

THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF PAUL C. MASSIE,
NOTICE OF APPARENT VIOLATION AND
INTENT TO ASSESS FORFEITURE.

CASE NO. 18-1811-TR-CVF
(CR201806260311)

OPINION AND ORDER

Entered in the Journal on August 14, 2019

I. SUMMARY

{¶ 1} The Commission finds that Staff has demonstrated, by a preponderance of the evidence, that Respondent Paul C. Massie violated the Commission's transportation regulations.

II. PROCEDURAL HISTORY

{¶ 2} On June 26, 2018, Hazardous Materials Specialist Robert Barrett (Specialist Barrett) conducted a compliance review of Paul C. Massie's (Respondent) facility. As a result of the inspection, Specialist Barrett discovered violations of 49 C.F.R. 382.115(a), 391.21(a), 391.23(a) and 396.3(b).

{¶ 3} Staff served a notice of preliminary determination upon Respondent in accordance with Ohio Adm.Code 4901:2-7-07, alleging a violation of the Commission's transportation regulations.

{¶ 4} On December 6, 2018, Respondent requested an administrative hearing in accordance with Ohio Adm.Code 4901:2-7-13.

{¶ 5} On December 18, 2018, the attorney examiner scheduled a prehearing conference on January 3, 2019, pursuant to Ohio Adm.Code 4901:2-7-16(B). During the prehearing, the parties were unable to reach a settlement.

{¶ 6} On January 7, 2019, the attorney examiner scheduled a hearing on this matter for February 5, 2019.

{¶ 7} On February 1, 2019, the Staff filed a motion for continuance. Accordingly, the attorney examiner rescheduled the hearing for February 21, 2019, at the Commission offices.

{¶ 8} At the hearing on February 21, 2019, Staff witnesses Specialist Barrett and Rod Moser testified in support of the violations identified by Staff. Respondent testified against the violations.

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

{¶ 10} The specific regulations which Staff is alleging Respondent violated include the following:

- 49 C.F.R. 382.115(a): Failing to implement an alcohol and/or controlled substances testing program on the date the employer begins commercial motor vehicle operations.
- 49 C.F.R. 391.23(a): Failing to investigate driver's background.

- 49 C.F.R. 391.21(a): Using a driver who has not completed and furnished an employment application.
- 49 C.F.R. 396.3(b): Failing to keep minimum records of inspection and vehicle maintenance.

IV. ISSUE

{¶ 11} At issue is whether Staff has satisfied its burden to show, by a preponderance of the evidence, that Respondent violated the following regulations: 49 C.F.R. 382.115(a), 391.23(a), 391.21(a), and 396.3(b).

V. SUMMARY OF EVIDENCE

{¶ 12} Specialist Barrett, on behalf of Staff, testified that his primary role at the Commission's Transportation Department is to conduct compliance reviews of motor carriers and hazardous material shipper reviews; driver/vehicle inspections; roadside inspections; site inspections; transportation industry outreach; and new entrant safety audits. He testified that he is stationed in Auglaize County and was assigned by the Transportation Department's central office to conduct a review of Respondent, who is located in that geographic area. Specialist Barrett explained that he was assigned to the review because Respondent's vehicle was subject to a roadside inspection on February 8, 2018. As a result of the February 8, 2018 roadside inspection, Respondent was assessed fines by the United States Department of Transportation (USDOT). (Tr. at 7-9, 21-22.)

{¶ 13} Subsequently, on June 26, 2019, Specialist Barrett conducted his assigned review of Respondent's facility. Specialist Barrett identified Staff Exhibit 1 as the compliance review, which he prepared after conducting the inspection. (Staff Ex. 1.) As a result of the inspection, Specialist Barrett identified that Respondent had failed to implement a controlled substances and alcohol testing program which constituted a violation of 49 C.F.R. 382.115(a). Specialist Barrett further explained that the February 8, 2018 roadside inspection revealed that Respondent was operating a vehicle which weighed in excess of 26,000

pounds, or exactly 26,001 pounds. Specialist Barrett clarified that Respondent's vehicle weight put him in the threshold of operating in interstate commerce, which then required Respondent to possess a commercial drivers license (CDL) and to implement a controlled substance or alcohol testing program. Specialist Barrett testified that Respondent failed to provide any records identifying that he had implemented such a program. (Tr. at 7-12; Staff Ex. 1.)

{¶ 14} Next, Specialist Barrett testified that per 49 C.F.R. 391.23(a), when a motor carrier hires a driver, it is required to check the driver's motor vehicle record within 30 days of the hire date to ensure good standing and to verify requisite endorsements associated with the license. According to Specialist Barrett, Respondent, who is self-employed, was required to keep his prior motor vehicle record as part of his qualification file. However, Respondent failed to provide his driver motor vehicle record in violation of 49 C.F.R. 391.23(a). (Tr. at 12.)

{¶ 15} Specialist Barrett also noted that because Respondent is self-employed, he is required to maintain an employment application for himself. Specialist Barrett clarified that there is no exception to 49 C.F.R 391.21(a) even when the owner of the company employs himself as the only driver for the company. (Tr. at 12-13.)

{¶ 16} Finally, Specialist Barrett testified that pursuant to 49 C.F.R 396.3(b), Respondent was required to maintain a maintenance file for each commercial vehicle, which would include all records of preventative maintenance, repairs, and replacement of components, parts, and accessories. Specialist Barrett testified that Respondent was unable to produce these records. (Tr. at 13.)

