

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION

SILVER SPRING, MARYLAND

ORDER NO. 12,174

IN THE MATTER OF:

Served October 1, 2009

CHUKWUNENYE NNAKWU, Trading as) Case No. MP-2008-242
PROGRESSIVE MEDICAL CARE SERVICES,)
Suspension and Investigation of)
Revocation of Certificate No. 1078)

This matter is before the Commission on respondent's request for reconsideration of Order No. 12,121, served August 18, 2009, which assessed a combined civil forfeiture of \$10,750 against respondent, suspended \$8,000, directed respondent to obtain for-hire license plates for his revenue vehicle and file a copy of the registration card with the Commission within thirty days, and placed respondent on probation for one year.

Under Title II of the Compact, Article XIII, Section 4, a party to a proceeding affected by a final order or decision of the Commission may file within 30 days of its publication a written application requesting Commission reconsideration of the matter involved, and stating specifically the errors claimed as grounds for the reconsideration.¹ If the application is granted, the Commission shall rescind, modify, or affirm its order or decision with or without a hearing, after giving notice to all parties.² Filing an application for reconsideration may not act as a stay upon the execution of a Commission order or decision, or any part of it unless the Commission orders otherwise.³

An order is final if it imposes an obligation, denies a right, or fixes some legal relationship, usually at the consummation of an administrative process.⁴ Normally, in an adjudication a final order is one that disposes of all issues as to all parties.⁵

Respondent timely applied for reconsideration on September 11, 2009.⁶ Although Order No. 12,121 did not dispose of all issues in this

¹ Compact, tit. II, art. XIII, § 4(a).

² Compact, tit. II, art. XIII, § 4(d).

³ Compact, tit. II, art. XIII, § 4(e).

⁴ *In re Affordable Airport Charter, Inc., & Bach Vu, t/a Affordable Airport Charter*, No. AP-97-47, Order No. 5400 (Aug. 31, 1998).

⁵ *Id.*

⁶ The application is styled a "Motion and Appeal" and "Request for Oral Hearing", but there is no discussion of any grounds for a hearing in the text

proceeding, as is apparent below, it did impose some obligations that are ripe for reconsideration.

Respondent argues that the Commission erred in finding that respondent willfully violated Regulation Nos. 58 and 62-02.

I. REGULATION NO. 58

The Commission found in Order No. 12,121 that respondent had knowingly and willfully operated for thirty-nine days while Certificate No. 1078 was suspended/revoked. Respondent argues that Certificate No. 1078 should not have been suspended in the first place because respondent did not willfully fail to comply with the Commission's insurance regulation, Regulation No. 58, which was cited as the basis for the suspension in Order No. 11,674, served November 10, 2008.

Regulation No. 58-01 states that: "No carrier shall transport passengers for hire between points in the Metropolitan District unless and until the carrier has satisfied the financial responsibility requirements set forth in this regulation." Regulation No. 58-03 states that: "A carrier operating under temporary authority or a certificate of authority issued by the Commission (WMATC carrier) shall maintain on file with the Commission at all times an acceptable, effective "WMATC Certificate of Insurance and Policy Endorsement" (WMATC Insurance Endorsement)." (Emphasis added).

Respondent argues in Paragraphs 1 through 5 of his pleading that the suspension order and all orders following were issued in error because "there was no interruption or any terminations of the Respondent's policy." This is not the issue. The issue is whether an effective WMATC Insurance Endorsement was on file for respondent when Order No. 11,674 was issued November 10, 2008. The record is clear that Order No. 11,674 was issued November 10, 2008, because the \$1.5 million primary WMATC Insurance Endorsement on file for respondent had expired on November 8, 2008, without replacement. Respondent does not dispute this.

Respondent did not file a replacement endorsement until November 13, 2008. The effective date of the endorsement was November 19, 2008, not November 8, 2008. It was not until April 23, 2009, that respondent filed a new \$1.5 million primary WMATC Insurance Endorsement with an effective date of November 8, 2008.

Respondent would have the Commission ignore the timing of these events, but the Commission does not give retroactive effect to WMATC Insurance Endorsements.⁷ To grant retroactive filing status to a

of the pleading and no request for hearing specified in the prayer for relief.

⁷ Cf., *In re District of Columbia ARC, Inc., t/a DC ARC*, No. MP-01-100, Order No. 6556 (Mar. 1, 2002) (denying retroactive effect to letter authorizing signature on previously unauthorized endorsement).

later-filed WMATC Endorsement would encourage carriers to continue operating in the face of suspension orders in the hope that a later-filed WMATC Endorsement would specify a retroactive effective date.⁸ In the meantime, such unlawful operations would shift onto the public the unacceptable risk of uninsured or underinsured operations - - and at that for an indefinite period of time.⁹ This is exactly what happened in this case.

