

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION

SILVER SPRING, MARYLAND

ORDER NO. 13,996

IN THE MATTER OF:

Served June 13, 2013

Application of CAROL ANN BARNER for)
a Certificate of Authority --)
Irregular Route Operations)

Case No. AP-2012-185

This matter is before the Commission (WMATC) on the application of Carol Ann Barner (Ms. Barner or applicant) for a certificate of authority to transport passengers in irregular route operations between points in the Metropolitan District and after a hearing held on March 4, 2013 to supplement the record through oral testimony.

PROCEDURAL HISTORY

On August 15, 2012, Carol Ann Barner filed an application with WMATC for authority to transport passengers in irregular route operations between points in the Metropolitan District. She proposed commencing operations with one motor coach, a 2008 Certa passenger bus, with a seating capacity of approximately 56 people, leased from Executive Technology Solutions, LLC (ETS).¹ The Commission conditionally granted her application on September 7, 2012, in accordance with WMATC Regulation No. 54-07, finding the proposed transportation consistent with the public interest and the applicant fit, willing, and able to perform the proposed transportation properly, to conform to the provisions of the Compact,² and to conform to the rules, regulations, and requirements of the Commission.³

The order also provided that Ms. Barner would be issued Certificate of Authority No. 2023 upon presenting her vehicle for inspection and filing the following documents in accordance with WMATC 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

¹ Tr. at 33 (“Tr.” References are to the transcript of the March 4, 2013 hearing.). The Commission revoked ETS’s Certificate No. 985 on February 17, 2012, *In re Exec. Tech. Solutions, LLC*, No. MP-10-090, Order No. 13,167, and denied its application for a replacement certificate of authority in an order being issued contemporaneously with this one.

² The Compact refers to Washington Metropolitan Area Transit Regulation Compact, Pub. L. No. 101-505, § 1, 104 Stat. 1300 (1990), amended by Pub. L. No. 111-160, 124 Stat. 1124 (2010) (amending Title I, Article III).

³ *In re Carol Ann Barner*, Case No. AP-12-185, Order No. 13,464 (September 7, 2012).

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; and (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.⁴

On November 29, 2012, the Commission issued Order No. 13,612, in which it reopened the question of whether Ms. Barner was a fit candidate for WMATC operating authority.⁵ That order observed that certain discrepancies existed regarding the signatures used on documents submitted by Ms. Barner in response to Order No. 13,464. Specifically, the applicant's signature on the motor coach lease documents presented to the Commission did not match the endorsement on her August 15, 2012 application, and neither signature conformed to the applicant's endorsement on a pleading seeking to expedite the application process, filed on November 9, 2012.⁶ Accordingly, the Commission stayed the execution of Order No. 13,464 and provided Ms. Barner with 30 days to show cause why Certificate No. 2023 should be issued notwithstanding the signature discrepancies in the record.⁷

With regard to a separate application for certificate of authority filed by ETS,⁸ the Commission issued an order on January 4, 2013, establishing a March 4, 2013 hearing date.⁹ However, ETS listed Ms. Barner as one of its primary witnesses for the hearing, stating that she possessed "[f]irsthand knowledge of disparate treatment of ETS." The Commission observed in Order No. 13,777 that Ms. Barner also raised a disparate treatment argument in her application for a certificate of authority and that her allegations related to the Commission's treatment of her vehicle lease with ETS. Accordingly, in order to obtain a "full airing of this common disparate treatment issue," the Commission consolidated the March 4, 2013 oral hearing to include the applications of Ms. Barner and ETS, pursuant to WMATC Rule No. 20-12.¹⁰

At the March 4, 2013 hearing conducted by a Hearing Officer, Ms. Barner did not call any witnesses. However, after presenting testimony in support of ETS's application, she spoke on her own behalf. Commission staff did not present any witnesses related to Ms. Barner's

⁴ *Id.* at 2.

⁵ *In re Carol Ann Barner*, Case No. AP-12-185, Order No. 13,612 (November 29, 2012).

⁶ *Id.* at 2.

⁷ *Id.* at 3.

⁸ ETS submitted an application for certificate of authority on June 5, 2012. However, the Commission found in Order No. 13,543 that ETS had not ceased operating after its Certificate No. 985 was revoked, and indeed had continued offering passenger transportation services within WMATC's jurisdiction, including while its application for a new certificate was pending. *In re Exec. Tech. Solutions, LLC*, Case No. AP-2012-079, Order No. 13,543 (October 19, 2012). ETS asked the Commission for an oral hearing on November 2, 2012, after the Commission provided ETS with an opportunity to show cause why it should not be assessed a civil forfeiture for knowingly and willfully violating the Compact, and why the Commission should not deny ETS's application for failure to demonstrate regulatory compliance fitness. *Id.* at 11.

