) (unreported decision) (see Attachment B); *United States v. Dominguez-Prieto*, 923 F.2d 464, 468.

66 *V-1 Oil Company v. Means*, 94 F. 3d 1420, 1425 (10th Cir., 1996); *United States v. Dominguez-Prieto*, 923 F.2d 464, 468.

> they are also comprehensively regulated by most, if not all, states . . . In view of this extensive state and federal regulation, we find the common carriers in the trucking industry to be a pervasively regulated business. [Citations omitted.] [67]

Such regulation led the federal Eleventh Circuit Court of Appeals to observe that "every circuit [federal circuit courts of appeal] to address the issue [whether commercial trucking is a pervasively regulated industry] has agreed that commercial trucking is a pervasively regulated industry within the meaning of Burger [*New York v. Burger*, 482 U.S. 691]."[68] Additionally, the Commission should recognize that Ohio extensively regulates commercial trucking and Ohio does so as pervasively as the federal government. The Commission's regulations, alone, regulate commercial trucking as pervasively as federal law. As the Commission knows well, it adopted the federal scheme as Ohio regulation.[69] This extensive regulation at both the federal and state level shows that commercial trucking is a pervasively regulated industry.[70] And, transportation of hazardous materials, such as the flammable cargo involved in this case, is even more closely regulated.[71]

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67 *United States v. Dominguez-Prieto*, 923 F.2d 464, 468.

68 *United States v. Steed*, 548 F.3d 961, 968 n.5 (11th Cir., 2008).

69 Ohio Admin. Code § 4001:2-5-02 (West 2010).

70 *United States v. Steed*, 548 F.3d 961, 967-968; *Owner-Operator Independent United States v. Dominguez-Prieto*, 923 F.2d 464, 467-470.

71 *V-1 Oil Company v. Means*, 94 F. 3d 1420, 1425 (10th Cir., 1996).

Since commercial trucking is a pervasively regulated industry, the warrantless search in this case was permissible if the criteria enunciated in *Burger* were met.[72] .

### 2. The Commission's inspection program satisfies the criteria for warrantless searches of pervasively regulated industries such as commercial trucking.

The first *Burger* criterion is met by the substantial government interest of this state, as that of all other states, in the need to place restrictions on transportation of commodities including hazardous materials, such as the flammable materials involved in this case.[73] Additionally, the state has a substantial interest in the safe operation of large commercial vehicles is critical to the welfare of the motoring public.[74] Finding these substantial governmental interests in the regulation of commercial motor vehicles, the 6th circuit explained:

> With respect to the regulation of common carriers in the trucking industry, the substantial interests of the government are evident. There is a clear need to place restrictions on what commodities may be transported and what type of vehicles may be used to transport those commodities. For example, the state has a substantial interest in prohibiting the transportation of flammable or hazardous materials absent certain safety precautions including vehicle design and placarding. Likewise, the safe operation of large commercial vehicles is critical to the welfare of the motoring public. [Citations omitted.] [75]

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72 *See, Burger*, 482 U.S. 691; *United States v. Steed*, 548 F.3d 961; *United States v. Dominguez-Prieto*, 923 F.2d 464.

73 *United States v. Dominguez-Prieto*, 923 F.2d 464, 468.

74 *Id.*

75 *United States v. Dominguez-Prieto*, 923 F.2d 464, 468.

Government's substantial interest in regulating the transportation of hazardous materials on public roadways for public safety should be beyond question.

The second *Burger* criterion is met by the necessity of the warrantless search to further the regulatory scheme to regulate the transportation of cargo, particularly hazardous materials, on public highways.[76] Simply, Ohio, as any other state, must be able to inspect commercial motor vehicles operating on public roadways if the state is to successfully regulate the trucking industry.[77] As the 6th circuit explained,

> In *Burger,* the Court held that the warrantless inspections of junkyards were necessary to further the regulatory scheme because they were a credible deterrent for the receiving of and marketing in stolen goods, and they facilitated frequent inspections. Imposing a warrant requirement would have frustrated both of these goals. The Court also noted that a warrant requirement would interfere with the purpose of the statute, "[b]ecause stolen cars and parts often pass quickly through an automobile junkyard."
>
> As was the case in *Burger,* warrantless inspections are critical to the regulatory scheme in question here. If the . . . [state] is to be successful in regulating or controlling common carriers in the trucking industry and the types of cargo they transport, they must be able to check the cargo frequently. Like the stolen cars and automobile parts which pass quickly through an automobile junkyard, trucks pass quickly through states and out of the jurisdictions of the enforcement agencies; the facts presented here in support of warrantless inspections are more compelling than those present in *Burger.* [Citations omitted.][78]

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76 *Id.*

77 *Id.*

78 *United States v. Dominguez-Prieto,* 923 F.2d at 468-469.

Trucks not only pass quickly out of the state but also they pass quickly down the road and out of view. If the state is to regulate them, it must inspect them. If the state is to protect public safety on public roadways, it must inspect commercial motor vehicles carrying hazardous materials such as the flammable hazardous materials carried on the truck involved in this case. Simply, a warrant requirement frustrates the state's ability to protect public safety on public roadways. Accordingly, warrantless searches are necessary to further the regulatory scheme to regulate the transportation of cargo, particularly hazardous materials, on public highways.[79]

The third, and final, *Burger* criterion is met because the Commission's inspection program performs the two basic functions of a warrant. First, it advises the owner of commercial motor vehicles, such as the Respondent, that inspections, including that by Mr. Forbes, are made pursuant to law and the inspection program has a properly defined scope. Second, the inspection program limits the time, place, and scope of the inspection, thereby, limiting the discretion of the inspecting officer. The Commission's commercial motor vehicle inspection program, provided and described in O.A.C. 4901:2-5-13 satisfies these functions.

The first function is satisfied if the inspection program advises the owner of the commercial motor vehicle that the search is made pursuant to law and has a properly defined scope.[80] The inspection program provided in O.A.C. 4901:2-5-13 is so compre-

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79 *Id.*

80 *Burger*, 482 U.S. 691, 702-703, 107 S.Ct. 2636, 2644; *United States v. Steed*, 548 F.3d 961, 968; *United States v. Dominguez-Prieto*, 923 F.2d 464, 467.

hensive that the Respondent, and all other commercial motor vehicle owners, cannot help but be aware that the commercial motor vehicle will be subject to periodic inspections. O.A.C. 4901:2-5-13 provides a comprehensive inspection program applicable to all commercial motor vehicles. It authorizes inspections to enforce standards and requirements relating to interstate and intrastate commerce.[81] That means commercial motor vehicles are subject to inspection when operating in both interstate and intrastate commerce. Additionally, O.A.C. 4901:2-5-13 authorizes inspections to enforce standards and requirements relating to both public and private-contract transportation.[82] Accordingly, commercial motor vehicles are subject to inspection under this rule whether they engage in public or private carriage.[83] Simply, O.A.C. 4901:2-5-13 notified Respondent, and all others engaged in the commercial trucking industry, that all types of commercial motor vehicles engaged in all types of transportation were subject to inspection by state inspectors like Mr. Forbes to enforce the Commission's standards and requirements relating to transportation. The rule's existence shows inspections are authorized by, and take place pursuant to, law - O.A.C. 4901:2-5-13.

The well-defined nature of the inspection program also shows Respondent, and all others engaged in the commercial trucking industry, that their commercial motor vehicles are subject to inspections authorized by law and conducted according to law. O.A.C. 4901:2-5-13 limits inspectors' discretion in choosing commercial motor vehicles to

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81 Ohio Admin. Code § 4901:2-5-13(A) (West 2010).

