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BEFORE THE PHILADELPHIA
PARKING AUTHORITY

IN RE: Proposed Rulemaking Order : Docket No. 126-3
Philadelphia Taxicab and :
Limousine Regulations :

COMMENTS OF MICHAEL S. HENRY

I. INTRODUCTION

Because there is a great potential for abuse and a significant risk that individual rights will be violated when the government exercises its power to seize private property without a hearing or warrant, the impoundment power should only be used when there is a serious and imminent threat to public safety and then only when alternate measures are inadequate to prevent harm from occurring. Any statute granting warrantless impoundment powers to the government should be construed narrowly and any regulations implementing them should apply only in rare and compelling circumstances. With this in mind, I submit my comments to the Authority's proposed rulemaking in this matter.

II. THE AUTHORITY'S PROPOSED REGULATIONS EXCEED THE SCOPE OF ITS ENABLING ACT TO THE EXTENT THEY APPLY TO PUC-CERTIFIED CARRIERS.

The Authority has the power to impound vehicles under Section 5714(g) of the Parking Authorities Law, 53 Pa. C.S. §5714(g). By its terms, subsection (g) limits the Authority's impoundment power to vehicles (1) "which are utilized to provide call or demand service in cities of the first class *without a proper certificate of public convenience issued by the authority*" (i.e. "unauthorized vehicles") or (2) "*which are in violation of regulations of the authority.*" But nothing in Subsection (g) empowers the Authority to impound "certificated taxicabs", such as taxicabs certified by the PUC. See *Sawink, Inc. v. Philadelphia Parking Authority*, 34 A.2d 926

(Pa. Cmwlth. 2012), *affirmed*, 2012 Pa. LEXIS 2897 (Pa. 2012) To the extent any of the Authority's proposed regulations can be interpreted as applying to PUC-certified carriers, they exceed the scope of the powers given to the Authority under its enabling act.

The Authority does not have subject matter jurisdiction over PUC-certified carriers. The Act of July 16, 2004, (H.B. 2654) P.L. 758, No. 94 ("Act 94") transferred the PUC's functions with regard to medallion taxicabs and limousines operating in Philadelphia to the Authority. See Section 22(1) of Act 94.[1] All other carriers in the Commonwealth remain subject to the PUC's jurisdiction and it is up to the PUC to enforce the Public Utility Code, 66 Pa. C.S. §§101 et seq., and its own rules, and regulations with regard to all carriers under its jurisdiction.[2]

All PUC-certified motor carriers throughout the Commonwealth with call or demand rights are authorized by the PUC to provide call or demand service in Philadelphia (and everywhere else in the Commonwealth), subject to the terms and conditions of their certificates of public convenience, the provisions of the Public Utility Code, 66 Pa. C.S. §101 et seq., and the Commission's regulations promulgated thereunder, 52 Pa. C.S., Part I. In fact, Section 5714(d)(1) of the Parking Authorities Law, 53 Pa. C.S. §5714(d)(1), explicitly recognizes the authorization of PUC-certified carriers to provide call or demand service in Philadelphia. When a PUC-certified carrier provides call or demand service in violation of the terms of its certificate or the provisions of the Public Utility Code or the Commission's regulations, it is up to the Commission to enforce applicable law, although, as noted, the Authority may prosecute an

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[1] Section 22(1) of Act 94 provides: "The Pennsylvania Public Utility Commission's appropriations, allocations, documents, records, equipment, materials, powers, duties, contracts, rights and obligations which are utilized or accrue in connection with the functions under 66 Pa.C.S. Ch. 24 [Medallion Act] and in connection with limousine regulation in cities of the first class shall be transferred to the Philadelphia Parking Authority in accordance with an agreement between the commission and the authority."

[2] The Authority may initiate enforcement actions against PUC-certified carriers before the PUC for violations of the Public Utility Code or the PUC's regulations. See 53 Pa. C.S. §5505(b)(2).

enforcement action before the Commission when a PUC-certified carrier violates the law. It should be noted that the PUC does not have the power to impound vehicles of motor carriers subject to its jurisdiction for violations of the Public Utility Code or Commission regulations.