⁹ *In re Exec. Tech. Solutions, LLC*, Case No. AP-2012-079, Order No. 13,664 (Jan. 4, 2013) at 2.

¹⁰ *In re Exec. Tech. Solutions, LLC*, Case No. AP-2012-079, Order No. 13,777 (March 1, 2013) at 4-5.

application. However, staff and Ms. Barner provided post-hearing briefs on April 15, 2013 and reply briefs on April 25, 2013.

In its brief, Commission staff argues that Ms. Barner has failed to demonstrate regulatory compliance fitness because she has submitted documents to the Commission that, without adequate explanation, contain signatures that do not match and because she has failed to fully disclose her relationship with ETS, an entity the Commission has found to have operated with a suspended and revoked certificate. Ms. Barner objects to the consolidation of the hearing, claims that her application has been delayed as a result of discrimination, and argues that any discrepancy in her signatures is explainable for legitimate reasons, including because of past injuries she has suffered.

DECISION

The Commission conditionally grants Ms. Barner's application for a certificate of authority, subject to the requirements noted below. We find that she is fit, willing, and able to perform transportation services properly, conform to the provisions of the Compact, and conform to the rules, regulations, and requirements of the Commission, and that her performance of such is consistent with the public interest. We do not find that the signature discrepancies, discussed below, rise to the level of requiring denial of her application. Moreover, the effects of her association with ETS – an entity that is not in good standing with the Commission – have been rendered moot as a result of her severance of the business relationship she previously had maintained with that entity.

I. APPLICATION FOR CERTIFICATE OF AUTHORITY

Title II of the Compact, Article CI, Section 7(a), authorizes the Commission to issue a certificate of authority if it finds that 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. If the applicant does not make the required showing, the application must be denied under Section 7(b).

An applicant for a certificate of authority has the burden of establishing financial fitness, operational fitness, and regulatory compliance fitness.¹¹ A determination of compliance fitness is prospective in nature.¹² The purpose of the inquiry is to protect the public from those whose conduct demonstrates an unwillingness to operate in accordance with regulatory requirements.¹³ Past violations do not necessarily preclude a grant of authority but permit the inference that violations will continue.¹⁴

¹¹ *In re Nur Corp.*, Case No. AP-2010-178, Order No. 12,730 (Feb. 15, 2011).

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

A. Staff Position

Staff argues that Ms. Barner’s application should be denied because of apparent inconsistencies that appear in her signature on documents submitted to the Commission, including specifically (i) Ms. Barner’s lease with ETS; (ii) Ms. Barner’s August 15, 2012 application; and (iii) Ms. Barner’s November 9, 2012 pleading seeking to expedite the application process.¹⁵ The Commission observed in Order No. 13,612 that none of the signatures on these three documents match.¹⁶

Staff also claims that Ms. Barner violated the terms of her lease agreement. The lease contains the following standard, Commission-approved language: “[t]he lessee agrees to operate each vehicle under the lease with a qualified driver in his employ who is subject to the direction and control of the lessee or with a qualified driver obtained from a personnel supplier not controlling, controlled by, or under common control or contractual relationship with the lessor.” In violation of the terms of that lease, Staff observes that an ETS employee drove Ms. Barner’s leased vehicle to the WMATC office for its October 2, 2012 inspection.¹⁷

More generally, staff contends that Ms. Barner has not been forthright with the Commission about her close relationship with ETS. For example, staff notes that the leased vehicle is currently stored on ETS property.¹⁸ Additionally, Ms. Barner admitted to sharing a post office mailbox registered in her name with Guy Whitney, a consultant to ETS and a former ETS employee and vice president.¹⁹ Staff argues that Commission precedent prohibits third parties not in good standing with the Commission from profiting from passenger transportation within the WMATC jurisdiction through a business relationship with a WMATC carrier.²⁰ Nevertheless, Staff argues that ETS – an entity that is not in good standing with the Commission – will benefit from its lease of a vehicle to Ms. Barner unless the Commission denies her application or otherwise conditions her certificate so as to prevent any business dealings with ETS.²¹ Accordingly, staff contends that the Commission should deny Ms. Barner’s application or at least prohibit her from leasing a vehicle from ETS.