82 *Id.*

83 Ohio Admin. Code § 4901:2-5-13(A) (West 2010).

inspect by location; only commercial motor vehicles located in one of three areas are subject to inspection.[84] Those areas include:

1. Premises owned or controlled by an offeror or motor carrier;

2. Any public roadway, such as the one involved in this case, public property or private property open to the public.

3. Any other premises if the inspection is conducted with permission of the owner or person in control of the property.[85]

O.A.C. 4901:2-5-13 also limits the commercial motor vehicles subject to inspection by proscribing criteria the inspectors must apply in identifying vehicles for inspection.[86] The Commission's inspection program authorizes an inspection only if one of the following six criteria applies:

1. Complaints received by the Commission's transportation department headquarters staff and issued to field employees.

2. Observed violations of rules and statutes listed in O.A.C. 4901:2-5-13(A).

3. Knowledge the commercial motor vehicle was recently inspected and had serious safety defects.

4. Motor vehicles, carriers, and offerors designated by headquarters staff of the transportation department as "special interest." These are "HINT inspections" and include Mr. Forbes' inspection involved in this case.

5. Any uniform, statistical selection procedure.

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84 Ohio Admin. Code § 4901:2-5-13(B) (West 2010).

85 *Id.*

86 Ohio Admin. Code § 4901:2-5-13(C) (West 2010).

> 6. Any inspection system developed by the federal highway administration and utilizing a carrier or driver's safety performance record as a factor.[87]

Indeed, the Commission's inspection program detailed in O.A.C. 4901:2-5-13 controls the choice of commercial motor vehicles inspected.

Further, O.A.C. 4901:2-5-13 defines the scope of inspections.[88] It identifies what the inspector may inspect and provides:

> (D) The content and extent of inspections may include but not be limited to examination of the employee's age (if employee is a driver), license to operate the motor vehicle, physical condition (drug or alcohol influence, illness, fatigue), medical examiner's certificate or medical examiner's provisional certificate, record of duty status and hours of service, and possession of controlled substances or alcohol, passenger authorization, vehicle inspection reports, seat belt, brake system, steering mechanism, wheels, tires, coupling devices, suspension, frame, fuel system, exhaust system, windshield and windshield wipers, lighting devices, safety devices, electrical system; cargo securement and authorization; hazardous materials requirements; and any other component, equipment, or device covered by the rules and statutes listed in paragraph (A) of this rule.[89]

This shows the Commission's rule, like a warrant, defines the scope of inspections.

In sum, the Commission's rule directs and controls inspections. Accordingly, the Commission's rule performs the first function of a warrant. It notifies Respondent, and all other owners of commercial motor vehicles, that they are subject to inspection and it advises them that inspections are made pursuant to law.

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87 Ohio Admin. Code § 4901:2-5-13(C) (West 2010).

88 Ohio Admin. Code § 4901:2-5-13(D) (West 2010).

89 *Id.*

The second function of a warrant is satisfied where, as here, it limits the discretion of the inspecting officer. The inspection program limits the time, place, and scope of the search, thereby, limiting the discretion of the inspecting officer. As discussed, O.A.C. 4901:2-5-13 limits the discretion of the inspector such that it defines the inspection and, thereby, performs the function of a warrant. It limits the inspectors' discretion in choosing commercial motor vehicles to inspect, as previously discussed. Additionally, O.A.C. 4901:2-5-13 defines the scope.

The inspections authorized by that rule are similar in scope to those authorized by the statute underlying the inspection upheld by the United States Supreme Court in *Burger*. Like the inspection program upheld in *Burger,* the Commission's scope of inspections is limited to identified items associated with a commercial motor vehicle including those associated with hazardous materials and components, equipment and devices covered by law. The statute upheld in *Burger* contained similar provisions concerning the regulatory program in that case, which involved junk yards. The statute in that case provided in pertinent part:

> Upon request of an agent of the commissioner or of any police officer and during regular business hours, a vehicle dismantler shall produce such records and permit said agent or police officer to examine them and any vehicles or parts of vehicles which are subject to the record keeping requirements of this section and which are on the premises. [90]

Accordingly, the *Burger* decision is testament to the propriety of the scope of inspections authorized by O.A.C. 4901:2-5-13.

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90 *Burger*, 482 U.S. 691, 694 n.1, 107 S.Ct. 2636, 2639 n. 1.

Additionally, the Commission's inspection program restrains the inspector's discretion as to time and place of the inspection. It provides that the inspection may only take place when the commercial motor vehicle is located in specific places.[91] As applied to this case, that location is a public highway. This restriction also restricts the time when a commercial motor vehicle may be inspected. It may only be inspected at those times it is in one of the specific locations. As applied to this case, Respondent's commercial motor vehicle could be inspected when it was on a public highway. That is a restriction similar to the time restriction in the statute involved in *Burger*. The statute involved in *Burger* provided for inspections during regular business hours. The "business hours" of a commercial motor vehicle are those when it is employed in business; that is, when it carries cargo. Viewed in that light, the Commission's inspection program, and the inspection involved in this case, provided for the inspection during the "business hours" of the commercial motor vehicle involved in this case. The restraint on location is a restraint on time also. Accordingly, the Commission's inspection program restrains the inspectors' discretion as to time, place and scope of inspection. Accordingly, the Commission's inspection program satisfies the second function of a warrant.

A decision of the Ohio 10th district court of appeals is further testament to the legitimacy of the Commission's inspection program. Under the Commission's inspection program, the limits on the scope of commercial motor vehicle inspection, even one containing hazardous materials as the Respondent's vehicle in this case, are greater than

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91 Ohio Admin. Code §4901:2-5-13(B) (West 2010).

the limitations on the scope of Ohio Racing Commission inspections upheld by the Ohio 10th district court of appeals. The rule supporting the search in *Burneson v. Ohio Racing Commission*, 2004 WL 1405321 (10th Distr., 2004) was not limited by scope, or time. It provided for the search of persons licensed by the Racing Commission or engaged in activities that require a license when they are in a race track area or have special access permission, vendors when on the track premises and endorsers within the track premises. The Court held that the ultimate question was whether the regulation "as a whole, places adequate limits upon the discretion of the inspecting officials."[92] The Commission's inspection program places greater restraint on the scope of inspections than the court held was required of the Ohio Racing Commission.

The Commission's inspection program satisfies all three criteria identified by the United States Supreme Court for a warrantless search. Accordingly, the search meeting the requirements and restrictions of O.A.C. 4901:2-5-13, that provides the inspection program, does not violate the fourth amendment and it is proper.

## CONCLUSION

Based on the record produced at the hearing and for the reasons stated herein, the Staff respectfully requests that the Commission find that the Respondent violated Section 383.93(b)(3) of the hazardous materials transportation regulations and that the Commis-

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92 *Burneson v. Ohio Racing Commission*, 2004 WL 1405321, ¶41, (Ohio App. 10th Distr., 2004) (unreported decision) (see Attachment A); *see also Burger*, 482 U.S. 691, 711, n.21, 107 S.Ct. 2636, 2648 n.21.

sion hold Respondent liable for the civil forfeiture of four hundred-fifty dollars ($450.00) as recommended by the Staff.

Respectfully Submitted,

**Richard Cordray**
Ohio Attorney General

**Duane W. Luckey,**
Section Chief

**Stephen A. Reilly**
***Thomas G. Lindgren***
Assistant Attorneys General
Public Utilities Section
180 East Broad Street
Columbus, Ohio 43215
614.466.4395 (telephone)
614.644.8764 (fax)
stephen.reilly@puc.state.oh.us
shomas.lindgren@puc.state.oh.us

## PROOF OF SERVICE

I hereby certify that a true copy of the **Post Hearing Brief submitted on Behalf of the Staff of the Public Utilities Commission of Ohio** was served by regular U.S. *mail, postage prepaid, or hand-delivered, upon counsel for Respondent,* David Ferris, P.O. Box 1237, Worthington, Ohio, 43085, this 29th day of January, 2010.

