



# CITY OF PORTLAND

Office of City Auditor LaVonne Griffin-Valade

## Hearings Office

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## HEARINGS OFFICER'S ORDER

### APPEAL OF AMERICAB LLC

CASE NO. 3100394

DATE OF HEARING: November 1, 2010

### APPEARANCES:

Mr. Nathan Kaneshiro, Attorney for Appellant

Ms. Kathleen Butler, for the City

HEARINGS OFFICER: Mr. Gregory J. Frank

### FINDINGS OF FACT AND CONCLUSIONS OF LAW:

Mr. Nathan Kaneshiro, attorney, ("Mr. Kaneshiro") appeared as legal counsel for Appellant Americab LLC ("Appellant"). Mr. Sergio Sandoval, member of Appellant appeared at the hearing and testified on behalf of Appellant ("Mr. Sandoval"). Mr. Doug McCroskey ("Mr. McCroskey") appeared at the hearing and testified on behalf of Appellant.

Ms. Kathleen Butler, Regulatory Division Manager for the City of Portland Revenue Bureau ("Ms. Butler") appeared and represented the City. Mr. Frank Dufay, Regulatory Program Administrator for the City of Portland Revenue Bureau ("Mr. Dufay") appeared as a witness for the City. Mr. Sean Berens ("Mr. Berens") appeared at the hearing and testified on behalf of the City. Ms. Lisa Hubbard ("Ms. Hubbard") appeared at the hearing and testified on behalf of the City.

Ms. Butler offered Exhibits 1 through and including 17 to be admitted into the evidentiary record. Mr. Kaneshiro objected to the admission of Exhibits 3 through and including 11c and 16, 16a, 16b and 17. Mr. Kaneshiro's primary objection to these exhibits was that they included hearsay, the City provided insufficient foundation for their entry, and that the exhibits were, in part or whole, not relevant. The Hearings Officer admitted Exhibits 1 through and including 17. The Hearings Officer found that Mr. Kaneshiro's objections were made generally, with the exception of Exhibits 16, 16a, 16b and 17. Mr. Kaneshiro's objections to Exhibits 16, 16a, 16b and 17 were directed to portions of emails that did not relate to the City's violation allegations. The Hearings Officer agreed with Mr. Kaneshiro that

statements in Exhibits 16, 16a, 16b and 17 not relating to the relevant issues at hand in this case should not be considered.

The Hearings Officer notes that the standards of evidence, in a City of Portland appeal hearing, are set forth in Portland City Code (“PCC”) 22.03.080 and Rule 12 of the Code Hearings Officer Rules (Portland Policy Document ADM-9.01). Evidence of the type commonly relied upon by reasonably prudent persons in the conduct of their affairs is admissible (PCC 22.03.080.A and ADM – 9.01 rule 12a). Irrelevant, immaterial or unduly repetitious evidence is to be excluded (PCC 22.03.080.A and ADM – 9.01b). The Oregon Evidence Code does not apply (excepting for privilege objections) (See ORS 183.450(1)). Hearsay evidence is admissible, under ORS 183.450 (1), so long as it meets the statutory test of reliability. *Reguero v. Teacher Standards and Practices Comm.*, 312 Or 402, 822 P2d 1171 (1991)

The Hearings Officer overruled Mr. Kaneshiro’s objections to admission of Exhibits 3 through and including 11c. The Hearings Officer did note that all written and oral evidence admitted in this case would be subject to the Hearings Officer’s review for relevance and credibility.

Exhibit 4, a September 17, 2010 letter from Mr. Dufay to Appellant, is agreed by Appellant and the City to be the key document in this case. Appellant is contesting, in this proceeding, the validity of Exhibit 4. (Exhibit 4 shall hereafter be referred to as the “Determination Letter.”)

The Determination Letter sets forth allegations made by the City that Appellant violated PCC 16.40.150.A and PCC 16.40.190.B. As a result of the alleged violations, the City, in the Determination Letter, assessed civil penalties (PCC 16.40.540). Specifically, the City alleged, in the Determination Letter, that Appellant violated PCC 16.40.150.A and PCC 16.40.190.B by picking up passengers and cruising for fares with a “toplight” in downtown Portland on September 3, 2010 and September 11, 2010.

PCC 16.40.150.A states “no person may conduct business as a taxicab company without a valid, current company permit issued by the City...” PCC 16.40.190.B states “no taxicab vehicle may be used for as a for-hire transportation vehicle without a valid and unobstructed taxiplate issued by the City under Chapter 16.40.” PCC 16.40.030.U defines “operate” as “driving a for-hire vehicle, using a for-hire vehicle to conduct a business, receiving money from the use of a for-hire vehicle, or causing or allowing another person to do the same.”