B. Ms. Barner’s Response

As a preliminary matter, Ms. Barner objects to the consolidation of the hearing with ETS.²² She argues that the Commission’s order of consolidation on March 1, 2012 failed to give her sufficient time to prepare for the March 4, 2013 hearing.

¹⁵ Staff Counsel’s Post-Hearing Brief at 9-10.

¹⁶ Order No. 13,612 at 2.

¹⁷ Tr. at 37.

¹⁸ *Id.* at 34.

¹⁹ *Id.* at 33, 68.

²⁰ See, for example, *In re C.P.R. Med. Transp. LLC*, Case No. MP-2010-053, Order No. 12,872 (June 1, 2011) (Requiring WMATC carrier to terminate certain vehicle leases with, and prohibiting their purchase from, person responsible for previous WMATC violations).

²¹ Staff Counsel’s Post-Hearing Brief at 13.

²² Barner Post-Hearing Brief at 2.

Ms. Barner concedes that not all of the signatures in her application material match. For example, she admits that she asked a Ms. Sheila West to assist her with the application process and that Ms. West signed her September 24, 2012 tariff.²³ Ms. Barner also states that her dominant hand has been broken on three different occasions, which caused her signature to be “inconsistent” on the remaining documents.²⁴

Ms. Barner contends that she is an African-American woman who has been subjected to disparate treatment by the Commission. She argues that Reston Limousine and Travel Service, Inc. submitted a nearly identical lease to the Commission, which was approved within one day, but that her lease with ETS was challenged by the Commission and has remained pending for months.²⁵ Ms. Barner further claims that her application has been unfairly delayed due to her association with ETS and the Commission’s inquiries associated with that entity. Finally, in her reply brief, Ms. Barner clarifies that she has severed her relationship with ETS and is pursuing the purchase of a new vehicle.²⁶

C. Commission Decision

Regarding the time period given to Ms. Barner to prepare for the hearing, we find that no prejudice resulted to her under the circumstances of this proceeding. Clearly, the March 1 order (Order No. 13,777) that set a consolidated March 4 hearing date did not provide her with significant notice that her proceeding would be addressed. However, the March 4 hearing for ETS had been set two months earlier and ETS submitted Ms. Barner as a hearing witness in its February 19, 2013 witness list. Therefore, Ms. Barner anticipated testifying at the oral hearing for at least two weeks. Additionally, her planned testimony – the alleged disparate treatment of the Commission regarding her lease with ETS – related to both ETS’s application and her own. Finally, an applicant does not have a procedural right to an oral hearing with regard to an application for a certificate of authority. We have held that “[a] paper hearing is normally all the statute requires.”²⁷ Indeed, oral hearings for operating authority are “the exception, not the rule.”²⁸ In effect, the consolidation of the March 4 hearing did no more than grant Ms. Barner an opportunity to present testimony on her own behalf, an opportunity she would not have had otherwise. We therefore find that she was not denied due process as a result of the consolidation of the March 4 hearing.

We reject Ms. Barner’s accusation that she has been subjected by the Commission and its staff to unfair disparate treatment. Ms. Barner concedes that discrepancies exist regarding the signatures on her application material. She cannot legitimately argue otherwise, as the signatures on the lease, application, and tariff appear markedly different on their face. And although Ms.

²³ Tr. at 35-36.

²⁴ Barner Post-Hearing Brief at 5.

²⁵ *Id.* at 6; Tr. at 39.

²⁶ Barner Reply Brief at 2.

²⁷ *In re Sydney Shuttle, LLC*, Case No. MP-2007-064, Order No. 10,792 (Sept. 8, 2007) at 3.

²⁸ *In re Washington Shuttle, Inc.*, Case No. AP-1996-013, Order No. 4996 (Jan. 8, 1997) at 4.

Barner explains that injuries to her hand have caused her signature to appear “inconsistent,” she admits that she asked Ms. West to sign the tariff on her behalf. Accordingly, the delay of Ms. Barner’s application while Commission staff looked into this matter was entirely justifiable. Moreover, the Commission has denied applications in the past because of discrepancies in the signatures contained in underlying documents. See, for example, *In re Upscale Car Serv.*, where the Commission terminated a proceeding for a certificate of authority because the signature on one lease “clearly does not match the other two.”²⁹