**Stephen A. Reilly**
**Thomas G. Lindgren**
Assistant Attorneys General

# ATTACHMENT A

Not Reported in N.E.2d, 2004 WL 1405321 (Ohio App. 10 Dist.), 2004 -Ohio- 3313
**(Cite as: 2004 WL 1405321 (Ohio App. 10 Dist.))**

C
CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio,
Tenth District, Franklin County.
Charles H. BURNESON, Jr., Appellant-Appellant,
v.
OHIO STATE RACING COMMISSION, Appellee-Appellee.
**No. 03AP-925.**

Decided June 24, 2004.

**Background:** Licensed horse trainer appealed from Racing Commission's determination that trainer possessed bottles of injectables, syringe, and hypodermic needles on race track grounds. The Court of Common Pleas, Franklin County, No. 02CVF-08-8662, affirmed. Trainer appealed.

**Holdings:** The Court of Appeals, Petree, J., held that:
(1) reliable, probative, and substantial evidence supported Commission's finding that trainer possessed prohibited items in violation of regulations, and
(2) regulation providing for warrantless searches by Commission does not violate constitutional prohibitions against unreasonable searches.

Affirmed.

West Headnotes

**[1] Public Amusement and Entertainment 315T ⇐35(2)**

315T Public Amusement and Entertainment
315TII Licensing and Regulation
315TII(A) In General
315Tk31 Racing in General
315Tk35 Administrative Agencies and Proceedings
315Tk35(2) k. Horse and Dog Racing. Most Cited Cases
(Formerly 376k3.10 Theaters and Shows)
Racing Commission's failure to refer, in its order imposing sanctions against licensed horse trainer, to rule forbidding possession of bottles designed for hypodermic administration did not exonerate trainer from violation of rule, where trainer was charged with violation of rule, hearing officer determined that trainer violated rule, and Commission's order indicated that Commission upheld hearing officer's findings of fact and conclusions of law. OAC 3769-8-01(B)(5).

**[2] Public Amusement and Entertainment 315T ⇐35(2)**

315T Public Amusement and Entertainment
*315TII Licensing and Regulation*
315TII(A) In General
315Tk31 Racing in General
315Tk35 Administrative Agencies and Proceedings
315Tk35(2) k. Horse and Dog Racing. Most Cited Cases
(Formerly 376k3.10 Theaters and Shows)
Reliable, probative, and substantial evidence supported Racing Commission's finding that licensed horse trainer possessed prohibited items, including bottles designed for hypodermic administration, hypodermic syringe, and hypodermic needle, in violation of regulations; trainer had horses stabled in area searched and bag containing such prohibited items was discovered during search. OAC 3769-8-01(B)(5), 3769-8-07.

**[3] Constitutional Law 92 ⇐4292**

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications

92XXVII(G)12 Trade or Business
92k4266 Particular Subjects and Regulations
92k4292 k. Public Amusement and Entertainment. Most Cited Cases
(Formerly 92k287.2(1))

**Public Amusement and Entertainment 315T ⚖7**

315T Public Amusement and Entertainment
315TI In General
315Tk4 Constitutional, Statutory and Regulatory Provisions
315Tk7 k. Racing in General. Most Cited Cases
(Formerly 376k3.10 Theaters and Shows)
Rule providing for revocation or suspension of horse trainer license when trainer engages in conduct which is against best interest of horse racing is not void for vagueness when charges against trainer, including that trainer possessed syringe and injectables in horse barn, directly relate to conduct of horse racing. U.S.C.A. Const.Amend. 14; OAC 3769-2-26(A)(10).

**[4] Searches and Seizures 349 ⚖26**

349 Searches and Seizures
349I In General
349k25 Persons, Places and Things Protected
349k26 k. Expectation of Privacy. Most Cited Cases
Licensed horse trainer had reasonable expectation of privacy in barn area assigned to him by race track, which was subjected to warrantless search, even though expectation was minimal because horse racing is pervasively regulated business. U.S.C.A. Const.Amend. 4; Const. Art. 1, § 14.

**[5] Searches and Seizures 349 ⚖31.1**

349 Searches and Seizures
349I In General
349k31 Persons Subject to Limitations; Governmental Involvement
349k31.1 k. In General. Most Cited Cases
Warrantless search of barn area assigned by race track to licensed horse trainer constituted government action, and thus, constitutional protections against unreasonable searches applied, where search was conducted by representative of Racing Commission and race track security director, who has apparent power to make arrests. U.S.C.A. Const.Amend. 4; Const. Art. 1, § 14.

**[6] Searches and Seizures 349 ⚖164**

349 Searches and Seizures
349IV Standing to Object
349k164 k. Particular Concrete Applications. Most Cited Cases
Licensed horse trainer, whose license was suspended based on trainer's possession of injectables and hypodermic needle, had standing to challenge constitutionality of regulation providing for warrantless searches by Racing Commission, where regulation authorized search of barn area assigned to trainer, which resulted in discovery of injectables and hypodermic needle. U.S.C.A. Const.Amend. 4; Const. Art. 1, § 14; OAC 3769-2-01.

**[7] Searches and Seizures 349 ⚖79**

349 Searches and Seizures
349I In General
349k79 k. Administrative Inspections and Searches; Regulated Businesses. Most Cited Cases
Regulation providing for warrantless searches by Racing Commission does not violate constitutional prohibitions against unreasonable searches; state has substantial government interest in regulating horse racing, warrantless searches are necessary to further that regulatory scheme, and regulation places adequate limits upon discretion of inspector in conducting searches. U.S.C.A. Const.Amend. 4; Const. Art. 1, § 14; OAC 3769-2-01.

**[8] Public Amusement and Entertainment 315T ⚖35(2)**

315T Public Amusement and Entertainment

315TII Licensing and Regulation
315TII(A) In General
315Tk31 Racing in General
315Tk35 Administrative Agencies and Proceedings
315Tk35(2) k. Horse and Dog Racing. Most Cited Cases
(Formerly 376k3.10 Theaters and Shows)
Licensed horse trainer, who was charged with violating Racing Commission regulations, was properly charged with cost incurred in having race track steward at hearing; regulation provides that cost of witnesses at hearing shall be borne by licenses found in violation and trainer was found to have violated regulations. OAC 3769-7-44(A).

Appeal from the Franklin County Court of Common Pleas.James G. Dawson, for appellant.

Jim Petro, Attorney General, and Michael D. Allen, for appellee.

PETREE, J.

*1 {¶ 1} Appellant-appellant, Charles H. Burneson, Jr., appeals from a judgment of the Franklin County Court of Common Pleas affirming the order of appellee-appellee, Ohio State Racing Commission ("Racing Commission"). For the reasons that follow, we affirm the judgment of the trial court.

{¶ 2} On or around August 27, 2001, Raymond Dennard, Director of Security for Thistledown Racetrack ("Thistledown"), received an anonymous tip that "illegal items" were located in the barn where Mr. Burneson stabled horses. According to Mr. Dennard, the informant stated that Mr. Dennard would find, in Mr. Burneson's barn, a red duffle bag containing illegal items. (Tr. 52.) Prior to conducting a search, Mr. Dennard discussed the information that was provided by the informant with Steve Benich, a representative of the Racing Commission.