{¶ 17} On cross-examination, Specialist Barrett stated that a United States Department of Transportation (USDOT) number is necessary for compliance reviews because it serves as a tracking number for those reviews. Furthermore, Specialist Barrett

explained that it is not uncommon for Staff request a USDOT number and audit a self-owned company such as Respondent's on the same day. (Tr. at 14.)

{¶ 18} Staff next presented the testimony of Rod Moser, the Compliance Chief of the Transportation Department of the Commission. Mr. Moser identified Staff Exhibit 2 as the notice of preliminary determination dated October 28, 2018, sent to Respondent as a result of the violations identified by Specialist Barrett. Mr. Moser testified that the fine for the violation of 49 C.F.R. 382.115(a) equaled to \$1,000; the violation of 49 C.F.R. 391.23(a) equaled to \$400; and the violation of 49 C.F.R. 396.3(b) equaled to \$425. Mr. Moser clarified that there is no associated fine for the violation of 49 C.F.R. 391.21(a). Mr. Moser testified that these fines were calculated using the applicable USDOT requirements. Overall, Mr. Moser recommended that the Commission assess a total of \$1,825 against Respondent. (Tr. at 18-20; Staff Ex. 2.)

{¶ 19} Respondent testified that on February 8, 2018 he was hauling scrap. He explained that a scale was not available where he loaded the material and unbeknownst to him, he crossed the 26,000 pound threshold, putting him in the category of drivers requiring a CDL. Respondent indicates that since being pulled over, he has not engaged in commercial trucking activities and is not in the business of hauling materials to and from locations. Respondent also testified that he has already paid fines assessed by the USDOT as a result of the inspection. (Tr. at 21-22.)

{¶ 20} On cross-examination, Respondent further clarified that he has previously never been employed as a commercial truck driver and has never previously held a CDL. He also noted that he has not hauled any other items on the truck that was the subject of the February 8, 2018 inspection and it has remained parked behind his house since that date. (Tr. at 22-26.)

VI. COMMISSION CONCLUSION

{¶ 21} 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 Respondent violated 49 CFR 49 C.F.R. 382.115(a), 391.23(a), 391.21(a), and 396.3(b). We find that based on the evidence, especially Specialist Barrett's testimony that Respondent's vehicle weighed 26,001 on February 8, 2018, that Respondent was acting as a commercial driver (Tr. at 11, 22). In paying his initial forfeiture, Respondent essentially admits so as well (Tr. at 22).

{¶ 22} Ohio Adm.Code 4901:2-7-21 states that, in assessing civil forfeitures, "the [C]ommission may order payment of a forfeiture greater than, less than, or equal to the forfeitures requested in the . . . notice of preliminary determination." Upon review of the evidence, we find that several mitigating factors support not assessing a forfeiture against Respondent for the violations in question. For example, Respondent stated that he did not intend to engage in commercial trucking activities on the day of inspection and did not possess a CDL. He explained that he unknowingly exceeded the 26,000 limit by one pound because he did not have access to a scale. (Tr. at 21-22.) Respondent also stated that he is not currently engaged in commercial trucking activities and has never previously engaged in such activities (Tr. at 22-23). Staff also did not present any contrary evidence indicating that Respondent has previously has been or is currently a self-employed commercial driver. Finally, the record reflects Respondent has already paid all associated forfeitures associated with the February 8, 2018 inspection (Tr. at 22). Accordingly, there is a reasonable basis to find that no forfeiture should be assessed against Respondent. However, the citation for the violations of 49 CFR 49 C.F.R. 382.115(a), 391.23(a), 391.21(a), and 396.3(b) should remain in Respondent's history of violations in the Commission's records.

VII. FINDINGS OF FACT AND CONCLUSIONS OF LAW

{¶ 23} On June 26, 2018, Specialist Robert Barrett of the Commission's Transportation Department inspected Respondent's facility and issued citations for violations of 49 C.F.R. 382.115(a), 391.23(a), 391.21(a), and 396.3(b).

{¶ 24} Staff served a notice of preliminary determination upon Respondent Paul C. Massie in accordance with Ohio Adm.Code 4901:2-7-07.

{¶ 25} During a prehearing settlement conference on January 3, 2019, the parties were unable to reach a settlement.

{¶ 26} An evidentiary hearing was held on February 26, 2019.

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

{¶ 28} Based upon the record in this proceeding, the Commission finds that Staff has proven, by a preponderance of the evidence, that Respondent was engaged in interstate commerce on February 6, 2018 and thereby violated 49 C.F.R. 382.115(a), 391.23(a), 391.21(a), and 396.3(b).

{¶ 29} Due to several mitigating factors, no forfeiture should be assessed against Respondent. However, the citation for the violations of 49 CFR 49 C.F.R. 382.115(a), 391.23(a), 391.21(a), and 396.3(b) should remain in Respondent's history of violations in the Commission's records.

VIII. ORDER

{¶ 30} It is, therefore,

{¶ 31} ORDERED, That the citation for violations of 49 C.F.R. 382.115(a), 391.23(a), 391.21(a), and 396.3(b) should remain in Respondent's history of violations for purposes of determining future penalty actions. It is, further,

{¶ 32} 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

AS/mef

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Summary: Opinion & Order that the Commission finds that Staff has demonstrated, by a preponderance of the evidence, that Respondent Paul C. Massie violated the Commission's transportation regulations. electronically filed by Docketing Staff on behalf of Docketing