

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION

SILVER SPRING, MARYLAND

ORDER NO. 12,828

IN THE MATTER OF:

Served April 29, 2011

Application of F&O TRANSPORT)
SERVICE, LLC, for a Certificate of)
Authority -- Irregular Route)
Operations)

Case No. AP-2011-007

Applicant seeks a certificate of authority to transport passengers in irregular route operations between points in the Metropolitan District, restricted to transportation in vehicles with a seating capacity of less than 16 persons only, including the driver. The application is unopposed.

Article XI, Section 7(a), of the Washington Metropolitan Area Transit Regulation Compact¹ provides that the Commission (WMATC) shall issue a certificate of authority to any qualified applicant, authorizing all or any part of the transportation covered by the application, if the Commission finds that: (i) the proposed transportation is consistent with the public interest and that the applicant is fit, willing, and able to perform the proposed transportation properly, conform to the provisions of the Compact, and conform to the rules, regulations, and requirements of the Commission; and (ii) the transportation is consistent with the public interest. An applicant must establish financial fitness, operational fitness, and regulatory compliance fitness.²

Applicant proposes commencing operations with one van. Applicant proposes commencing operations under a tariff containing mileage and/or hourly rates and rates for private pay ambulatory/wheelchair transportation.

Applicant verifies that: (1) applicant owns or leases, or has the means to acquire through ownership or lease, one or more motor vehicles meeting the Commission's safety requirements and suitable for the transportation proposed in this application; (2) applicant owns, or has the means to acquire, a motor vehicle liability insurance policy that provides the minimum amount of coverage required by Commission regulations; and (3) applicant has access to, is familiar with and will comply with the Compact, the Commission's rules,

¹ Pub. L. No. 101-505, § 1, 104 Stat. 1300 (1990), amended by Pub. L. No. 111-160, 124 Stat. 1124 (2010) (amending tit. I, art. III).

² See *In re Academy Express, LLC, t/a Academy*, No. AP-11-037, Order No. 12,817 at 1 (Apr. 19, 2011) (same).

regulations and orders, and Federal Motor Carrier Safety Regulations as they pertain to transportation of passengers for hire.

Normally, such evidence would establish an applicant's fitness,³ but this applicant has a history of regulatory violations.

I. PAST VIOLATIONS

Applicant previously held WMATC Certificate No. 748 from January 30, 2003, until December 30, 2008, when it was revoked in Order No. 11,775 for applicant's willful failure to comply with the Commission's insurance requirements and pay a \$50 late fee assessed under Regulation No. 67-03(c).⁴ The order noted that the \$50 late fee remained due and gave applicant 30 days to: (1) remove from its vehicles the identification placed thereon pursuant to Commission Regulation No. 61; (2) file a notarized affidavit with the Commission verifying removal; and (3) surrender Certificate No. 748 to the Commission.

Applicant subsequently paid the \$50 late fee,⁵ submitted a new \$1.5 million primary WMATC Endorsement, and filed a request for reinstatement of Certificate No. 748.⁶ The request was denied because applicant was not in compliance with Regulation No. 58-14. That regulation applies whenever a carrier's operating authority is automatically suspended under Regulation No. 58-12 and the effective date of a later-filed replacement Endorsement falls after the automatic suspension date. When that happens, Regulation No. 58-14 requires that the carrier verify cessation of operations as of the automatic suspension date. In applicant's case, the automatic suspension date was November 20, 2008, and the effective date of the replacement Endorsement was January 26, 2009.⁷ Applicant failed to verify cessation of operations as of November 20, 2008, and the request for reinstatement was accordingly denied.⁸

Applicant thereafter reapplied for operating authority in 2010. The application was supported by a statement accounting for the whereabouts of Certificate No. 748,⁹ but applicant still had not

³ *Id.* at 2.

⁴ *In re F&O Transp. Serv., LLC*, No. MP-08-248, Order No. 11,775 (Dec. 30, 2008).

⁵ Applicant initially tendered a \$50 check in payment of the late fee on January 28, 2009, but the check was returned unpaid. Applicant subsequently tendered a \$50 money order on October 8, 2010.

⁶ *In re F&O Transp. Serv., LLC*, No. MP-08-248, Order No. 11,872 (Mar. 4, 2009).

⁷ Order No. 11,872.