{¶ 3} At approximately 8:17 a.m., on August 29, 2001, Mr. Dennard, Mr. Benich, Thistledown security guard Thomas Gallagher, and Ohio Horseman's Benevolent Protection Association representative Mark Doering conducted a warrantless search of "Barn 21A" at Thistledown, in response to the anonymous tip. When these individuals arrived at Barn 21A, they encountered Kathy Ackman, who, according to Mr. Benich, is also a licensee. Mr. Benich and Mr. Dennard proceeded to the far end of the "shed row." A goat was tied up near this location.[FN1] Mr. Dennard testified that "underneath a sprinkle of straw" was a red duffle bag. (Tr. 31.) Mr. Dennard opened the bag in front of Mr. Benich, Mr. Gallagher, and Mr. Doering. The items found in the bag on August 29, 2001, included nine bottles of injectables and one syringe with a hypodermic needle. (See Tr. 170; appellee's exhibit 1.)

FN1. Apparently, the presence of a goat can calm a nervous horse.

{¶ 4} On September 5, 2001, a hearing was conducted before the stewards. The stewards found appellant's possession of said items to be a violation of Ohio Adm.Code 3769-8-01, 3769-8-02, 3769-8-07, 3769-2-26(A)(10), and 3769-2-01. Consequently, the stewards fined appellant in the amount of $1,000 and suspended his trainer license for 60 days. (Appellant's exhibit A.) Appellant appealed this ruling to the Racing Commission. On January 7, 2002, a hearing was held before a hearing officer. The hearing officer issued a "Report and Recommendation," in which the officer recommended that the ruling of the stewards be affirmed in its entirety. On July 24, 2002, the Racing Commission issued its "Finding and Order," which agreed to uphold the hearing officer's findings of fact, conclusions of law, and recommendation. The Racing Commission ordered that appellant's thoroughbred trainer's license be suspended for 60 days, that appellant pay a $1,000 fine, and that appellant pay for the costs of the hearing, which was $1,947 above the $500 appeal deposit.

{¶ 5} Subsequently, appellant appealed from the order of the Racing Commission to the Franklin County Court of Common Pleas, pursuant to R.C. 119.12. Upon its review of the record, the trial

court found that the order of the Racing Commission was supported by reliable, probative, and substantial evidence, and was in accordance with law. (See August 27, 2003 judgment entry.) Appellant appeals from this judgment and assigns the following errors:

*2 I. THE TRIAL COURT ERRED TO THE PREJUDICE OF THE APPELLANT AND ABUSED ITS DISCRETION WHEN IT FOUND THE OHIO STATE RACING COMMISSION'S ADMINISTRATIVE DETERMINATION, THAT APPELLANT VIOLATED OHIO ADM. CODE 3769-8-01 AND 3769-8-07, WAS SUPPORTED BY RELIABLE, PROBATIVE AND SUBSTANTIAL EVIDENCE AND WAS IN ACCORDANCE WITH LAW.

II. THE TRIAL COURT ERRED TO THE PREJUDICE OF THE APPELLANT WHEN IT FOUND THE OHIO STATE RACING COMMISSION'S ADMINISTRATIVE DETERMINATION, THAT APPELLANT VIOLATED OHIO ADM. CODE 3769-2-26[A](10), WAS IN ACCORDANCE WITH LAW.

III. THE TRIAL COURT ERRED TO THE PREJUDICE OF THE APPELLANT WHEN IT FOUND THAT THE WARRANTLESS SEARCH OF BARN 21A AT THISTLEDOWN RACETRACK ON AUGUST 29, 2001 BY A REPRESENTATIVE OF THE OHIO STATE RACING COMMISSION AND OTHERS WAS IN ACCORDANCE WITH LAW.

IV. THE TRIAL COURT ERRED TO THE PREJUDICE OF THE APPELLANT WHEN IT FOUND THAT THE ALLEGED COST ($280.) TO HAVE STATE STEWARD ALLEN FAIRBANKS ATTEND THE HEARING HELD ON JANUARY 7, 2002 WAS IN ACCORDANCE WITH LAW.

{¶ 6} Under R.C. 119.12, when a common pleas court reviews an order of an administrative agency, it must consider the entire record and determine whether the agency's order is supported by reliable, probative, and substantial evidence and is in accordance with law. *Univ. of Cincinnati v. Conrad* (1980), 63 Ohio St.2d 108, 110-111, 407 N.E.2d 1265; see, also, *Andrews v. Bd. of Liquor Control* (1955), 164 Ohio St. 275, 280, 131 N.E.2d 390.

{¶ 7} The evidence required by R.C. 119.12 can be defined as follows:

(1) "Reliable" evidence is dependable; that is, it can be confidently trusted. In order to be reliable, there must be a reasonable probability that the evidence is true. (2) "Probative" evidence is evidence that tends to prove the issue in question; it must be relevant in determining the issue. (3) "Substantial" evidence is evidence with some weight; it must have importance and value.

*Our Place, Inc. v. Ohio Liquor Control Comm.* (1992), 63 Ohio St.3d 570, 571, 589 N.E.2d 1303, fn. omitted.

{¶ 8} The common pleas court's "review of the administrative record is neither a trial *de novo* nor an appeal on questions of law only, but a hybrid review in which the court 'must appraise all the evidence as to the credibility of the witnesses, the probative character of the evidence, and the weight thereof.' " *Lies v. Veterinary Med. Bd.* (1981), 2 Ohio App.3d 204, 207, 441 N.E.2d 584, quoting *Andrews*, at 280, 131 N.E.2d 390. Furthermore, even though the common pleas court must give due deference to the administrative agency's resolution of evidentiary conflicts, the findings of the agency are not conclusive. *Conrad*, at 111, 407 N.E.2d 1265.

{¶ 9} An appellate court's standard of review in an administrative appeal is even more limited than that of a common pleas court. *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621, 614 N.E.2d 748, rehearing denied, 67 Ohio St.3d 1439, 617 N.E.2d 688. In *Pons*, the Supreme Court of Ohio stated:

* * * While it is incumbent on the trial court to ex-

amine the evidence, this is not a function of the appellate court. The appellate court is to determine only if the trial court has abused its discretion, *i.e.*, being not merely an error of judgment, but perversity of will, passion, prejudice, partiality, or moral delinquency. Absent an abuse of discretion on the part of the trial court, a court of appeals may not substitute its judgment for [that of an administrative agency] or a trial court. Instead, the appellate court must affirm the trial court's judgment. * * *

*3 {¶ 10} *Id.*, citing *Lorain City School Dist. Bd. of Edn. v. State Emp. Relations Bd.* (1988), 40 Ohio St.3d 257, 260-261, 533 N.E.2d 264. Thus, in this case, our review of the common pleas court's determination that the commission's order was supported by reliable, probative, and substantial evidence is limited to determining whether the trial court abused its discretion. Moreover, " 'abuse of discretion connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable.' " (Citations omitted.) *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

{¶ 11} In an administrative appeal, an appellate court does have plenary review of purely legal questions. *Big Bob's, Inc. v. Ohio Liquor Control Comm.*, 151 Ohio App.3d 498, 784 N.E.2d 753, 2003-Ohio-418, at ¶ 15. Therefore, we must also determine whether the common pleas court's decision is in accordance with law.

{¶ 12} By his first assignment of error, appellant asserts that the trial court's determination that the Racing Commission's finding that appellant violated Ohio Adm.Code 3769-8-01 and 3769-8-07 was not supported by reliable, probative, and substantial evidence and was not in accordance with law. We find appellant's argument to be without merit.

[1] {¶ 13} Appellant argues that he "has been exonerated" from any violation of Ohio Adm.Code 3769-8-01 because the July 24, 2002 order of the Racing Commission did not refer to Ohio Adm.Code 3769-8-01. (See appellant's brief, at 11.)