The Hearings Officer, in this case, relies primarily upon the oral testimony offered by witnesses at the November 1, 2010 hearing. The Hearings Officer shall inform the reader of this decision whenever the Hearings Officer relies upon to any written evidence found in an admitted document.

### **Application of PCC 16.40.150.A and PCC 16.40.190.B to the City’s Alleged Violations**

The first issue to be addressed by the Hearings Officer is whether or not picking up a passenger and/or cruising for a passenger with toplight illuminated, within the City of Portland by a taxicab, is a violation of either/both PCC 16.40.150.A and/or PCC 16.40.190.B

The relevant portion of PCC 16.40.150.A states that “no person or entity may conduct business as a taxicab company without a valid, current company permit issued by the City under Chapter 16.40.” The Hearings Officer finds that interpreting the phrase “conduct business as a taxicab” is central to

determining if the City's alleged violations in the Determination Letter, if proven, would result in violation of PCC 16.40.190.B. In addressing that issue, the Hearings Officer applies the principles of statutory construction as set out in *PGE v. Bureau of Labor and Industries*, 317 Or 606, 6100-12, 859 P2d 1143 (1993). The Hearings Officer's fundamental task is to discern and, if possible, effectuate the Portland City Council's intent in enacting PCC 16.40.150.A. The Hearings Officer begins that inquiry by examining the text and context of PCC 16.40.150.A.

PCC 16.40.010 (Purpose) states, in part, that the "purpose of Chapter 16.40 is to provide for the safe, fair and efficient operation of private 'for-hire' transportation services." PCC 16.40.030.CC says, in relevant part, that "Private for-hire transportation" means "providing vehicular or pedicab transportation for compensation of any kind within the Portland City limits." The word "providing" is not defined in PCC 16.40.030 (definitions section of PCC 16.40) but is defined in the Merriam-Webster Online Dictionary as "to supply or make available (something wanted or needed)" and also as "to make something available."

The phrase "conduct business as a taxicab" is not defined in PCC 16.40.030. "Taxicab" is defined in PCC 16.40.030.KK as "any vehicle that carries passengers for-hire where the destination and route traveled may be controlled by a passenger and the fare is calculated on the basis of an initial fee, distance traveled, waiting time, or any combination thereof." The word "conduct" is not defined in PCC 16.40.030 but is defined in the Merriam-Webster Online Dictionary as "to direct or take part in the operation or management." The word "business" is not defined in PCC 16.40.030 but is defined in the Merriam-Webster Online Dictionary as "dealings or transactions especially of an economic nature."

The Hearings Officer finds that phrase "conduct business" in PCC 16.40.150.A may be reasonably interpreted in the context of the dictionary definitions of "conduct" and "business" and the PCC 16.40.030 definition of "Private for-hire transportation" to mean the provision of motor vehicle services by carrying passengers for a fare within the City of Portland city limits. The Hearings Officer finds the picking up and or dropping off of passengers, for a fare, within the City of Portland city limits falls within the PCC 16.40.150.A permit requirements. The Hearings Officer finds cruising for passengers, within the City of Portland limits, with a taxicab toplight illuminated falls within the PCC 16.40.150.A permit requirements. The Hearings Officer also finds that "conduct of business" under PCC 16.40.150.A includes other activities necessary to provide for-hire transportation services. The Hearings Officer finds that other activities would include, but are not limited to, dispatching taxicabs from a location within the City of Portland limits and advertising taxicab pick-up services within the City of Portland limits.

PCC 16.40.190.B states, in part, that "no taxicab vehicle may be used as a for-hire transportation vehicle without a valid and unobstructed taxiplate issued by the City..." The phrase "private for-hire transportation" is defined in PCC 16.40.030. The term "used" is not defined in PCC 16.40.030 but is defined in the Merriam-Webster Online Dictionary as "to put into action or service." The Hearings Officer finds that putting a taxicab in action or service as a private for-hire taxicab would include picking up passengers and also cruising for passengers. The Hearings Officer finds that a taxicab vehicle is used as a for-hire transportation vehicle, under PCC 16.40.190.B, if the vehicle is involved in actions or service leading up to the carrying of passengers and collecting a fare.

**Is there substantial evidence in the record to support findings that Appellant violated PCC 16.40.150.A and/or PCC 16.40.190.B?**

As stated above, the Hearings Officer finds that a violation of PCC 16.40.150.A and/or PCC 16.40.190.B occurs if the Hearings Officer makes a finding that Appellant, through one or more of its taxicabs, either picked up a passenger or was cruising for passengers within the Portland city limits.