⁸ *Id.*

⁹ Applicant states that the certificate was mailed. The Commission, however, has no record of receiving it. We view this as the equivalent of a statement that the original cannot be located and, therefore, not an impediment to approval of this application. See *In re Pantio Med. Transp.*:

confirmed removal of Regulation No. 61 markings from applicant's vehicle(s) in compliance with Order No. 11,775 and still had not verified cessation of operations as of November 20, 2008, in compliance with Regulation No. 58-14. The application was therefore denied without prejudice for failure to demonstrate compliance fitness.¹⁰

II. ASSESSMENT OF FORFEITURE

The instant application is supported by an affidavit from applicant's controlling member, Mr. Foday Kamara. The affidavit is dated January 7, 2011, and was filed January 11, 2001. It states that all WMATC markings have been removed from applicant's vehicle. But the affidavit does not explain why applicant waited two years to address the issue.

As noted above, the order revoking Certificate No. 748, Order No. 11,775, required applicant to file a vehicle-marking-removal affidavit on or before January 29, 2009. Applicant did not do that. Instead, applicant filed for reconsideration. Under Article XIII, Section 4(e), of the Compact, "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." The Commission did not order otherwise.

While we do not necessarily fault applicant for delaying compliance while its application for reconsideration was pending, applicant should have removed the WMATC markings from its vehicle and filed an affidavit confirming removal promptly after February 28, 2009 - the 31st day after applicant filed for reconsideration and therefore the date applicant's request for reconsideration was deemed denied under Article XIII, Section 4(c), of the Compact.¹¹

A person who knowingly and willfully violates a provision of the Compact, or a rule, regulation, requirement or order issued under it, or a term or condition of a certificate shall be subject to a civil forfeiture of not more than \$1,000 for the first violation and not more than \$5,000 for any subsequent violation.¹²

LLC, No. AP-11-023, Order No. 12,799 (Apr. 8, 2011) (same); *In re Felicia Elizabeth Medlock, T/A I Get Around the DMV Shuttle*, No. AP-10-082, Order No. 12,512 (Aug. 19, 2010) (approving application notwithstanding original certificate not located); *In re Carl's Place Inc.*, No. AP-10-020, Order No. 12,361 (Apr. 7, 2010) (same).

¹⁰ *In re F&O Transp. Serv., LLC*, No. AP-10-132, Order No. 12,638 (Nov. 29, 2010).

¹¹ Although the Commission later addressed applicant's reconsideration request in Order No. 11,872, served March 4, 2009, that order merely explained why denial was appropriate. It did not alter the deemed denial date under the statute. *In re Baron Transp., Inc.*, No. MP-02-42, Order No. 6846 at 1 n.1 (Oct. 9, 2002).

¹² Compact, tit. II, art. XIII, § 6(f)(i).

The term "knowingly" means with perception of the underlying facts, not that such facts establish a violation.¹³ The term "willfully" does not mean with evil purpose or criminal intent; rather, it describes conduct marked by careless disregard whether or not one has the right so to act.¹⁴ Employee negligence is no defense.¹⁵ "To hold carriers not liable for penalties where the violations . . . are due to mere indifference, inadvertence, or negligence of employees would defeat the purpose of" the statute.¹⁶

Applicant's request for reconsideration in Case No. MP-2008-248 is proof that applicant was aware of the revocation order, Order No. 11,775. Under Article XIII, Section 4(c), of the Compact, applicant knew or should have known that the request for reconsideration stood denied as of February 28, 2009. We therefore find that applicant's failure to comply with Order No. 11,775 by filing a vehicle-marking-removal affidavit promptly thereafter was knowing and willful within the meaning of the Compact. Accordingly, we shall assess a civil forfeiture of \$250.¹⁷

III. LIKELIHOOD OF FUTURE COMPLIANCE

When an applicant or a person controlling an applicant has a record of violations, or a history of controlling companies with such a record, the Commission considers the following factors in assessing the likelihood of applicant's future compliance: (1) the nature and extent of the violations, (2) any mitigating circumstances, (3) whether the violations were flagrant and persistent, (4) whether the controlling party has made sincere efforts to correct past mistakes, and (5) whether the controlling party has demonstrated a willingness and ability to comport with the Compact and rules and regulations thereunder in the future.¹⁸

The failure to comply with the Commission's insurance requirements in Regulation No. 58 was serious enough to warrant revocation of Certificate No. 748. On the other hand, applicant attempted to mitigate the violation by filing a new WMATC Insurance Endorsement in support of its request for reconsideration of the revocation order.

The failure to comply with Order No. 11,775 is only serious enough to warrant a one-time \$250 civil forfeiture, even in the absence of mitigating circumstances.

¹³ Order No. 12,817 at 4.

¹⁴ *Id.* at 4.

¹⁵ *Id.* at 4.

