

**THE STATE CORPORATION COMMISSION  
OF THE STATE OF KANSAS**

Before Commissioners: Pat Apple, Chairman  
Shari Feist Albrecht  
Jay Scott Emler

In the Matter of the Investigation of Eric B. )  
Smith of Paola, Kansas, Pursuant to the Kansas )  
Highway Patrol Issuance of a Notice of ) Docket No. 17-GIMM-404-KHP  
Violation(s) and Invoice for the Violations of )  
the Kansas Motor Carrier Safety Statutes, )  
Rules and Regulations. )

**ORDER DENYING PETITION FOR RECONSIDERATION**

The above-captioned matter comes before the State Corporation Commission of the State of Kansas (Commission) for consideration. Having examined its files and records, and being duly advised in the premises, the Commission finds and concludes as follows:

**I. BACKGROUND**

1. On February 17, 2017, the Kansas Highway Patrol (KHP) issued a Notice of Violation(s) against Eric B. Smith (Respondent), for alleged violations found during a February 15, 2017, routine motor carrier stop and inspection conducted by the KHP. Respondent was assessed \$550 in civil fines, comprised of the following violations: (1) a \$150.00 fine for No/Improper Breakaway or Emergency Braking, citing 49 C.F.R. 393.43;(2) a \$150.00 fine for Inoperative Turn Signal, citing 49 C.F.R. 393.9TS; and (3) a \$250.00 fine for No Drivers Record of Duty Status, citing 49 C.F.R. 395.8A.

2. On March 3, 2017, Respondent initiated a formal challenge with the KHP.<sup>1</sup>

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<sup>1</sup> Letter from Eric Smith contesting KHP fines, p. 1 (Mar. 3, 2017).

3. On March 7, 2017, the KHP denied Respondent's challenge and advised Respondent of his right to an administrative hearing before the Commission.<sup>2</sup>

4. Also on March 7, 2017, Respondent verbally requested a hearing before the Commission.<sup>3</sup>

5. On June 27, 2017, the Commission issued an Order Setting Hearing, scheduling a hearing for August 23, 2017.

6. On August 11, 2017, Commission Staff (Staff) filed the Direct Testimony of Deputy Director of Transportation, Gary Davenport, and KHP Trooper, Josh Weber.

7. On August 23, 2017, the Commission held a hearing on this matter.

8. On September 19, 2017, the Commission issued an Order Dismissing Violations.

## **II. Staff's Petition for Reconsideration**

9. On September 29, 2017, Staff filed a Petition for Reconsideration (PFR).<sup>4</sup> Staff alleged the Commission's Order Dismissing Violations erred in two ways. First, Staff alleged the Commission erred in failing to consider the bill of lading and mistakenly concluded it had not been offered and accepted as Exhibit 2 during the hearing.<sup>5</sup> Staff argued the bill of lading was evidence of "Respondent's involvement in the commercial operations of Hillside Range (sic) and confirms that he was not hauling the six pallets of clay pigeons for personal use."<sup>6</sup> Staff also argued the bill of lading provided evidence that Hillsdale Range was the purchaser of the clay pigeons, as well as providing Hillsdale Range's business address, telephone number, and confirmation of the range manager's name.<sup>7</sup>

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<sup>2</sup> *Order Setting Hearing*, ¶ 3 (June 27, 2017).

<sup>3</sup> *Id.* at ¶ 4.

<sup>4</sup> Petition for Reconsideration of Order Dismissing Violations (Sep. 29, 2017).

<sup>5</sup> *Id.* at pp. 2-3.

<sup>6</sup> *Id.* at p. 3.