The General Assembly meant to distinguish between "unauthorized vehicles" and "certificated taxicabs" when it enacted two separate subparagraphs pertaining to penalties that could be imposed on vehicles operating illegally. See §5714(e) (entitled "Penalties involving certificated taxicabs") and §5714(f) (entitled "Unauthorized vehicles"). In, *Sawink, Inc., supra,* the Commonwealth Court considered the "mischief to be remedied" and the "object to be attained" by the impoundment power authorized by Section 5714(g) of the Parking Authorities Law, 53 Pa. C.S. §5714(g), and concluded that "the impoundment penalty is targeted at the more serious scofflaws: those that do not have a valid certificate from any authority." Id.

The Commonwealth Court recognized that violations committed by "unauthorized vehicles" are more serious than violations committed by "certificated taxicabs" and pose a much greater risk to public safety because the operators of "unauthorized vehicles," unlike the operators of "certificated taxicabs," are not required to demonstrate fitness before beginning service and have no duty to purchase liability insurance, to present their vehicles for safety inspections, or to subject their drivers to criminal background checks. Id. Furthermore, because they have no certificates of public convenience, the operators of "unauthorized vehicle" are not deterred by the threat of cancellation or revocation of their operating rights, which provides a strong incentive to "certificated taxicabs" to comply with the Authority's regulatory requirements. It makes sense then that the General Assembly would have reserved the extreme enforcement tool of impoundment for "unauthorized vehicles", but not "certificated taxicabs".

On July 5, 2012, the Governor approved Act 119 of 2012, which amended Section 5714(g); however, the amendments make only minor changes to the subsection and do not make any substantive changes to the Authority's impoundment power. See, Act of July 5, 2012 (H.B. 2390) P.L. 1022, No. 119 ("Act 119). Accordingly, the holding in *Sawink, Inc.*, *supra*, that the Authority has no power to impound vehicles operated by PUC-certified carriers remains good law. Had the General Assembly intended to overturn *Sawink*, it would have used explicit language to do so. It did not.

Act 119 deleted the introductory clause of the first sentence of subsection (g), which indicated that the impoundment power was "in addition to" the sanctions imposed on "unauthorized vehicles" under subsection (f). But the Authority's power to impound vehicles was never restricted to "unauthorized vehicles". Prior to Act 119, the Authority also had the power to impound vehicles for violations of the Authority's regulations. This would include vehicles authorized by the Authority to provide call or demand service in Philadelphia. So the deletion of the introductory clause in the first sentence of subparagraph (g) was most likely made to eliminate any confusion that the impoundment power was limited to "unauthorized vehicles". In any event, the elimination of the clause does not explicitly support the conclusion that the General Assembly intended to overturn *Sawink*, supra, or that it intended to expand the impoundment powers given to the Authority under Act 94. Given the extreme nature of the impoundment power, a narrow construction of the amendatory statute is more appropriate.

Act 119 also added the words "issued by the authority" to the first sentence of subsection (g), most likely to make it consistent with subsection (a), which provides that "[a] vehicle may not be operated as a taxicab with citywide call or demand rights in cities of the first class unless a certificate of public convenience is *issued by the authority* authorizing the operation of the

taxicab and a medallion is attached to the hood of the vehicle." (emphasis added). The Medallion Act, which preceded Act 94, was enacted to eliminate the widespread use of unauthorized vehicles in citywide taxicab service.[3] Subsection (a), which is substantially similar to Section 2404(a) of the Medallion Act, 66 Pa. C.S. §2404(a) (now repealed), defines the primary offense in the medallion system of regulation: using an "unauthorized vehicle" (i.e. no medallion and no certificate "issued by the Authority") in citywide taxicab service. So the addition of the phrase "issued by the authority" in the first sentence of subsection (g) makes it clearer that the impoundment power is directly related to the offense of using "unauthorized vehicles" in citywide taxicab service defined in subparagraph (a).

But it would be improper to conclude that the language "issued by the authority" added to the first sentence of subsection (g) was intended to empower the Authority to impound PUC-certified taxicabs when they violate the territorial restrictions of their certificates. As noted, territorial violations by an authorized carrier are far less serious than the offense of providing service in an unauthorized, and therefore completely unregulated, vehicle. The latter is an intentional act that poses a serious threat to public safety, while the former is, at the worst, an instance of unfair competition committed by a driver whom the certificate holder may not be able to control.