{¶ 14} As stated above, the stewards, on September 5, 2001, charged appellant with violating Ohio Adm.Code 3769-8-01, 3769-8-02, 3769-8-07, 3769-2-26(A)(10), and 3769-2-01. The hearing officer recommended that the ruling of the stewards be affirmed in its entirety. The hearing officer's recommendation stated that "[a] search of Charles Burneson Jr.'s barn revealed the presence of a needle, a syringe and injectables in violation of the rules of the Commission. OSRC Rules *3769-8-01*, 3769-8-02, 3769-8-07, 3769-2-26(A)(10), and 3769-2-01." (Emphasis added.) (See Hearing Officer Report and Recommendation, at 8.)

{¶ 15} In its July 24, 2002 order, the Racing Commission stated that it "agreed to uphold the Findings of Fact; Conclusions of Law and the Recommendations of the Hearing Officer." In its order, the Racing Commission recognized that appellant was fined and suspended for 60 days because contraband was found during a search of appellant's barn area. However, the Racing Commission stated that "[t]his is a violation of Ohio Rules of Racing # 3769-2-01, # 3769-2-26, # 3769-8-02 and # 3769-8-07." (See July 24, 2002 Racing Commission Finding and Order.) Thus, even though the Racing Commission's July 24, 2002 order did not explicitly refer to Ohio Adm.Code 3769-8-01, the Racing Commission "upheld" the findings of fact, conclusions of law, and recommendation of the hearing officer. Appellant's arguments to the contrary, we conclude that this omission in the July 24, 2002 order did not exonerate appellant from his violation of Ohio Adm.Code 3769-8-01. Furthermore, as discussed infra, there was reliable, probative, and substantial evidence to support a finding that contraband was found in appellant's barn area, which is a violation of Ohio Adm.Code 3769-8-01(B)(5).

*4 [2] {¶ 16} Appellant argues that no evidence was presented at the January 7, 2002 hearing indicating that appellant was in "possession" of "bottles designed for hypodermic administration," as is required under Ohio Adm.Code 3769-8-01(B)(5), or

in "possession" of prohibited items for purposes of Ohio Adm.Code 3769-8-07. Additionally, appellant asserts that "[t]here was no evidence presented at the hearing that would establish that Thistledown Racetrack (owner of the stall) assigned barn 21A to Charles Burneson." (Appellant's brief, at 12.) We disagree with appellant on this issue.

{¶ 17} Ohio Adm.Code 3769-8-01(B)(5) provides, in pertinent part, as follows:

On premises under the jurisdiction of the commission, no licensees other than veterinarians shall possess a nasogastric tube, equipment, including bottles designed for hypodermic administration, any foreign substance considered a prescription drug unless it is for an existing condition and is prescribed by a veterinarian, any quantity of sodium bicarbonate (baking soda) or any preparation containing more than 30 grams (one ounce) of sodium bicarbonate. * * *

{¶ 18} Ohio Adm.Code 3769-8-07 provides, in pertinent part, as follows:
(A) No person shall have in his/her possession on the premises of a permit holder any nasogastric tube, drugs, chemicals which may be used as stimulants, hypodermic syringes or hypodermic needles or any other instrument which may be used for injection, or batteries of any other electrical or mechanical instrument which may be used to affect the speed or actions of a horse. * * *

{¶ 19} In order for a person to violate Ohio Adm.Code 3769-8-01 and 3769-8-07, the person must be in "possession" of a prohibited item. Ohio Adm.Code 3769-1-40 defines "possession" as follows:
"Possession" or "in their possession" shall mean: in, on or about the licensee's person, or any vehicle which they own, use, or have access to, as well as the entire area assigned and occupied or used by the responsible person which would include but is not limited to barns, stables, stalls, tack rooms, feed rooms.

{¶ 20} The Racing Commission was permitted to make reasonable inferences from the evidence presented at the hearing, which included testimony that the search was conducted at "Chuck Burneson's barn," and that appellant had horses stabled in the area searched. We find that it was reasonable for the Racing Commission to infer from the testimony presented at the hearing that appellant was assigned, and used, the area where the "contraband" was discovered.[FN2] Therefore, in view of the testimony at the January 7, 2002 hearing, we conclude that the trial court did not abuse its discretion when it found reliable, probative, and substantial evidence to support the Racing Commission's determinations with respect to Ohio Adm.Code 3769-8-01 and 3769-8-07. Consequently, we overrule appellant's first assignment of error.

FN2. Possession, as defined under Ohio Adm.Code 3769-1-40, does not require proof of knowledge. See *Haehn v. Ohio State Racing Comm.* (1992), 83 Ohio App.3d 208, 212-213, 614 N.E.2d 833.

*5 [3] {¶ 21} In his second assignment of error, appellant asserts that the trial court erroneously found that the Racing Commission's determination that appellant violated Ohio Adm.Code 3769-2-26(10) was in accordance with law. Appellant specifically argues that this regulation is "void for vagueness," and that appellant did not violate this regulation because he did not violate the rules of horse racing.

{¶ 22} Ohio Adm.Code 3769-2-26(A)(10) provides, in pertinent part, as follows:

The commission may refuse to grant, may revoke or may suspend any license, or may otherwise penalize, under the provisions of rule 3769-2-99 of the Administrative Code, a person to whom any of the following apply:

* * *

(10) The applicant or licensee has engaged in conduct which is against the best interest of horse ra-

cing[.]

{¶ 23} Initially, we note that the "specificity requirements which must be met by a criminal statute are not required in the licensing context." *Smith v. Haney* (1980), 61 Ohio St.2d 46, 49, fn. 2, 398 N.E.2d 797, citing *Salem v. Liquor Control Comm.* (1973), 34 Ohio St.2d 244, 246, 298 N.E.2d 138. This case involves a civil proceeding before the Racing Commission in which appellant, as a licensee, was charged with violating Ohio Adm.Code 3769-2-26(10).

{¶ 24} This court, in *State Racing Comm. v. Robertson* (1960), 111 Ohio App. 435, 172 N.E.2d 628, held that, "[t]he phrases, 'improper practice on the part of the holder' and 'for conduct detrimental to the best interests of racing,' employed in a regulation of an administrative agency, are too broad and indefinite to impose liability for conduct not having a direct relationship to the subject sought to be regulated." *Id.* at paragraph two of the syllabus.

{¶ 25} This court further stated:

* * * Assuming the power to license jockeys and regulate their conduct is properly derived from Section 3769.03, Revised Code, any such regulation must have a reasonable relationship to the power to regulate horse racing. Although the question is not free from doubt, we do not go so far as to hold Rule 68 invalid *ipso facto*, but do hold that its terms should be so construed as to relate directly to the conduct of horse racing. * * *

*Id.* at 440, 172 N.E.2d 628.

{¶ 26} The Second District Court of Appeals in *In re Cline* (1964), 3 Ohio App.2d 345, 210 N.E.2d 737, found "Rule 65," which provided that "[a]ny license issued by the Commission may * * * be revoked for corrupt, fraudulent or improper practice on the part of the holder, or for conduct detrimental to the best interests of racing," not to be void for vagueness when the charge directly relates to the conduct of horse racing. *Id.* at 349-350, 210 N.E.2d 737, citing *Robertson, supra.* Here, appellant was charged with possessing, in his horse barn, a needle, a syringe, and injectables. Clearly, the possession of such contraband in a horse barn directly relates to horse racing. Moreover, the possession of the contraband in this case was unquestionably "against the best interest of horse racing."

*6 {¶ 27} Based on the foregoing, we conclude that Ohio Adm.Code 3769-2-26(10) is not void for vagueness for charges resulting from the possession of horse racing contraband. Also, the evidence presented at the January 7, 2002 hearing supports the finding that appellant violated the rules of horse racing. Accordingly, appellant's second assignment of error is overruled.