<sup>7</sup> *Id.*

10. Second, Staff alleged the Commission erred in not considering Respondent's admission against interest in the driver/vehicle inspection report.<sup>8</sup> Staff argued the inspection report was not used for the purpose of admitting hearsay, but for admitting the written observations of Trooper Weber.<sup>9</sup> Staff further argued that at the time of the inspection, Trooper Weber: (1) observed Respondent's admission that he was being compensated with free membership to the gun range, and (2) in the normal course of business as a KHP Trooper, contemporaneously made a record of that observation.<sup>10</sup> Staff argued the inspection report constituted a business record and thus fell under the business record exception to the prohibition against hearsay.<sup>11</sup>

11. Additionally, Staff took issue with the Respondent's failure to pre-file testimony, to object to Trooper Weber's testimony or the inspection report, to conduct cross-examination, or to testify on his own behalf.<sup>12</sup>

### III. LEGAL STANDARD

12. Kansas courts examine the validity of Commission orders pursuant to the Kansas Judicial Review Act (KJRA), K.S.A. 77-621 *et seq.* On appeal to Kansas courts, the party challenging the Commission's order bears the burden of proving the Commission's action was invalid.<sup>13</sup> The validity of the Commission's action is determined in accordance with the standards of judicial review provided in K.S.A. 77-621, as applied to the Commission's action at the time it issued its Final Order.<sup>14</sup> The party challenging the Commission's action must prove one of the eight grounds under K.S.A. 77-621(c) in order to obtain relief. Staff did not expressly

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<sup>8</sup> *Id.* at pp. 4-6.

<sup>9</sup> *Id.* at p. 5.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at pp.4-5.

<sup>12</sup> *Id.* at pp. 5-6.

<sup>13</sup> K.S.A. 77-621(a)(1).

<sup>14</sup> K.S.A. 77-621(a)(2).

cite to any of the eight grounds, however, one is implicated. Staff's argument can be construed to assert the Commission's action was based upon a determination of fact that was not supported by evidence that is substantial when viewed in light of the record as a whole.

13. The statute further states that the "record as a whole" shall include all record evidence, whether it supports or detracts from the Commission's findings.<sup>15</sup> The statute also specifically notes that a court, in reviewing the record, will not re-weigh the evidence.<sup>16</sup> Moreover, Kansas' courts have found the Commission has discretion to weigh and accept or reject testimony. On appeal, the court may not substitute its judgment for that of the Commission even though there may be conflicting evidence in the record that would support a contrary result. Further, the court recognized that the Commission's decisions 'involve complex problems of policy, accounting, economics, and other special knowledge.' The Commission has experienced staff with backgrounds in statistics, accounting, and engineering, which appellate courts lack.<sup>17</sup> As further guidance, the Kansas Supreme Court has held that substantial competent evidence possesses both relevance and substance and provides a substantial basis of fact from which the issues can be reasonably determined.<sup>18</sup> K.S.A. 77-621(c)(7) allows that "[t]he court shall grant relief only if it determines...the agency action is based on a determination of fact, made or implied by the agency, that is not supported to the appropriate standard of proof by evidence that is substantial when viewed in light of the record as a whole,<sup>19</sup> which includes the agency record

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<sup>15</sup> K.S.A. 77-621(d).

<sup>16</sup> *Id.*

<sup>17</sup> *Citizens' Util. Ratepayer Bd. v. State Corp. Comm'n*, 47 Kan. App. 2d 1112, 1124, 284 P.3d 348, 356-57 (2012).

<sup>18</sup> *Frick Farm Properties v. Kansas Dept. of Agriculture*, 289 Kan. 690, 709, 216 P.3d 170 (2009).