Respondent attempts to shift the blame to third parties for negligently failing to timely file an effective WMATC Endorsement on respondent's behalf. This does not negate the willfulness of respondent in failing to ensure that the necessary filing had been made before continuing to operate on and after November 8. Regulation No. 58-11 clearly states that:

When a WMATC carrier's insurance has terminated or is about to terminate the carrier must contact the Commission to ascertain whether the necessary WMATC Insurance Endorsement has been filed before continuing to operate on and after the termination date. Proof a WMATC carrier has satisfied its duty to verify shall consist of contemporaneous written verification from the Commission.

There is no such written verification in the record.

The finding that respondent knowingly and willfully violated Regulation No. 58 stands.

II. REGULATION NO. 62-02

The Commission found in Order No. 12,121 that respondent knowingly and willfully violated Regulation No. 62-02 by operating a non-owned vehicle on May 14, 2009, without an approved lease on file with the Commission. That regulation states in pertinent part that: "No carrier subject to the jurisdiction of this Commission may charter, rent, borrow, lease, or otherwise operate in revenue service any motor vehicle to which such carrier does not hold title, except in accordance with this regulation." (Emphasis added). Regulation No. 62-02 further provides that the carrier may not operate a borrowed vehicle except under a lease "approved by the Commission".

As noted in Order No. 12,121, respondent has confirmed that he was arrested on May 14, 2009, and charged with "unregistered auto/misuse of tags" while operating a 1996 Toyota Camry that respondent borrowed from a family friend while respondent's van was out of service for repairs. Respondent admits that he had a passenger in the vehicle at the time and admits that the passenger was a client of Health Services for Children with Special Needs, Inc., (HSCSN), whose clients respondent had been transporting for hire for some time

⁸ Cf., *id.* (same as to retroactive authorization letters).

⁹ *Id.*

under an agreement with HSCSN. No lease was on file with the Commission at the time respondent was operating the Camry.

Respondent argues in Paragraphs 6 through 10 of his pleading that Regulation No. 62-02 does not apply to the Camry because allegedly respondent was not under contract with HSCSN at the time he operated the Camry and because allegedly respondent did not charge HSCSN for the trip; therefore, the argument goes, the vehicle was not being used "in revenue service". We disagree. "[T]he for-hire nature of a commercial carrier's enterprise is not nullified simply because that carrier does not collect or charge a fare."¹⁰ The for-hire nature of the trip in question is revealed in respondent's statement introduced into the record on July 1, 2009, which reads in pertinent part as follows:

This is in response to Order No. 12,038 served June 10, 2009. On May 14, 2009, I transported a recipient of HSCSN to Washington Hospital Center with my Toyota Sienna 1999 model which was registered with WMATC. After I dropped her off, I took the Van to the FRANK'S AUTO SERVICE to replaced the front brake pads. They could not do it immediately because there are other vans ahead of mine.

I was stranded waiting for the van to be repaired on that day. I called HSCSN member services and cancelled all other trips because my van was still in the shop and I dont have no other van to used to transport. Also I told the member service rep, that one recipient I transported this morning was still in hospital, I gave HSCSN member service rep, the recipient name and Medicaid number to re-route the trip to another transportation company. This female rep, promised to re-route the trip as requested.

At about 1:00pm, my phone rang and it was the recipient calling that she was ready to go home. I told the recipient that I took my van to the shop to be repaired because she knew my front brakes was not good in the morning. she said "oh yes, you need to fixed the brakes" but who is coming to pick me up? I told the recipient that, I have reported to the member services rep, HSCSN has re-route your trips to another transportation company. I called the member service again to remind them that the recipient has finished her appointment and she is ready to go home. Hscsn member services told me that they will get somebody to transport her back home. I call the recipient back and told her.

¹⁰ *In re Madison Limo. Serv., Inc.*, No. AP-91-39, Order No. 3891 (Feb. 24, 1992) (citing *Unique Freight Lines Co. v. White Tier Trans. Co.*, 618 F. Supp. 216 (S.D.N.Y. 1985)).

At 1:35pm, the recipient called me and was crying that she was stranded. Nobody has shown up to take her. Recipient said that, she has called the member services and they put her on hold for long. Because I put the recipient on speaker phone, Frank's auto staff heard the crying and pleading. She wants to go home to take her medication. I called the member services again, they put me on hold.

At 1:45pm, I called a family friend at her job in the District, borrowed her Toyota Camry 1996 model to help this recipient. I arrived at the Washington hospital center at 1:55pm, took the recipient and was going to drop her when the Capitol police stopped us and called me to come to him. I opened my door and walked straight to the officer, He told me, the reason why he stopped me was, that the car was unregistered.