{¶ 28} By his third assignment of error, appellant asserts that the warrantless search that led to the seizure of the red duffle bag was unlawful, and therefore the evidence found via the search "must be suppressed as 'fruits' of an illegal search and seizure." (Appellant's brief, at 23.)

{¶ 29} The Fourth Amendment to the United States Constitution, as applied to the states through the Fourteenth Amendment, and Section 14, Article I, of the Ohio Constitution, prohibit the government from conducting unreasonable searches and seizures of persons or their property.[FN3] " '[T]he underlying command of the Fourth Amendment is always that searches and seizures be reasonable.' " *Wilson v. Arkansas* (1995), 514 U.S. 927, 931, 115 S.Ct. 1914, 131 L.Ed.2d 976, quoting *New Jersey v. T.L.O.* (1985), 469 U.S. 325, 327, 105 S.Ct. 733, 83 L.Ed.2d 720. "Warrantless searches are generally considered unreasonable. * * * Accordingly, evidence obtained by means of a warrantless search is subject to exclusion, unless the circumstances of the search establish it as constitutionally reasonable." (Citations omitted.) *AL Post 763 v. Ohio Liquor Control Comm.* (1998), 82 Ohio St.3d 108, 111, 694 N.E.2d 905. Furthermore, "[c]ertain warrantless searches have been judicially recognized as reasonable notwithstanding the presumption of unreasonableness dictated by the Fourth Amend-

ment." *Id.* citing *Stone*, supra, at 164-165, fn. 4, 593 N.E.2d 294.

> FN3. The Fourth Amendment to the United States Constitution provides as follows: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."
>
> Section 14, Article I, of the Ohio Constitution provides as follows: "The right of the people to be secure in their persons, houses, papers, and possessions, against unreasonable searches and seizures shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched and the person and things to be seized."
>
> In accord with the Supreme Court of Ohio, we use the term "Fourth Amendment" to collectively refer to both the Fourth Amendment to the United States Constitution and Section 14, Article I, of the Ohio Constitution. See *Stone v. Stow* (1992), 64 Ohio St.3d 156, 164, fn. 3, 593 N.E.2d 294.

[4] {¶ 30} We preliminarily note that if a person has no reasonable expectation of privacy in the property searched, then the Fourth Amendment protections do not apply. *State v. Lane* (Mar. 11, 1998), Athens App. No. 97CA47, citing *Katz v. United States* (1967), 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576. Here, appellant had a reasonable expectation of privacy in the area assigned to him by Thistledown, even though the expectation was minimal because horse racing is a pervasively regulated business.

[5] {¶ 31} Furthermore, the Fourth Amendment only provides protection against government action. *State v. Henry* (1981), 1 Ohio App.3d 126, 439 N.E.2d 941. Thus, a seizure by a private person is not prohibited by the Fourth Amendment. *Id.*, citing *Coolidge v. New Hampshire* (1971), 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564; *Irvine v. California* (1954), 347 U.S. 128, 74 S.Ct. 381, 98 L.Ed. 561; *Burdeau v. McDowell* (1921), 256 U.S. 465, 41 S.Ct. 574, 65 L.Ed. 1048; *State v. McDaniel* (1975), 44 Ohio App.2d 163, 337 N.E.2d 173. Considering the Racing Commission representative's participation as well as the Thistledown security director's apparent power to make arrests, we conclude that the search conducted in this case was government action.

*7 {¶ 32} Because appellant had a reasonable expectation of privacy in the area assigned to him and the search constituted government action, we must determine whether the search of appellant's area in Barn 21A was reasonable under the Fourth Amendment.

[6] {¶ 33} The search in this case was conducted without a warrant. Thus, in order for it to be valid and lawful, the search must have been conducted pursuant to an exception to the warrant requirement. In *State v. Akron Airport Post No. 8975* (1985), 19 Ohio St.3d 49, 51, 482 N.E.2d 606, the Supreme Court of Ohio listed the recognized exceptions to the search warrant requirement as:

(a) A search incident to a lawful arrest;

(b) consent signifying waiver of constitutional rights;

(c) the stop-and-frisk doctrine;

(d) hot pursuit;

(e) probable cause to search, and the presence of exigent circumstances; or

(f) the plain-view doctrine.

Later, in *Stone*, supra, at 165, fn. 4, 593 N.E.2d 294, the Supreme Court explicitly added "administrative searches" to the list of recognized warrantless search exceptions.

{¶ 34} Appellant argues that Ohio Adm.Code 3769-2-01, which provides for searches by the Racing Commission, is unconstitutional because it does not limit the time or scope of the searches it authorizes. We address this issue with caution in view of decisions from other Ohio district courts of appeals. Namely, we take notice of *Loom Lodge 926 New Philadelphia, Inc. v. Liquor Control Comm.* (Feb. 9, 1995), Tuscarawas App. No. 94AP100070; *VFW Post 9622 v. Liquor Control Comm.* (1996), 109 Ohio App.3d 762, 673 N.E.2d 166; and *American Legion Post 0046 Bellevue v. Ohio Liquor Control Comm.* (1996), 111 Ohio App.3d 795, 677 N.E.2d 384. In each of those cases, the respective appellants argued that the administrative search provision at issue was unconstitutional because it failed to establish sufficient time, place, and scope limitations. Also, in each case, the respective district courts determined that the constitutionality of the search provision could not be challenged because the appellant was not injured by the allegedly unconstitutional provision. See *Loom Lodge 926 New Philadelphia, Inc.; VFW Post 9622*, at 767, 673 N.E.2d 166; and *American Legion Post 0046 Bellevue*, at 798, 677 N.E.2d 384. Each court cited *Palazzi v. Estate of Gardner* (1987), 32 Ohio St.3d 169, 512 N.E.2d 971, which held: "The constitutionality of a state statute may not be brought into question by one who is not within the class against whom the operation of the statute is alleged to have been unconstitutionally applied and who has not been injured by its alleged unconstitutional provision." *Id.* at syllabus.

{¶ 35} We conclude that *Palazzi* does not preclude us from considering the constitutionality of the contested provision. Ohio Adm.Code 3769-2-01 authorized the search in this case, which led to the finding of the injectables. Clearly, appellant has standing to contest the constitutionality of the provision.

[7] {¶ 36} We observe that the Supreme Court of Ohio has "held enactments of the General Assembly to be constitutional unless such enactments are clearly unconstitutional beyond a reasonable doubt," and that "[t]his principle applies equally to administrative regulations." *Roosevelt Properties Co. v. Kinney* (1984), 12 Ohio St.3d 7, 13, 465 N.E.2d 421. Thus, "[c]ourts accord legislatively authorized administrative regulations a strong presumption of constitutionality ." *Teeple v. Ohio Real Estate Comm.* (Dec. 15, 1988), Cuyahoga App. No. 54836, citing *Roosevelt Properties Co.*

*8 {¶ 37} In *New York v. Burger* (1987), 482 U.S. 691, 107 S.Ct. 2636, 96 L.Ed.2d 601, the Supreme Court of the United States outlined a three-part test for determining whether a warrantless administrative search will be deemed reasonable. "First, there must be a 'substantial' government interest that informs the regulatory scheme pursuant to which the inspection is made." *Id.* at 702, citing *Donovan v. Dewey* (1981), 452 U.S. 594, 602, 101 S.Ct. 2534, 69 L.Ed.2d 262. "Second, the warrantless inspections must be 'necessary to further [the] regulatory scheme.' " *Burger*, at 702, citing *Donovan*, at 600. Third, " 'the statute's inspection program, in terms of the certainty and regularity of its application, [must] provid[e] a constitutionally adequate substitute for a warrant.' " *Burger*, at 703, citing *Donovan*, at 603.