<sup>19</sup> In light of the record as a whole is defined as, "...the adequacy of the evidence in the record before the court to support a particular finding of fact shall be judged in light of all the relevant evidence in the record cited by any party that detracts from such finding as well as all of the relevant evidence in the record, compiled pursuant to K.S.A. 77-620, and amendments thereto, cited by any party that supports such finding, including any determinations of veracity by the presiding officer who personally observed the demeanor of the witness and the agency's explanation of why the relevant evidence in the record supports its material findings of fact. In reviewing the evidence in light of the record as a whole, the court shall not reweigh the evidence or engage in de novo review.

for judicial review, supplemented by any additional evidence received by the court under this act” (emphasis added). The Commission is only required to make a clear finding that is specific enough to allow judicial review of the reasonableness of the order and which has record evidentiary support.<sup>20</sup>

14. An agency’s action is arbitrary and capricious if it is unreasonable or without foundation in fact.<sup>21</sup> “Whether an agency’s decision is arbitrary or capricious tests the reasonableness of the [agency’s] exercise of discretion in reaching the determination” at issue.<sup>22</sup> Unreasonable action is action taken without regard to the benefit or harm to all interested parties.<sup>23</sup>

### III. ANALYSIS

15. Upon review of the record, the Commission acknowledges Staff’s PFR accurately noted that the bill of lading was admitted to the record as Staff’s Exhibit #2. However, in considering Staff’s Exhibit #2, the Commission is not persuaded the bill of lading provides sufficient corroborating evidence to support Trooper Weber’s hearsay statement from the range manager of the Hillsdale Range that the Respondent was transporting the clay pigeons in exchange for free membership to the range. First, although the bill of lading lists the Respondent’s name and indicates the customer is responsible for picking up the goods. The bill of lading does not establish whether the Respondent was transporting the goods on behalf of

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K.S.A. 77-621.

<sup>20</sup> *Farmland Indus., Inc. v. State Corp. Comm’n of State of Kan.*, 25 Kan. App. 2d 849, 852, 971 P.2d 1213, 1217 (1999) (holding that [t]o assure the KCC has engaged in lawful procedures and followed prescribed procedures, K.S.A. 77-621(c)(5), the KCC must render a written decision that is concise and contains a specific statement of relevant law and basic facts that support the decision. The KCC is not required to state factual findings in minute detail, but must be specific enough to allow judicial review of the reasonableness of the order. To guard against arbitrary action, conclusions of law must be supported by findings of fact supported by evidence in the record”).

<sup>21</sup> *Sunflower Racing, Inc. v. Bd. of Cty. Comm’rs of Wyandotte Cty.*, 256 Kan. 426, 431, 885 P.2d 1233, 1237 (1994).

<sup>22</sup> *Muir v. Kansas Health Policy Auth.*, 50 Kan. App. 2d 854, 862, 334 P.3d 876, 881 (2014).

<sup>23</sup> *Sunflower Racing, Inc.*, 256 Kan. at 431.

Hillsdale Range for compensation. Second, the bill of lading does not provide sufficient evidence to properly identify Virgil's last name or his relationship to the Hillsdale Range. Likewise, following the alleged conversation between Trooper Weber and Virgil, Trooper Weber did not record a last name for Virgil. Finally, Staff did not provide any other evidence establishing the link between the Virgil listed on the bill of lading and the Virgil with whom Trooper Weber allegedly spoke. Consequently, the Commission does not find the bill of lading to be sufficient evidence in support of Trooper Weber's hearsay testimony.

16. The Commission is not persuaded by Staff's argument that the Commission erred in not considering the inspection report attached to Trooper Weber's pre-filed direct testimony as a business record detailing Respondent's admission against his own interest. A business entry is defined as a writing offered as a memoranda or record of acts, conditions, or events to prove the facts stated therein.<sup>24</sup> A business entry used as an exception to the prohibition against hearsay must be made in the regular course of a business, at or about the time of the act and the sources of information from which made, and the method and circumstances of the record's preparation must be such as to indicate the record's trustworthiness.<sup>25</sup>

17. Staff fails to cite to the portion of the evidentiary record that supports Staff's assertion<sup>26</sup> that the inspection report was completed contemporaneously with Trooper Weber's inspection of the Respondent. Furthermore, the method utilized to complete the inspection report attached to Trooper Weber's pre-filed direct testimony does not indicate trustworthiness. The Commission's review of the inspection report shows the report was not fully completed, as the inspection report was not signed by Trooper Weber or the Respondent and the portion confirming Respondent's identification was notably absent. Although the inspection report was

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<sup>24</sup> K.S.A. 60-460(m).