Ms. Barner has provided only one example of potential disparate treatment related to her application. Namely, she argues that Reston Limousine is a white-owned company that received Commission approval to operate several buses much more quickly than the Commission addressed her own application.³⁰ Nevertheless, the analogy to Reston Limousine is inapposite. Reston Limousine’s application did not require additional staff scrutiny because of signature discrepancies or other issues, unlike Ms. Barner’s request for certification. Additionally, as conceded by Ms. Barner, her application has been delayed as a result of her association with ETS, a company that has had its certificate suspended and revoked in the past for violations of the Compact.³¹ Indeed, during the hearing, Ms. Barner admitted “I made a big mistake by asking Mr. Whitney to help me. I made a mistake by contracting with ETS.”³² In an apparent effort to put her application in a better light, she represented in her reply brief that “we have terminated our relation with Executive Technology Solutions, LLC. We are in the process of purchasing a vehicle from a local dealership.”³³

We elect not to deny Ms. Barner’s application as a result of the signature discrepancies associated with her application for a certificate of authority. She was forthright at the hearing in admitting to the Commission that Ms. West signed the tariff on her behalf. Additionally, we accept Ms. Barner’s assertion that past injuries have caused her signature to appear inconsistent at times. In the future, however, we direct Ms. Barner to personally sign all documents submitted to the Commission.³⁴

We also decline to dismiss Ms. Barner’s application as consequence of her association with ETS. It is true that ETS is currently not in good standing with the Commission. Its Certificate No. 985 has been revoked and its application for a new certificate has been denied. It

²⁹ *In re Upscale Car Serv., LLC*, Case No. AP-2011-033, Order No. 13,131 (January 26, 2012) at 2.

³⁰ *Id.* at 22.

³¹ Order No. 13,167, Order No. 13,543.

³² *Id.* at 144.

³³ April 25, 2013 Reply Brief at 2. Ms. Barner will be required to supplement her application to the Commission to indicate that she has severed her business relationship with ETS and that she has purchased another vehicle to provide passenger transportation services. Commission Regulation No. 66 provides the applicant with 180 days from the issuance date of the order to comply with the conditions of the Commission’s conditional grant of a certificate.

³⁴ If in the future she physically is unable to do so, the document clearly must identify where an agent has signed on her behalf. For example, the signature line on the tariff signed by Ms. West should have contained a signature with the following words or words of similar effect: “by Ms. Sheila West, as agent for and on behalf of Carol Ann Barner.”

is also true that we give higher scrutiny to applicants who have business relationships with third parties that are not in good standing with the Commission. That policy exists to prevent those third parties from indirectly profiting from passenger transportation in the Metropolitan District as a result of a business relationship with a WMATC carrier. In this proceeding, however, Ms. Barner has represented to the Commission that she has severed her relationship with ETS and is pursuing the purchase of a new vehicle.³⁵ She has therefore rendered moot the issue of whether her application should be denied as a result of a continuing business relationship with ETS. Ms. Barner must not again, however, allow a driver employed by a carrier that is not in good standing with the Commission (having, for example, a suspended or revoked certificate) to drive her Commission-approved vehicle, as she did by allowing an ETS employee to drive her leased bus to the WMATC inspection. Additionally, Ms. Barner is directed to change her business address to one that is not connected with ETS.

On the record before us, we therefore find that Ms. Barner's application for a certificate of authority should be granted. She has demonstrated that she is fit, willing, and able to perform transportation services properly, conform to the provisions of the Compact, and conform to the rules, regulations, and requirements of the Commission. Likewise, we find that her provision of these transportation services is consistent with the public interest.

THEREFORE, IT IS ORDERED:

1. That upon applicant's timely compliance with the requirements of this order, Certificate of Authority No. 2023 shall be issued to Carol Ann Barner, 10705 Timberline Drive, Upper Marlboro, MD 20772-5520.

2. 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.

3. That consistent with applicant's representation that she has severed her business relationship with Executive Technology Solutions, LLC, applicant is hereby directed to present her revenue vehicle(s) for inspection and update her existing application by filing 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; and (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.

³⁵ Barner Reply Brief at 2.

4. That the applicant must not allow a driver employed by a carrier that is not in good standing with the Commission to drive her Commission-approved vehicle.

5. That applicant must establish a new business address separate from ETS's address and report the same to the Commission within the 180-day deadline provided by Commission Regulation No. 66.

6. 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 ORDER OF THE COMMISSION:

S/Lawrence Brenner
Lawrence Brenner, Chairman

S/Richard D. Holcomb
Richard D. Holcomb, Commissioner

S/Terry L. Bellamy
Terry L. Bellamy, Commissioner