Considering that respondent was a carrier for-hire on the day in question, that the passenger in question was "a recipient of HSCSN", that respondent had "other trips" scheduled that day with HSCSN, that transportation of the passenger in question began that day in a van "registered with WMATC," and that respondent called HSCSN "to re-route the trip to another transportation company" when it appeared respondent would not be able to return the passenger to her home, we find that the transportation in the borrowed van was a "continuation" of transportation begun under Certificate No. 1078 and that therefore: "This is transportation 'for hire,' notwithstanding the temporary absence of any charge."¹¹

We are not persuaded to the contrary by the notice ostensibly prepared by respondent on May 8, 2009, and first introduced on reconsideration, that purports to terminate respondent's relationship with HSCSN. There is no evidence respondent sent it and no evidence HSCSN received it. If it was sent and received, the parties apparently ignored it. Otherwise, there would have been no "other trips" for respondent to cancel on May 14 and no agreement for HSCSN to terminate on May 15 based on the events of May 14.

The finding that respondent knowingly and willfully violated Regulation No. 62-02 therefore stands.

Respondent also takes issue with the Commission's description of the dismissal of the charges against respondent. According to respondent, "the Commission exceeded its bounds by concluding that the dismissal, though without prejudice means that the charges will be reinstated." Respondent further contends that, "The Commission has no

¹¹ Order No. 3891.

fact before it to discern the reason for the dismissal and to indicate that the Respondent can be successfully prosecuted for this charge."

First, here is what the court's order says:

The Office of the Attorney General for the District of Columbia or the United States Attorney's Office for the District of Columbia filed a dismissal or *nolle prosequi* for the complaint or information filed against you for the offense of

UNREGISTERED AUTO; MISUSE OF TAGS

This means that your arrest charge has been dismissed without prejudice. A Dismissal or a *Nolle Prosequi* is a formal entry upon the record by the prosecuting attorney in a criminal action, by which he/she declares that he/she "will no further prosecute" the case. A Dismissal without Prejudice means that the prosecution can re-bring the charges against you at a later date.

Here is what the Commission said:

Respondent confirms he was arrested on May 14, 2009, and charged with "unregistered auto/misuse of tags" while transporting an HSCSN client. Respondent states that he transported the HSCSN client in a 1996 Toyota Camry that respondent borrowed from a family friend while respondent's van was out of service for repairs. A copy of an order issued by the Superior Court of the District of Columbia on June 29, 2009, and submitted to the Commission by respondent on July 1, 2009, indicates that the charges were dismissed as of June 1, 2009. The dismissal, however, was without prejudice to the right of the prosecution to reinstate the charges at a later date.

We see no error in our previous description of the dismissal order.

III. EXTENSION OF PAYMENT PERIOD AND SUSPENSION OF AUTHORITY

Order No. 12,121 assessed a combined forfeiture of \$10,750, suspended all but \$2,750, and directed respondent to pay the net forfeiture of \$2,750 within thirty days. The order stipulated that the full combined forfeiture of \$10,750 would be immediately due and payable if applicant failed to timely pay the net forfeiture of \$2,750. Respondent requests that the Commission stay the requirement that respondent pay the \$2,750 net forfeiture until respondent's request for reconsideration has been determined. Now that respondent's request for reconsideration has been determined, respondent shall have thirty days to pay the net forfeiture.

Order No. 12,121 also directed respondent to obtain for-hire license plates for the 1999 Toyota Sienna and file a copy of the registration card with the Commission within thirty days. Respondent

has yet to submit a copy of any for-hire registration card even though this requirement was not stayed by the filing of the application for reconsideration and even though respondent has not requested a stay.¹²

Order No. 12,121 placed respondent on probation for one year and stipulated that "a willful violation of the Compact, or Commission rules, regulations, or orders thereunder, during the period of probation shall constitute grounds for immediate suspension and/or revocation of Certificate No. 1078 regardless of the nature and severity of the violation." Consistent with the terms of probation specified in Order No. 12,121, Certificate No. 1078 hereby stands suspended for respondent's willful failure to submit a copy of a for-hire registration card as directed by Order No. 12,121. Respondent shall have thirty days to show cause why the Commission should not revoke Certificate No. 1078.

THEREFORE, IT IS ORDERED:

1. That the application for reconsideration is granted.
2. That Order No. 12,121 is hereby affirmed.
3. That respondent shall have thirty days to pay the combined net forfeiture of \$2,750 assessed in Order No. 12,121.
4. That pursuant to Article XI, Section 10(c), of the Compact, and the terms of probation imposed in Order No. 12,121, Certificate No. 1078 is hereby suspended for respondent's willful failure to comply with the requirement in Order No. 12,121 that respondent produce a copy of a for-hire registration card for respondent's revenue vehicle.
5. That respondent shall have thirty days to show cause why the Commission should not revoke Certificate No. 1078 for respondent's willful failure to comply with Order No. 12,121.
6. That respondent may submit within 15 days from the date of this order a written request for oral hearing, specifying the grounds for the request, describing the evidence to be adduced and explaining why such evidence cannot be adduced without an oral hearing.

BY DIRECTION OF THE COMMISSION; COMMISSIONERS CHRISTIE AND BRENNER:



William S. Morrow, Jr.
Executive Director

¹² Compact, tit. II, art. XIII, § 4(e).