<sup>25</sup> *Id.*

<sup>26</sup> PFR at p. 5.

admitted into the record as an attachment to Trooper Weber's Direct Testimony, the Commission gave it little evidentiary weight because the Commission was unable to determine when the report was filled out, and the incompleteness of the report caused the Commission to doubt the inspection report was completed in a method indicative of trustworthiness.

18. Staff is correct that the Respondent had every opportunity to contradict the testimony of Trooper Weber and the observations included in his inspection report.<sup>27</sup> The Respondent chose not to pre-file testimony, which was his right. The Respondent raised no objection to the admission of Trooper Weber's testimony or to the admission of the inspection report as an attachment to that testimony. The Respondent did not cross-examine Trooper Weber. The Respondent did not testify on his own behalf to challenge any of the statements made by Staff's witnesses. The only evidence of a statement by the Respondent was in the form of a single sentence included on an incomplete and unsigned inspection report attached to Trooper Weber's Direct Testimony. This purported statement made by the Respondent against his own interest was neither discussed by Trooper Weber in his Direct Testimony nor pointed out by Staff until its PFR. Staff alone bore the burden of proof in this case.<sup>28</sup>

19. The Commission has previously found proof of the Respondent's compensation to be a necessary element of Staff's case,<sup>29</sup> and despite Staff's arguments to the contrary, Staff did not provide sufficient evidence to carry its burden of proof for this necessary element. Although the Commission finds its prior order incorrectly indicated the bill of lading was not offered into evidence,<sup>30</sup> further review of the document included in Staff's Exhibit #2 demonstrates there is insufficient corroborating evidence to support Trooper Weber's hearsay testimony regarding the

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<sup>27</sup> PFR at pp. 5-6.

<sup>28</sup> See generally K.A.R. 82-1-230(b); *In re Marriage of Gordon-Hanks*, 27 Kan. App.2d 987, 994, 10 P.3d 42 (2000) (stating that [i]n most situations the burden lies with the moving party).

<sup>29</sup> *Order Dismissing Violations*, p. 4 (Sep. 19, 2017).

<sup>30</sup> *Id.* at p. 5.

Respondent's compensation. Likewise, the Commission is not persuaded by Staff's argument that the inspection report constitutes a business entry recording a statement against self-interest as an exception to the prohibition against hearsay because the inspection report was not completed in a manner consistent with the requirements of K.S.A. 60-460(m). Therefore, the Commission concludes Staff's Petition for Reconsideration should be denied.

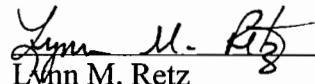
**THEREFORE, THE COMMISSION ORDERS:**

- A. Staff's Petition for Reconsideration is denied.
- B. To the extent this Order constitutes final agency action as defined by K.S.A. 77-607(b)(1), Lynn M. Retz, Secretary to the Commission, is the agency officer designated to receive service of a petition for judicial review on behalf of the agency.<sup>31</sup>
- C. The Commission retains jurisdiction over the subject matter and the parties for the purpose of entering such further orders as it deems necessary.

**BY THE COMMISSION IT IS SO ORDERED.**

Apple, Chairman (recused); Albrecht, Commissioner; Emler, Commissioner

Dated: OCT 26 2017

  
Lynn M. Retz  
Secretary to the Commission

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Order Mailed Date

OCT 27 2017

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<sup>31</sup> K.S.A. 77-529(d).



**CERTIFICATE OF SERVICE**

17-GIMM-404-KHP

I, the undersigned, certify that the true copy of the attached Order has been served to the following parties by means of first class mail/hand delivered on OCT 26 2017.

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/S/ DeeAnn Shupe  
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DeeAnn Shupe

Order Mailed Date

OCT 27 2017