¹⁶ *United States v. Illinois Cent. R.R.*, 303 U.S. 239, 243, 58 S. Ct. 533, 535 (1938).

¹⁷ See Order No. 12,817 at 4-5 (same).

¹⁸ *Id.* at 5.

Characterizing applicant's failure to comply with Regulation No. 58 and Order No. 11,775, as "flagrant and persistent" seems inapt in the absence of any evidence of post-suspension operations.

We find that applicant has made a sincere effort to correct past mistakes by belatedly complying with the revocation order and by filing an affidavit verifying cessation of operations as of September 1, 2008 - an affidavit that finds corroboration in applicant's pertinent business records.

The 2010 application and this application are some evidence of applicant's willingness to comport with the Compact and rules and regulations thereunder in the future.¹⁹

The Commission has found other applicants fit under similar circumstances.²⁰

Upon payment of the forfeiture assessed herein, the record will support a finding of prospective compliance fitness,²¹ subject to a one-year period of probation.²²

IV. CONCLUSION

Based on the evidence in this record, and in consideration of the terms of probation and other conditions prescribed herein, the Commission finds that the proposed transportation is consistent with the public interest and that applicant is fit, willing, and able to perform the proposed transportation properly, conform to the provisions of the Compact, and conform to the rules, regulations, and requirements of the Commission.

THEREFORE, IT IS ORDERED:

1. That pursuant to Article XIII, Section 6(f), of the Compact, the Commission hereby assesses a civil forfeiture against applicant in the amount of \$250 for knowingly and willfully violating Order No. 11,775.

¹⁹ *In re Jet Tours USA, Inc.*, No. AP-94-50, Order No. 4649 at 9 (Aug. 22, 1995); *In re Reston Limo. & Travel Serv., Inc., t/a Reston Limo.*, No. AP-93-36, Order No. 4232 at 2 (Jan. 11, 1994).

²⁰ *See In re Top Choice Transp. Servs. LLC*, No. AP-10-185, Order No. 12,760 (Mar. 14, 2011) (paid outstanding late fees, accounted for vehicle markings, and verified timely cessation of operations with no evidence to the contrary); Order No. 12,512 (same); *In re Voneva Inc.*, No. AP-09-107, Order No. 12,240 (Dec. 1, 2009) (same); *In re Smart Ride, Inc.*, No. AP-08-081, Order No. 11,446 (July 1, 2008) (paid outstanding late fees, accounted for vehicle markings, and verified timely cessation of operations).

²¹ *See id.* at 6 (same).

²² *See id.* at 6 (same).

2. That applicant is hereby directed to pay to the Commission within thirty days of the date of this order, by check or money order, the sum of two hundred fifty dollars (\$250).

3. That upon applicant's timely compliance with the requirements of this order, Certificate of Authority No. 748 shall be reissued to F&O Transport Service, LLC, 2202 Dunrobin Drive, Mitchellville, MD 20721-2859.

4. That applicant may not transport passengers for hire between points in the Metropolitan District pursuant to this order unless and until a certificate of authority has been issued in accordance with the preceding paragraph.

5. That applicant is hereby directed to present its revenue vehicle(s) for inspection and file the following documents within the 180-day maximum permitted in Commission Regulation No. 66: (a) evidence of insurance pursuant to Commission Regulation No. 58; (b) an original and four copies of a tariff or tariffs in accordance with Commission Regulation No. 55; (c) a vehicle list stating the year, make, model, serial number, fleet number, license plate number (with jurisdiction) and seating capacity of each vehicle to be used in revenue operations; (d) a copy of the for-hire vehicle registration card, and a lease as required by Commission Regulation No. 62 if applicant is not the registered owner, for each vehicle to be used in revenue operations; (e) proof of current safety inspection of said vehicle(s) by or on behalf of the United States Department of Transportation, the State of Maryland, the District of Columbia, or the Commonwealth of Virginia; and (f) a copy of the cancelled check submitted with applicant's Form 1040X for 2009.

6. That applicant shall be placed on probation for a period of one year commencing with the reissuance of Certificate No. 748 in accordance with the terms of this order and that a willful violation of the Compact, or of the Commission's rules, regulations or orders thereunder, by applicant during the period of probation shall constitute grounds for immediate suspension and/or revocation of applicant's operating authority without further proceedings, regardless of the nature and severity of the violation.

7. That the grant of authority herein shall be void and the application shall stand denied upon applicant's failure to timely satisfy the conditions of issuance prescribed herein.

BY DIRECTION OF THE COMMISSION; COMMISSIONERS BRENNER, HOLCOMB, AND KUBLY:



William S. Morrow, Jr.

Executive Director