In other words, the regulatory statute must perform the two basic functions of a warrant: it must advise the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope, and it must limit the discretion of the inspecting officers. To perform this first function, the statute must be "sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes." In addition, in defining how a statute limits the discretion of the inspectors, we have observed that it must be "carefully limited in

time, place, and scope."

(Citations omitted.) *Burger*, at 703.

{¶ 38} Horse racing is a pervasively regulated industry. This court, in *Haehn v. Ohio State Racing Comm.* (1992), 83 Ohio App.3d 208, 213, 614 N.E.2d 833, discussed the regulation of horse racing as follows:

* * * The very nature of horse racing itself presents numerous opportunities for abuse. Specific and strict rules are necessary in order to preserve the integrity of the sport. Persons who wish to receive licenses to participate in the sport must conform to certain standards, rules and regulations, which are designed to maintain the integrity of horse racing. It is necessary that members of the commission and its representatives have the right to full and complete entry to any and all areas under the control of the permit holders. * * *

See *Winner v. Ohio State Racing Comm.* (Apr. 15, 1998), Wayne App. No. 97CA0014 (noting the broad regulatory powers of the Racing Commission).

{¶ 39} Although a warrantless administrative search may be reasonable under the Fourth Amendment in the context of pervasively regulated industries such as horse racing, the search must comply with the three requirements of *Burger*. Clearly, the first and second requirements of *Burger* are met in this case. At issue is whether the regulation sufficiently limits searches by the inspectors in time, place, and scope.

{¶ 40} Pursuant to R.C. 3769.03, the Racing Commission "shall prescribe the rules and conditions under which horse racing may be conducted." Ohio Adm.Code 3769-2-01 provides, in pertinent part, as follows:

"9 (A) Members of the commission and its representatives shall have the right of full and complete entry to any and all parts of the grounds and mutual plants of permit holders.

(B) The Ohio state racing commission and its representatives or the state steward investigating for violations of law or of the rules and regulations of the commission, shall have the authority to permit persons authorized by them to search certain persons and areas as follows:

(1) All persons licensed by the commission or persons engaged in activities that require a license by the commission when such persons are within the race track premises or those who have gained access by special permission;

(2) Vendors licensed by the commission when they are within the race track premises;

(3) Stables, rooms, vehicles and any other place within the race track premises used by those persons who may be searched pursuant to this rule;

(4) Stables, rooms and vehicles used or maintained by persons licensed by the commission and which are located in areas outside of the race track premises where horses eligible to race at the race meeting are stabled.

{¶ 41} Notwithstanding appellant's arguments to the contrary, we find that Ohio Adm.Code 3769-2-01 is not unconstitutional. Ohio Adm.Code 3769-2-01 does provide a time limitation on when a person may be searched under the regulation. Even though the regulation does not explicitly provide guidance as to when a search may take place or the frequency of searches of "stables, rooms, and vehicles," we do not find this as determinative in our assessment of the regulation. Factors such as the frequency of searches are relevant in the constitutionality analysis, but are not necessarily determinative. See *Burger*, at 712, fn. 21. In fact, "in some situations, inspections must be conducted frequently to achieve the purposes of the statutory scheme ." *Id.*, citing *United States v. Biswell* (1972), 406 U.S. 311, 316, 92 S.Ct. 1593, 32 L.Ed.2d 87. Ultimately, the issue is whether the regulation, "as a whole, places adequate limits upon the discretion of the inspecting officers." *Burger*, at

712, fn. 21. We find that Ohio Adm.Code 3769-2-01, as a whole, places adequate limits upon the discretion of inspectors in the context of Racing Commission administrative searches. For the foregoing reasons, we overrule appellant's third assignment of error.

[8] {¶ 42} In his fourth assignment of error, appellant asserts that the trial court erroneously found that appellant was properly assessed costs, which included witness expenses, by the Racing Commission. Essentially, appellant argues that the costs assessed by the Racing Commission were excessive. More specifically, appellant argues that the $280 he has been charged for the presence of Allen Fairbanks, a state steward at Thistledown, at the January 7, 2002 hearing, is contrary to law. We find appellant's argument to be without merit.

{¶ 43} Ohio Adm.Code 3769-7-44(A) provides as follows:

*10 In the event the commission should hold a hearing pertaining to a violation of the rules of racing and it is necessary to subpoena witnesses, the cost of such witnesses and all other necessary costs of the hearing shall be borne by the licensee found in violation. In case the licensee should be found not in violation of the rules, such cost shall be borne by the commission.

{¶ 44} Ohio Adm.Code 3769-7-42 provides that "the necessary expenses for the commission to conduct a formal hearing of the appeal * * * may include but are not limited to the cost of a hearing officer, expense of witnesses called, cost of a court reporter and the cost of renting equipment needed during the hearing ." The above regulations provide that the cost of witnesses at the hearing may be assessed against a licensee in violation of the Racing Commission rules. Mr. Fairbanks, who was subpoenaed to appear at the January 7, 2002 hearing, testified at said hearing. The Racing Commission's imposition of costs was in accordance with law. Therefore, appellant's fourth assignment of error is overruled.

{¶ 45} For the foregoing reasons, appellant's four assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

BRYANT and WATSON, JJ., concur.
Ohio App. 10 Dist.,2004.
Burneson v. Ohio State Racing Com'n
Not Reported in N.E.2d, 2004 WL 1405321 (Ohio App. 10 Dist.), 2004 -Ohio- 3313

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# ATTACHMENT B

Westlaw.



124 F.3d 199, 1997 WL 525411 (C.A.6 (Tenn.))
**(Table, Text in WESTLAW), Unpublished Disposition**
**(Cite as: 124 F.3d 199, 1997 WL 525411 (C.A.6 (Tenn.)))**

**H**

NOTICE: THIS IS AN UNPUBLISHED OPINION.

(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. Use FI CTA6 Rule 28 and FI CTA6 IOP 206 for rules regarding the citation of unpublished opinions.)

United States Court of Appeals, Sixth Circuit.
OWNER-OPERATOR INDEPENDENT DRIVERS ASSN., INC., a corporation; Mark P. Nye, Plaintiffs-Appellees, Cross-Appellants,
and
Kenneth D. McFADDEN, Intervening Plaintiff-Appellee/ Cross-Appellant,
v.
Keith BISSELL, Chairman, Tennessee Public Service Commission, Defendant-Appellant,
and
PUBLIC SERVICE COMMISSION OF TENNESSEE, Defendant (94-6178) Defendant-Appellee (94-6179), Cross-Appellee.
**Nos. 94-6178, 94-6179.**

Aug. 21, 1997.

On Appeal from the United States District Court for the Middle District of Tennessee.

BEFORE: GUY, NELSON, and NORRIS, Circuit Judges.

PER CURIAM.

*1 Defendant, Keith Bissell, appeals the district court's judgment holding that various practices of the Tennessee Public Service Commission ("Commission"), of which he was one of three commissioners, violated plaintiffs' rights under the Equal Protection Clause of the Fourteenth Amendment and constituted an undue burden on interstate commerce in violation of the Commerce Clause. The court enjoined Bissell from violating plaintiffs' rights in the future. Plaintiffs, Owner-Operator Independent Drivers Association, Inc. ("OOIDA") and two of its members, Mark Nye and Kenneth McFadden, cross-appeal the district court's grant of summary judgment in favor of Bissell and the Commission on their claim that warrantless searches of truck cabs and sleeper berths conducted by the Commission's officers violate the truckers' rights under the Fourth Amendment as applied to the states through the Due Process Clause of the Fourteenth Amendment. For the reasons that follow, we affirm the district court's grant of summary judgment in favor of defendants on plaintiffs' Fourth Amendment Claim, but vacate the injunction.