City witnesses Mr. Berens, Mr. Dufay and Mr. Hubbard provided first-hand observational testimony related to events they observed. City witness Dufay also testified related to various emails; such testimony was hearsay in nature. Mr. Sandoval, on behalf of Appellant, testified about Appellant's business and its policies but was not present during any of the events observed by Mr. Berens, Mr. Dufay and Ms. Hubbard. Mr. McCroskey, a witness for Appellant, testified as to Appellant company policies and the physical characteristics of his taxicab, but had no recollection of the City allegations of specific events occurring on September 11, 2010.

Mr. Berens testified that on September 11, 2010, he observed Americab #717 in the vicinity of West 18<sup>th</sup> and West Burnside in the City of Portland. Mr. Berens stated that he followed Americab #717 and observed the taxicab stop, load three or four people into the cab, and depart. Mr. Berens stated that he did not know if the passengers boarding Americab #717 in the vicinity of 18<sup>th</sup>/Burnside on September 11, 2010 were "new" passengers or "returning passengers." Mr. Berens stated that at another time he observed, in the vicinity of Kells Bar in downtown Portland, Americab #717 pull up to the curb where one or more persons was "flagging cabs" and talk to them.

Mr. Dufay, the City of Portland Private For-Hire Transportation Administrator, testified that he observed Americab #717 within the City of Portland limits on September 3, 2010. Mr. Dufay stated that his observation of Americab #717 on September 3, 2010 lasted approximately 15 minutes. Mr. Dufay stated that Americab #717 had its "top-light" illuminated. Mr. Dufay stated that Americab #717 appeared to be cruising for customers, as the vehicle would slow down in locations where people were walking on the sidewalk. Mr. Dufay testified about emails from "Tope" and "Finley." The Hearings Officer found such emails to be hearsay and add little substantive evidence.

Mr. Dufay also testified that he investigated Appellant "online" and observed, on the Appellant's website, a fare to the Portland Airport from the Sellwood area of the City of Portland.

Ms. Hubbard, a taxicab driver for Radio Cab Company, testified that on September 11, 2010 at approximately 10:30 p.m., she observed Americab #717 driving in downtown Portland. Ms. Hubbard stated, on the evening of September 11, 2010, that she observed two people standing on the corner, in front of Berbati's Pan restaurant/nightclub (vicinity of SW 2<sup>nd</sup>/SW Ankeny). Ms. Hubbard stated the two people appeared to be flagging a taxi. Ms. Hubbard stated she began to pull towards the corner where the two people were located when Americab #717 pulled over to the curb and picked the two people up.

Mr. Sandoval testified that he is the owner/operator of Appellant's taxicab business. Mr. Sandoval stated that the current office location for Appellant is within the City of Portland. Mr. Sandoval stated that it is the Appellant's company policy to pick up customers outside of the City of Portland. Mr. Sandoval stated that it is Appellant's company policy to refer any request for a pick-up of a customer within the City of Portland to another firm that is licensed/permitted to do business in the City; Mr. Sandoval stated Appellant receives no compensation for such referrals. Mr. Sandoval stated that Mr.

Dufay, on behalf of the City, informed him that customer drop-offs within the City of Portland limits was acceptable to the City. Mr. Sandoval stated that all of Appellant's taxicab drivers sign a contract which includes a prohibition on picking up customers within the City of Portland limits. Mr. Sandoval testified that Appellant does not "employ" any drivers; rather, all drivers are independent contractors. Mr. Sandoval stated he does not drive a taxicab as part of his duties with Appellant.

Mr. Sandoval testified that on occasion, one or more customers picked up, outside of the City of Portland limits, by an Appellant's driver will request to be dropped off briefly while in the City. Mr. Sandoval stated, in such instance, the taxicab meter remains running. Mr. Sandoval acknowledged, in his testimony, that Appellant's website referenced taking reservations for the transport of customers from locations (i.e. Sellwood) in the City of Portland limits. Mr. Sandoval stated that the website was simply "bringing attention" to his company and should not be interpreted as Appellant actually offering service (pick-ups) within the City limits. Mr. Sandoval stated that dispatch of Appellant taxicabs occurs at the Appellant's office in the City of Portland limits.