The words "issued by the authority" were not added to subsection (g) to bring PUC-certified carriers within the scope of the Authority's impoundment power. They were added to make it clear that vehicles without any authorization whatsoever are subject to impoundment. PUC-certified carriers may operate legally in Philadelphia. The mere fact that their authorization

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[3] Many of these unauthorized vehicles were being operated by existing certificate holders with citywide rights, whose certificates restricted service to the operation of one vehicle per certificate, but who were operating 2 or more additional vehicles per certificate.

to operate in Philadelphia is not issued by the Authority is of no consequence. Likewise, the mere fact that a regulatory violation by a PUC-certified carrier occurs in Philadelphia as opposed to anywhere else in the Commonwealth is not sufficient to justify the exercise of the extreme enforcement measure of impoundment. The General Assembly has provided adequate enforcement mechanisms through the PUC to hold PUC-certified carriers accountable for their actions.

Thus, from the foregoing, it should be clear that the General Assembly meant to empower the Authority to impound vehicles providing call or demand service without any authority whatsoever (i.e. "unauthorized vehicles") and not the vehicles of PUC-certified carriers ("certificated taxicabs"). In referring to service provided *"without a proper certificate of public convenience issued by the authority,"* the General Assembly did not intend to expose the vehicles of PUC-certified carriers to impoundment merely because they do not possess a certificate issued by the Authority. It intended to expose the vehicles of scofflaws, who did not bother to go through the process of applying for legal authorization from either the PUC or the Authority to impoundment.

Similarly, the General Assembly did not intend to expose the vehicles of PUC-carriers to impoundment merely because they are not in compliance with Authority regulations. PUC carriers must comply with the PUC's vehicle requirements and standards and are not subject to Authority regulations.

III. SECTION 5714(g), AS AMENDED, IS UNCONSTITUTIONAL AS ARE ANY REGULATIONS IMPLEMENTING IT.

Prior to the amendment of Section 5714(g), the PUC-certified carriers in *Sawink, supra*, challenged the constitutionality of the statute. But the Commonwealth Court did not reach the issue of the constitutionality of the statute because it concluded that the statute did not empower

the Authority to impound PUC-certified taxicabs. Id. None of the amendments enacted by Act 119 addressed the constitutional defects in the statute. Accordingly, any regulations implementing the statute are likewise unconstitutional.

When an individual is deprived of property by governmental action, he must be afforded at some point in the proceeding an opportunity to be heard. *See Cedarbrook Realty, Inc. v. Nahil*, 399 A.2d 374 (Pa. 1979). The United States Supreme Court has been critical of procedures that provide redress only through subsequent suits. *Matthews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976); *North Ga. Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 95 S.Ct. 719, 42 L.Ed.2d 751 (1975); *Mitchell v. W. T. Grant Co.*, 416 U.S. 600, 94 S.Ct. 1895, 40 L.Ed.2d 406 (1974); *Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972); *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970); *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969). Consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action. *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895, 81 S.Ct. 1743, 6 L.Ed.2d 1230 (1961).

Even with the expanded perception of the requirements of procedural due process, the Supreme Court has nonetheless recognized the right of the government to seize property without affording the property owner a pre-deprivation or prompt post-deprivation hearing where the governmental interest involved is particularly urgent. See *Colero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 94 S.Ct. 2080, 40 L.Ed.2d 452 (1974) (seizure of yacht carrying contraband); *Ewing v. Mytinger & Asselberry, Inc.*, 339 U.S. 594, 70 S.Ct. 870, 94 L.Ed. 1088 (1950) (misbranded drugs); *Coffin Bros. & Co. v. Bennett*, 277 U.S. 29, 48 S.Ct. 422, 72 L.Ed.

49 (1928) (bank failure); *Stoehr v. Wallace*, 255 U.S. 239, 41 S.Ct. 293, 65 L.Ed. 604 (1921) (a wartime emergency); *North Am. Cold Storage Co. v. City of Chicago*, 211 U.S. 306, 29 S.Ct. 101, 53 L.Ed. 195 (1908) (a contagion that has threatened the public). Where the governmental action does not serve a particularly urgent need an individual deprived of his property is entitled to more than the availability of a subsequent suit for redress. See, e. g., *Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972); *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970).

