

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MOSHE LEIB,)
)
Petitioner,)
)
vs.) Case No. 10-5714RX
)
HILLSBOROUGH COUNTY PUBLIC)
TRANSPORTATION COMMISSION A)
LEGISLATIVELY CREATED)
INDEPENDANT SPECIAL DISTRICT OF)
THE STATE OF FLORIDA,)
)
Respondent.)
_____)

FINAL ORDER

Administrative Law Judge (ALJ) Daniel Manry conducted the final hearing of this case for the Division of Administrative Hearings (DOAH), on August 31, 2010. The ALJ conducted the hearing by telephone in Tallahassee and Tampa, Florida.

APPEARANCES

For Petitioner: Moshe Leib, pro se
Post Office Box 782
Indian Rocks Beach, Florida 33785

For Respondent: Orlando Perez, Esquire
Hillsborough County Attorney's Office
601 East Kennedy Boulevard, 27th Floor
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STATEMENT OF THE ISSUE

The issue is whether the definition of the term "Limousine" in Rule 1.4 of the Rules of the Hillsborough County Public

Transportation Commission (Effective August 10, 2010) (Rule 1.4)¹ is an invalid exercise of delegated legislative authority within the meaning of Subsections 120.52(8) and 120.56(1)(a), Florida Statutes (2010).²

PRELIMINARY STATEMENT

On July 15, 2010, Petitioner challenged Rule 1.4 by filing with DOAH a Petition Seeking Administrative Determination of the Invalidity of Agency Rules (the Rule Challenge). Respondent filed a Motion to Dismiss Petition for Lack of Standing (the Motion to Dismiss).

The Motion to Dismiss alleges that the Petition fails to show Petitioner has standing and is legally insufficient. Petitioner filed a written opposition to the Motion to Dismiss, including a Notice of Supplemental Authority. Ruling on the Motion to Dismiss was reserved for disposition in this Final Order.

The parties were unable to file a joint pre-hearing stipulation. Each party timely filed a unilateral pre-hearing stipulation.

At the hearing, Petitioner did not testify and did not call any other witnesses. Petitioner submitted 16 exhibits for admission into evidence. Respondent presented the testimony of one witness and submitted five exhibits for admission into evidence.

The identity of the witnesses and exhibits and the rulings regarding each are recorded in the record of the hearing.

Neither party requested a transcript of the hearing.

FINDINGS OF FACT

1. Respondent is an Independent Special District created by the Florida Legislature. Ch. 01-777, § 1, at 1, Laws of Fla. The Legislature created Respondent, in relevant part, for the purpose of regulating the operation of public vehicles upon the public highways of Hillsborough County, Florida (Hillsborough County), and its municipalities. Ch. 01-777, § 2, at 2, Laws of Fla.

2. Petitioner previously operated vehicles for hire within Hillsborough County in conformity with the rule he now challenges. Petitioner previously held a Hillsborough County Public Transportation Commission (HCPTC) Certificate under the name of Moshe Leib, d/b/a TBLimo.com. (TBL), and operated a transportation service pursuant to that HCPTC Certificate.

3. On or about August 27, 2009, Petitioner sold the intangible assets of TBL, including the right to operate under the HCPTC Certificate, to Ambassador Limo Services, Inc. (Ambassador). Mr. Kenneth Lucci is the president and chief executive officer of Ambassador and the witness for Respondent in this proceeding.

4. As part of the sale transaction between Petitioner and Ambassador, Petitioner signed a document identified in the record as the Covenant Not to Compete (the CNC). The CNC prohibits Petitioner from conducting commercial transportation business in Hillsborough County for six years from the date of the CNC.

5. It is undisputed that Petitioner has opened a website identified in the record as Blackcarservice.net (Blackcar). Petitioner intends to form and operate a commercial transportation business in which Petitioner may transport passengers from Citrus and Hernando counties to destinations in Hillsborough County and back to their origin.

6. Conduct of part of the business proposed for Blackcar would not require an HCPTC Certificate. The remainder of the proposed Blackcar business would require an HCPTC Certificate.

7. If a Blackcar trip were a continuous roundtrip from the place of origin in either Citrus or Hernando County and back to the place of origin, it is undisputed that Petitioner would not be required to obtain an HCPTC Certificate for such activity. However, Petitioner would be required to have an HCPTC Certificate if a proposed Blackcar trip were to originate in either Citrus or Hernando County, Petitioner were to drop the passenger at a destination in Hillsborough County, and later return to take the passenger back to Citrus or Hernando County;

or, after dropping the passenger in Hillsborough County, Petitioner were to pick up another passenger in Hillsborough County for return to his or her place of origin in Citrus or Hernando County.

8. Petitioner challenges Rule 1.4. Rule 1.4 provides:

"Limousine" means any motor vehicle for hire not equipped with a taximeter, with the capacity for 15 passengers or less, including the driver. This definition consists of vehicles which are recognized by the industry as "luxury" vehicles, that are considered as high-end luxury vehicles by the manufacturer and vehicles that have been uniquely modified so as to provide "luxury" limousine service. The "luxury" quality of vehicles will be determined by assessing aesthetics of the interior and exterior of the vehicles, amenities provided to the passenger, spaciousness and comparison to current industry standards for vehicles performing limousine service in Hillsborough County. Unless otherwise indicated, use of the word "limousine" within these Rules shall be meant to include all varieties of limousines discussed in these rules, collectively. Limousines can be sub-categorized as follows:

- a. "Stretch Limousine" or a sedan/SUV model that was manufactured or remanufactured with an extended wheel base or;
- b. "Limousine Sedans" or luxury vehicles with space for at least two passengers behind the driver and additional space behind those passengers for luggage, or;
- c. "Sport Utility Vehicles" (SUV) that are top-of-the-line models and have the luxury package options included to provide a luxury service, or;

d. "Limousine Buses" that are used for passenger transport for-hire. These buses can have forward facing seating or can be modified for circular or "party" seating.