Mr. McCroskey, an Appellant taxicab driver, appeared and testified on behalf of Appellant. Mr. McCroskey testified that he is aware of, and follows, Appellant's policy prohibiting picking up customers within the City of Portland limits. Mr. McCroskey stated that he is the driver of Americab #717. Mr. McCroskey had no specific recollection of picking up passengers on September 11, 2010. Mr. McCroskey stated that on occasion, a customer will request to be briefly dropped off at a bar/market, within the City of Portland limits. Mr. McCroskey stated that he would "probably give the customer 5 minutes" to reenter the taxicab.

The Hearings Officer finds that the testimony of Mr. Berens, Mr. Dufay and Ms. Hubbard is credible to the extent of their observations. The Hearings Officer finds the testimony of Mr. Sandoval is credible as it relates to Appellant company business practices and policies. The Hearings Officer finds that Mr. Sandoval did not provide any credible testimony or evidence related to Americab #717 activities on September 3, 2010 and September 11, 2010. The Hearings Officer finds the testimony of Mr. McCroskey to be credible related to his general taxicab operation policies; in particular, his policy not to pick up passengers within the City of Portland limits and his policy of allowing passengers to briefly get out of his cab, within the City of Portland limits, and to reenter within 5 minutes. The Hearings Officer finds Mr. McCroskey provided no credible testimony related to actual events of September 3, 2010 and September 11, 2010.

The Hearings Officer finds, based upon the testimony of Mr. Berens, that on September 11, 2010, that Americab #717 loaded passengers in the vicinity of 18<sup>th</sup>/Burnside within the City of Portland limits. The Hearings Officer finds that the passengers loaded into Americab #717 on September 11, 2010 could have been "new" customers" or ""continuing passengers" (dropped off by Americab #717 and picked back up shortly thereafter). The Hearings Officer finds, based upon the testimony of Mr. Berens, that in the vicinity of Kells Bar (within the City of Portland limits) persons standing on the sidewalk were flagging for a cab and Americab #717 stopped (did not load the people as passengers). The Hearings Officer finds, based upon the testimony of Mr. Dufay, that on September 3, 2010, Americab #717 was in the City of Portland limits (NW 3<sup>rd</sup>/NW Couch) driving with its toplight illuminated. The Hearings Officer finds, based upon the testimony of Ms. Hubbard, that on September 11, 2010, Americab #717 was driving in the City of Portland limits (vicinity of SW 2<sup>nd</sup>/SW Ankeny) and picked up two persons who had been on the sidewalk flagging for a taxi.

The Hearings Officer finds that Appellant maintains an online website for the purposes of generating taxicab business and that the website references taxicab transportation from one or more locations within the City of Portland limits. The Hearings Officer finds, based upon the testimony of Mr. Sandoval, that dispatch activity occurs at the current office location of the Appellant, within the City of Portland limits.

The Hearings Officer did not place any reliance, in making this decision, upon Mr. Dufay's testimony related to emails (Exhibits 16, 16a and 16b). The Hearings Officer placed no reliance upon Exhibits 16, 16a and 16b in making this decision. The Hearings Officer placed no reliance on testimony of Mr. Dufay related to Ms. Tope or Mr. Finley.

There is no evidence in the record that Appellant is licensed under PCC 16.40 to conduct business in the City of Portland limits. There is no evidence or argument in the record, by Appellant, contesting the amount of penalty assessed in the Determination Letter; all evidence and argument presented by Appellant was directed to the issue of the occurrence, or not, of violations of PCC 16.40.150.A and PCC 16.40.190.B.

### **Conclusions**

PCC 22.03.080.B and ADM 9.01 – 11(b) state that “the burden of presenting evidence to support a fact or proposition rests on the proponent of that fact or proposition.” In this case, the City has the burden to show, by a preponderance of the evidence, that (1) one or more of Appellant's taxicabs conducted business within the City of Portland limits without a valid, current company permit issued by the City under Chapter 16.40 and/or (2) one or more of Appellant's taxicabs was used within the City of Portland limits without having a valid and unobstructed taxiplate issued by the City under Chapter 16.40.

As discussed in the findings above, the Hearings Officer finds that picking up passengers for a fare within the City of Portland limits and cruising for passengers with a taxicab toplight illuminated within the City of Portland is the conduct of a taxicab business within the City of Portland in violation of PCC 16.40.150.A. The Hearings Officer finds that the picking up of passengers and cruising for passengers with a taxicab toplight illuminated, within the City of Portland, is providing for-hire transportation and in violation of PCC 16.40.190.B if the taxicab does not display of a valid decal issued by the City of Portland. The Hearings Officer finds, based upon the testimony of Mr. Berens and Ms. Hubbard, that Americab #717 did load passengers within the City of Portland limits. The Hearings Officer finds that the reasonable inference that may be drawn from the observation that the Americab #717 toplight was illuminated was that the customers were picked up in the taxicab's course of business, which included the charge of a fare. Specifically, the observation of Ms. Hubbard, that she observed persons “flagging” for a cab and then observing Americab #717 pick up those persons is persuasive and substantial evidence that the customers were picked up in the course of the taxi business, including the payment of fare.