I.

OOIDA is a national organization of independent truck drivers and owners with approximately 20,000 members, the majority of whom are engaged in interstate commerce. Approximately one half of its members drive through Tennessee on a regular basis. The Commission was a regulatory agency created by the Tennessee legislature to regulate motor carriers and enforce both state and federal highway safety regulations. It consisted of three commissioners, including Bissell, who were elected in state-wide elections.[FN1]

> FN1. The Commission was abolished in July 1996, and its regulatory authority and duties were transferred to a new government body consisting of three director to be appointed by the Governor, the Speaker of the Senate, and the Speaker of the House of Representatives. *See* Tenn.Code Ann. § 65-1-201 *et seq.*

On March 22, 1990, OOIDA and Mark Nye filed a claim under 42 U.S.C. § 1983 against Bissell, the Commission, and two of its officers, alleging that the Commission's policy of conducting warrantless

inspections of truck cabs and sleeper berths violates the Fourth Amendment, and seeking injunctive and declaratory relief. The complaint was later amended to add McFadden as an additional plaintiff, and to add claims under § 1983 for violations of the Due Process and Equal Protection Clauses of the Fourteenth Amendment and the Commerce Clause. Plaintiffs' Equal Protection and Commerce Clause claims were based upon the Commission's alleged practices of favoring Tennessee trucking companies and companies that contributed to Bissell's re-election campaigns over out-of-state companies, and selectively enforcing safety regulations in favor of in-state trucking companies by concentrating border enforcement on incoming traffic. Following discovery, all parties filed motions for summary judgment.

On March 17, 1992, the district court entered an order granting defendants' motion for summary judgment on plaintiffs' Fourth Amendment claim, and dismissing all claims against the two officers of the Commission. The case then proceeded to trial on plaintiffs' Equal Protection and Commerce Clause claims. Following a bench trial, the district court issued an opinion rejecting defendants' defenses of lack of standing, statute of limitations, and immunity, and holding that defendants' practices violated plaintiffs' right to equal protection of the law, and constituted an undue burden on interstate commerce in violation of the Commerce Clause. The court then dismissed all claims against the Commission as barred by the Eleventh Amendment. Finally, the court enjoined Bissell, the only remaining defendant, from continuing to violate plaintiffs' rights in the future. This appeal and cross-appeal followed.

II.

*2 As a preliminary matter, we hold that the district court correctly concluded that OOIDA has standing to litigate this action as a representative of its members, that plaintiffs could introduce evidence of events which occurred outside of the applicable one-year statute of limitations period, and that Bissell is not entitled to absolute or qualified immunity. First, an organization such as OOIDA has standing to assert the claims of its members in a representative capacity if (1) its members would otherwise have standing to sue in their own right; (2) the interests the organization seeks to protect are germane to its purposes; and (3) neither the claims asserted, nor the relief requested, requires the participation of individual members in the lawsuit. *See Hunt v. Washington State Apple Advertising Comm'n,* 432 U.S., 333, 343 (1977). We believe that OOIDA has met all three requirements. Second, evidence of defendants' actions which occurred more than one year before this action was filed is admissible despite the one-year statute of limitation, because defendants' discrimination was continuous in nature. *See Held v. Gulf Oil Co.,* 684 F.2d 427, 430 (6th Cir.1982). Finally, Bissell is not entitled to either absolute or qualified immunity for his actions, because "immunity only precludes claims of monetary damages against officials in their individual capacities, and not claims for injunctive or declaratory relief" *Collyer v. Darling,* 98 F.3d 211, 222 (6th Cir.1996) (citing *Cagle v. Gilley,* 957 F.2d 1347 (6th Cir.1992)), *cert. denied,* 117 S.Ct. 2439 (1997).

We also conclude that the district court properly dismissed plaintiffs' Equal Protection and Commerce Clause claims against the Commission because the Eleventh Amendment bars a plaintiff from bringing a claim against a state agency in federal court unless the state waived its immunity. *See, e.g., Welch v. Texas Dep't of Highways and Public Transp.,* 483 U.S. 468, 472-73 (1987).

III.

As part of his argument on appeal, Bissell contends that the injunction issued against him by the district court should be set aside because its language fails to meet the specificity requirement of Fed.R.Civ.P. 65(d). Rule 65(d) requires that "[e]very order granting an injunction ... shall be specific in terms; shall

describe in reasonable detail ... the act or acts sought to be restrained." "[T]he specificity provisions of Rule 65(d) are no mere technical requirements. The Rule was designed to prevent uncertainty and confusion on the part of those faced with injunctive orders, and to avoid the possible founding of a contempt citation on a decree too vague to be understood." *Schmidt v. Lessard,* 414 U.S. 473, 476 (1974). Moreover, "[i]n the absence of specific injunctive relief, informed and intelligent appellate review is greatly complicated, if not made impossible." *Id.* at 477.

The district court's one sentence injunction in this case, enjoining Bissell "from continuing to violate the Plaintiff's rights," falls considerably short of satisfying the requirements of Rule 65(d). The court failed to use specific terms or to describe in reasonable detail the acts sought to be restrained. Precision is especially important in this case because the district court's findings of fact and conclusions of law consistently attribute conduct to "defendants," rather than to Bissell individually, making it impossible to discern the extent of Bissell's objectionable activities. Indeed, the only findings of fact which directly implicate Bissell are that Bissell requested officers to sell fund-raising tickets, and that he told officers to stop inspecting trucks which were leaving the state and instead to concentrate on inbound traffic. Consequently, it is impossible to comprehend the bounds of the district court's order, and we must vacate the injunction.

*3 For much the same reasoning, it is difficult to address the merits of plaintiffs' Equal Protection and Commerce Clause claims. Bissell's conduct of discriminating against out-of-state truckers in inspections, mentioned in the previous paragraph, can be said to support those claims. However, upon remand the district court should consider whether that specific conduct warrants injunctive relief against him, and indeed the propriety of any such relief since Bissell was just one of three commissioners, is no longer a commissioner, and the Commission itself was abolished to be replaced by an agency whose directors are no longer elected.

IV.

Plaintiffs cross-appeal from the district court's order granting summary judgment in favor of defendants on their claim that the Commission's policy of conducting warrantless searches of truck cabs and sleeper berths violates the truckers' rights under the Fourth Amendment as applied to the states through the Due Process Clause of the Fourteenth Amendment. Summary judgment was properly entered in favor of the Commission because, absent a waiver of immunity, the Eleventh Amendment bars any claims against a state agency in federal court. *See, e.g., Welch,* 483 U.S. at 472-73. Likewise, summary judgment was properly entered in favor of Bissell because the warrantless searches conducted by the Commission's officers fall within the long-recognized exception to the Fourth Amendment's warrant requirement for searches of "closely" or "pervasively" regulated industries. *See, e.g., Donovan v. Dewey,* 452 U.S. 594 (1981); *United States v. Dominguez-Prieto,* 923 F.2d 464, 468 (6th Cir.1991) (commercial trucking is a pervasively regulated industry for the purposes of Fourth Amendment analysis).

V.

Accordingly, the district court's order granting summary judgment in favor of defendants on plaintiffs' Fourth Amendment claim is affirmed. The injunction issued against defendant Bissell is vacated, and this case is remanded to allow the district court to conduct further proceedings consistent with this opinion.

C.A.6 (Tenn.),1997.
Owner-Operator Independent Dirvers Ass'n
124 F.3d 199, 1997 WL 525411 (C.A.6 (Tenn.))

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