

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

NOTICE OF PENALTIES INCURRED AND DUE FOR VIOLATIONS OF LAWS AND RULES

PENALTY ASSESSMENT: TE-150531
PENALTY AMOUNT: \$1,000

BREMERTON-KITSAP AIRPORTER
5748 BETHEL RD. SE.
PORT ORCHARD, WA 98367

The Washington Utilities and Transportation Commission (Commission) believes that you have committed violations of Washington Administrative Code (WAC) 480-30-221- Vehicle and driver safety requirements. The WAC requires passenger transportation companies to comply with parts of Title 49, Code of Federal Regulations (C.F.R.), Part 382, Controlled Substance and Alcohol Use and Testing. Revised Code of Washington (RCW) 81.04.530 allows penalties of up to \$1,500 for conducting motor vehicle operations without having a controlled substance and alcohol testing program that is in compliance with these requirements and up to an additional \$500 for each driver employed by the company who is not in compliance with motor vehicle driver testing requirements.

On February 26, 2015, Motor Carrier Safety Inspector Francine Gagne conducted a compliance review inspection of Bremerton-Kitsap Airporter (Bremerton-Kitsap or Company). Ms. Gagne found 20 violations, two of which were critical violations. The 20 violations of WAC 480-30-221 found during the inspection include the following:

- **Two critical violations of 49 C.F.R. Part 382.301(a)** – Using a driver prior to the driver receiving a negative pre-employment controlled substance and alcohol use test result. Of the five drivers checked, Gregory Legister drove on June 12, 2014, and test results were received on June 13, 2014. William Rupright drove on November 12, 2014, and test results were received on November 17, 2014.
- **Three violations of 49 C.F.R. Part 382.305(i)(2)** – Failing to ensure that each driver subject to random alcohol and controlled substances testing has an equal chance of being selected each time selections are made.
- **One violation of 49 C.F.R. Part 382.601(b)** – Failing to provide employees a written policy on misuse of alcohol and controlled substances that meets the requirements of 382.601(b)(1) through (11).
- **One violation of 49 C.F.R. Part 382.603** – Failing to ensure that the person designated to determine that drivers undergo reasonable suspicion testing received 60 minutes of training on alcohol misuse and an additional 60 minutes of training for controlled substances use.

- **One violation of 49 C.F.R. Part 390.15(b)(1)(vi)** – Failing to keep an accident record in the form and manner prescribed.
- **Eight violations of 49 C.F.R. Part 391.51(b)(9)** – Failing to place a note related to the verification of the medical examiner’s listing on the National Registry of Certified Medical Examiners as required by 391.23(m) in driver qualification file(s).
- **Two violations of 49 C.F.R. Part 396.11(a)(3)(ii)** – (cited as 396.11(c)(1) in Part B) - Failing to certify that repairs were made or were not necessary.
- **Two violations of 49 C.F.R. Part 396.13(c)** - Failing to require a driver to sign the last vehicle inspection report when defects or deficiencies were noted.

These violations demonstrate that Bremerton-Kitsap was conducting motor vehicle operations without having a testing program that is in compliance with the requirements of 49 C.F.R. Part 382. The Commission exercises its discretion not to impose a penalty for the Company’s failure to maintain a compliant program, but the Commission penalizes Bremerton-Kitsap for the two violations of the motor vehicle driver testing requirements.

It is the policy of the Commission’s Transportation Safety Staff to recommend penalties for any violations of statutes or rules related to keeping the public safe from unqualified drivers, such as drivers driving prior to receiving a negative pre-employment controlled substance and alcohol use test result. Bremerton-Kitsap’s violations of CFR Part 382.301(a) are just such critical violations.¹ Critical violations are generally indicative of breakdowns in a carrier's management controls. Patterns of non-compliance with critical regulations are quantitatively linked to inadequate safety management controls and usually higher than average accident rates.²

The Commission accepts Staff’s recommendation and hereby notifies you that it has assessed penalties against you in the amount of \$1,000 for two violations of 49 C.F.R. Part 382.301(a). The Commission finds that the maximum penalty of \$500 for each violation is appropriate based on consideration of the following factors:

1. **How serious or harmful the violation is to the public.** The violations are serious and potentially harmful to the public. Companies that permit their employees to perform safety-sensitive functions, such as transporting passengers, prior to receiving a negative pre-employment controlled substance and alcohol use test result put the traveling public at risk.

¹ 47 C.F.R., [Appendix B to Part 385—Explanation of safety rating process.](#)

² *Id.*

2. **Whether the violation is intentional.** Considerations include:

- Whether the Company ignored Staff's previous technical assistance; and
- Whether there is clear evidence through documentation or other means that show the Company knew of and failed to correct the violation.

During Bremerton-Kitsap's 2012 compliance review, Staff found that the Company's controlled substance and alcohol testing program was not in compliance but that the violations are the result of lack of oversight by Company personnel and inadequacies in the current program and do not appear to be intentional. However, Staff has conducted four compliance reviews and provided technical assistance numerous times during the past 10 years. The Company knew or should have known about these requirements.

3. **Whether the Company self-reported the violation.** Bremerton-Kitsap did not self-report these violations.