The Director, subject to Commission review, may develop and update a list of vehicles which qualify as Limousine Sedans and SUVs.

9. A preponderance of the evidence does not show that Petitioner's intent to form and operate a commercial transportation business, as described in paragraph 5, is of sufficient immediacy to give Petitioner standing to challenge Rule 1.4. Any attempt by Petitioner to engage in business in Hillsborough County within the next six years in a manner that requires an HCPTC Certificate will violate the CNC and subject Petitioner to potential litigation with Ambassador. Assuming arguendo that Petitioner had standing, a preponderance of evidence does not show that the challenged rule creates the adverse economic effect alleged by Petitioner.

10. For reasons stated in the Conclusions of Law, the burden of proof is on Petitioner. Petitioner did not testify, did not call any witnesses, and did not successfully admit any exhibits into evidence. The preponderance of evidence was submitted by Respondent. That evidence was credible and persuasive. Petitioner's cross-examination of Respondent's evidence was neither credible nor persuasive to the trier of fact.

CONCLUSIONS OF LAW

11. DOAH has jurisdiction over the parties and subject matter in this proceeding. §§ 120.569 and 120.56. DOAH provided the parties with adequate notice of the final hearing.

12. Petitioner bears the ultimate burden of proving the invalidity of the challenged rule. § 120.56(3)(a); Florida Board of Medicine, et al. v. Florida Academy of Cosmetic Surgery, Inc., et al., 808 So. 2d 243 (Fla. 1st DCA 2002). Petitioner must show by a preponderance of the evidence that the challenged rule is invalid as promulgated. Charity v. Florida State University, 680 So. 2d 463 (Fla. 1st DCA 1996).

13. In order to be substantially affected by the challenged rule, Petitioner must show by a preponderance of the evidence that the rule will result in a real and immediate injury in fact and that the alleged interest is within the zone of interests to be protected or regulated. Ward v. Board of Trustees of the Internal Improvement Trust Fund, 651 So. 2d 1236, 1237 (Fla. 4th DCA 1995). A preponderance of the evidence does not show that Petitioner satisfies the immediacy test.

14. Several evidential deficiencies preclude a finding that Petitioner's substantial interests are affected by the challenged rule. A preponderance of the evidence does not show that Petitioner has applied for and been denied an HCPTC Certificate for an existing business based on the challenged

rule. See Jacoby v. Florida Board of Medicine, 917 So. 2d 358 (Fla. 1st DCA 2005) (New York physician that had applied for and been denied a temporary certificate in Florida had standing to challenge Florida rule). A preponderance of the evidence does not show that Respondent charged Petitioner with operating a business in violation of the rule. See Lanoue v. Florida Department of Law Enforcement, 751 So. 2d 94 (Fla. 1st DCA 1999) (driver who was arrested and charged with DUI had standing to challenge rule regulating breath testing machines). Finally, a preponderance of the evidence does not show how Petitioner can obtain an HCPTC Certificate and operate within Hillsborough County pursuant to an HCPTC Certificate during the next six years without violating the CNC with Ambassador.

15. Alternatively, if it were determined that Petitioner is substantially affected by the challenged rule, a preponderance of the evidence does not show that the challenged rule has any adverse impact on Petitioner. Petitioner did not testify, did not call any witnesses, and did not submit any evidence or legal argument to overcome Respondent's objections to the admissibility of Petitioner's exhibits, which were sustained.

16. The challenged rule is not an invalid exercise of delegated legislative authority within the meaning of Subsection 120.52(8). The challenged rule complies with the

flush paragraph of the cited statute. In relevant part, the Legislature authorizes Respondent to adopt rules for safety and equipment requirements for limousines. Ch. 01-777, § 5(m), at 7, Laws of Fla. The challenged rule implements that legislative authority and provides clarification to prospective applicants.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is

ORDERED that Rule 1.4 is valid as promulgated and that the Rule Challenge is dismissed for the reasons stated herein.

DONE AND ORDERED this 8th day of October, 2010, in Tallahassee, Leon County, Florida.



DANIEL MANRY
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 8th day of October, 2010.

ENDNOTES

^{1/} References to Rules are to rules promulgated as of August 31, 2010. The parties refer in their Proposed Final Orders to Rule 1.15, and the Rule Challenge was filed challenging Rule 1.15. However, changes between the date of the Rule Challenge and the date of this Final Order resulted in renumbering of the rules without any substantive changes in former Rule 1.15 and current Rule 1.4.

^{2/} References to subsections, sections, and chapters are to Florida Statutes (2010), unless otherwise stated.

COPIES FURNISHED:

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing one copy of a Notice of Administrative Appeal with the agency clerk of the Division of Administrative Hearings and a second copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the appellate district where the party resides. The Notice of Administrative Appeal must be filed within 30 days of rendition of the order to be reviewed.