The Hearings Officer finds that Mr. Dufay's 15 minute observation of Americab #717 on September 3, 2010, with the toplight illuminated and the vehicle circling blocks in Northwest downtown Portland, is evidence of Americab #717 conducting business in downtown. The Hearings Officer finds that there is no evidence in the record to discount Mr. Berens', Ms. Hubbard's or Mr. Dufay's observational testimony. Appellant's evidence, with respect to the events described by Mr. Berens, Ms. Hubbard, and Mr. Dufay only related to company policy, not to the specific alleged events of September 3, 2010 and September 11, 2010. The Hearings Officer finds Mr. Sandoval's testimony that Appellant's primary

business location in Northeast Portland being used for "dispatch" is evidence that Appellant was conducting business within the City of Portland limits.

The Hearings Officer finds, based upon the evidence in the record, that it is more probable than not that on September 3, 2010 and September 11, 2010, a taxicab operating as Americab #717 did violate PCC 16.40.150.A and PCC 16.40.190.B. The Hearings Officer finds the violations alleged in the Determination Letter, to have been committed by Appellant on September 3, 2010 and September 11, 2010, did occur. The Hearings Officer finds Appellant did not challenge the specific penalty amounts assessed in the Determination Letter. The Hearings Officer finds the Determination Letter is valid and Appellant's appeal is denied.

The Hearings Officer notes that Appellant's advertising (i.e. service from Sellwood to the Portland Airport) and its dispatch of taxicabs from a location within the City of Portland may also be violations of PCC 16.40.150.A and PCC 16.40.190.B. However, the Hearings Officer does not find, in this case, those activities to have been included within the alleged violations in the Determination Letter.

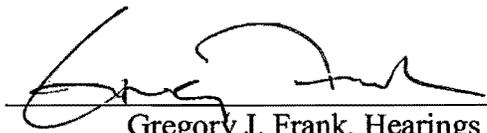
**ORDER AND DETERMINATION:**

1. The Determination Letter (Exhibit 4) is valid; Appellant's appeal is denied.
2. This order has been mailed to the parties on November 10, 2010.
3. This order may be appealed to a court of competent jurisdiction pursuant to ORS 34.010 et seq.

Dated: November 10, 2010

GJF:rs

Enclosure



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Gregory J. Frank, Hearings Officer

<b>Exhibit #</b>	<b>Description</b>	<b>Submitted by</b>	<b>Disposition</b>
1	Appeal form page 1	Dufay, Frank	Received
2	Appeal Form page 2	Dufay, Frank	Received
3	Staff Report from Dufay dated 10/4/10	Dufay, Frank	Received
4	Letter to Americab LLC/Sergio Sandoval from Dufay dated 9/17/10	Dufay, Frank	Received
5	Copy of certified mail envelope and card	Dufay, Frank	Received
6	Oregon Secretary of State Business Registry - Corporate Division printout (2 pages)	Dufay, Frank	Received
7	Faxed copy of Appeal Form page 1 with fax cover sheet	Dufay, Frank	Received
8	Letter to Dufay from Kaneshiro dated 9/27/10 with fax confirmation sheet and copy of Appeal Form page 1 (3 pages total)	Dufay, Frank	Received
9	Photo	Dufay, Frank	Received
10	Photo	Dufay, Frank	Received
11	Google Internet printouts (2 pages) with attachments	Dufay, Frank	Received
11a	Americab Area Maps Internet printout	Dufay, Frank	Received
11b	Americab Welcome Internet printout	Dufay, Frank	Received
11c	Americab Area Rate Zone Map Internet printout	Dufay, Frank	Received
12	Hearing notice	Hearings Office	Received
13	Mailing list	Hearings Office	Received
14	Defendant's Pre-Hearing Statement	Kaneshiro, Nathan T.	Received
15	Certificate of Service	Kaneshiro, Nathan T.	Received
16	9/12/10 E-mail, Lisa Tope to Dufay	Butler, Kathleen	Received
16a	10/31/10 E-mail, Robert W. Irwin Jr. to Dufay	Butler, Kathleen	Received
16b	E-mail, Christine Finley to Dufay	Butler, Kathleen	Received
17	16.40.030 Definitions	Butler, Kathleen	Received