In the present case, Section 5714(g) of the Parking Authorities Law, 53 Pa. C.S. §5714(g), and the proposed regulations implementing them are unconstitutional because they authorize impoundment of a vehicle under circumstances that are not urgent at all and are not reasonably related to any legitimate exercise of the Authority's police power under its enabling act. In the examples set forth below, the Authority's interest in removing a vehicle from the streets is not sufficiently "emergent" to make the seizure reasonable within the meaning of the Fourth Amendment of the United States Constitution and Article I, Section 8 of the Pennsylvania Constitution. When it enacted Act 94 of 2004, the General Assembly specifically found that "[u]nemployment, the spread of poverty and the heavy burden of public assistance and unemployment compensation can be avoided by the promotion, attraction, stimulation, development and expansion of business, industry, commerce and tourism in this Commonwealth through the development of a clean, safe, reliable and well-regulated taxicab and limousine industry locally regulated by parking authorities in cities of the first class." See 53 Pa. C.S. §5701.1(2). But the Authority's mission of establishing a "clean, safe, reliable and well-regulated taxicab and limousine industry" does not constitute an "emergent need" that would justify the impoundment of a taxicab for just any regulatory violation and certainly not for the

"impoundable offenses" as defined in the proposed regulations. Examples of impoundable offenses include:

(a) Operation of a vehicle with an expired TLD inspection sticker;

(b) Failing to file an application for transfer of rights within 90 days after the death of an individual certificate holder;

(c) Failing to file an application for the sale of stock of a certificate holder within 6 months after the death of a shareholder with 5% or more of the outstanding shares;

(d) Failing to file an application for renewal of rights by the end of the Authority's fiscal year;

(e) Late payment of an annual assessment (under current law the Authority's assessments are unconstitutional, see MCT Transp. v. Phila. Parking Auth., 60 A.3d 899, 2013 Pa. Commw. LEXIS 47 (Pa. Commw. Ct. 2013);

(f) Operation of a taxicab when a criminal prosecution that could possibly lead to acceptance in the Accelerated Rehabilitative Disposition Program is initiated against a key employee of a certificate holder. 52 Pa. Code §1011.5(d).

(g) Use of a taxicab meter that meets all of the Authority's functionality requirements, but is not yet on the Authority's list of approved meters;

(h) Failing to stop a taxicab to permit a field inspection; 52 Pa. Code §107.35;

Neither the statute nor the proposed regulations afford sufficient procedural due process protections in the form of a prompt post-deprivation hearing, thereby violating the Fifth Amendment of the United States Constitution, through the Fourteenth Amendment and Article I, Section 1 and 11 of the Pennsylvania Constitution. The proposed regulations provide for a post-deprivation hearing within 48 hours after a request for hearing; however, the only issue for

consideration at the hearing is whether the TLD enforcement officer properly impounded the vehicle (i.e. whether the reason for impoundment falls within the definition of impoundable offenses, not whether any regulatory violation actually occurred or whether the offense was sufficiently serious to warrant seizure of the property). And, although the Hearing Officer may establish conditions for the release of the impounded property, he is not required to do so.

Pursuant to the statute, as amended, the only way that the owner or lienholder of an impounded vehicle may recover the vehicle is "upon satisfaction of all penalties imposed and all outstanding fines assessed against the owner or operator of the confiscated vehicle and payment of the costs of the authority associated with confiscation and impoundment." 53 Pa. C.S. §5714(g)(1). This would include not only the penalties and fines imposed in connection with the regulatory violation that led to the impoundment in the first place, but any other penalties and fines that are "outstanding" against the owner or the operator of the impounded vehicle and would include outstanding parking tickets imposed by the Authority as part of its on-street parking regulation. In fact, the non-payment of outstanding penalties and fines, including parking tickets, is a regulatory violation and may, in and of itself, constitute the basis for a vehicle impoundment by the Authority. See 52 Pa. Code §1101.7. Because recovery of a vehicle cannot occur until outstanding penalties and fees are satisfied, a vehicle owner or lienholder who wishes to contest an alleged violation must wait until after the Authority has adjudicated a violation on the merits before attempting to recover the vehicle.

For all of the foregoing reasons, the proposed regulations should not be approved.

Respectfully submitted,

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