4. **Whether the Company was cooperative and responsive.** Bremerton-Kitsap provided documentation showing that William Rupright received a negative controlled substance and alcohol use result on November 17, 2104, and Gregory Legister received a negative controlled substance and alcohol use result on June 13, 2014. After the compliance review, Staff sent a letter to the Company requesting a compliance plan for each violation identified, detailing action the Company will take to ensure future compliance. The Company's initial response was not adequate and Staff has asked for additional information.

5. **Whether the Company promptly corrected the violations and remedied the impacts.** The Company provided the controlled substance screening results promptly. Staff has been unable to determine if the Company has remedied the impacts of the violations because the Company has not provided an adequate compliance plan.

6. **The number of violations.** The number of violations found was low; however, the violations are significant because they involve alcohol and substance abuse requirements. Bremerton-Kitsap's violations of CFR Part 382.301(a) are considered critical violations.³ Critical violations are generally indicative of breakdowns in a carrier's management controls. Patterns of non-compliance with critical regulations are quantitatively linked to inadequate safety management controls and usually higher than average accident rates.⁴

³ *Id.*

⁴ *Id.*

7. **The number of customers affected.** Customers were not affected by these violations.
8. **The likelihood of recurrence.** As a result of the compliance review Staff has requested the company respond to each violation and address the actions they will take to ensure future compliance. Staff expects this will improve its safety management controls and avoid recurrence of these critical violations.
9. **The Company's past performance regarding compliance, violations, and penalties.** During Bremerton-Kitsap's 2012 compliance review, Staff noted no previous violations of this type. Staff believes the violations are based on lack of oversight by Company personnel and do not appear to be intentional. However, Staff has conducted four compliance reviews and provided technical assistance numerous times during the past 10 years. The Company knew or should have known about these requirements.
10. **The Company's existing compliance program.** The Company does have an existing controlled substance and alcohol testing program in place. However, Staff found that the Company's current controlled substance and alcohol testing policy is lacking multiple required elements and the supervisory training obtained by the supervisor, Mr. Dame, is inadequate.
11. **The size of the Company.** Bremerton-Kitsap operates 18 passenger vans and employs 27 drivers. The Company's 2014 gross revenue was approximately \$3,000,000.

The Commission's Enforcement Policy, moreover, provides that some Commission requirements are so fundamental to safe operations that the Commission may issue penalties for a first-time violation.⁵ Violations of regulations designed to protect public safety are just such requirements.

This information, if proved at a hearing and not rebutted or explained, is sufficient to support the penalty assessment.

Your penalty is due and payable now. If you believe the violations did not occur, you may request a hearing to contest the penalty assessment. The Commission will grant that request only if material issues of law or fact require consideration of evidence and resolution in a hearing. A request for a hearing must include a written statement of the reasons supporting that request. Failure to provide such a statement will result in denial of the request.

If there is a reason for the violations that you think should excuse you from the penalty, you may ask for mitigation (reduction) of this penalty through evidence presented at a hearing or in writing. The Commission will grant a request for hearing only if material issues of law or fact require consideration of evidence and resolution in a hearing. Any request for mitigation must

⁵ Docket A-120061 – Enforcement Policy of the Washington Utilities & Transportation Commission – Section V.

include a written statement of the reasons supporting that request. Failure to provide such a statement will result in denial of the request. *See* RCW 81.04.405.

If you properly present your request for a hearing and the Commission grants that request, the Commission will review the evidence supporting your dispute of the violation or application for mitigation in a Brief Adjudicative Proceeding before an administrative law judge. The administrative law judge will consider the evidence and will notify you of his or her decision.

You must act within 15 days after receiving this notice to do one of the following:

- Pay the amount due.
- Request a hearing to contest the occurrence of the violations.
- Request mitigation to contest the amount of the penalty.

Please indicate your selection on the enclosed form and send it to the Washington Utilities and Transportation Commission, Post Office Box 47250, Olympia, Washington 98504-7250, **within FIFTEEN (15) days** after you receive this notice.

If you do not act within 15 days, the Commission may refer this matter to the Office of the Attorney General for collection. The Commission may then sue you to collect the penalty.

DATED at Olympia, Washington, and effective, June 9, 2015.

Gregory J. Kopta
Administrative Law Judge

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

PENALTY ASSESSMENT TE-150531

PLEASE NOTE: You must complete and sign this document, and send it to the Commission within 15 days after you receive the penalty assessment. Use additional paper if needed.

I have read and understand RCW 9A.72.020 (printed below), which states that making false statements under oath is a class B felony. I am over the age of 18, am competent to testify to the matters set forth below and I have personal knowledge of those matters. I hereby make, under oath, the following statements.

- 1. **Payment of penalty.** I admit that the violation occurred and enclose \$ _____ in payment of the penalty.

- 2. **Request for a hearing.** I believe that the alleged violation did not occur for the reasons I describe below, and I request a hearing based on those reasons for a decision by an administrative law judge:

- 3. **Application for mitigation.** I admit the violation, but I believe that the penalty should be reduced for the reasons set out below:
 - a) I ask for a hearing to present evidence on the information I provide above to an administrative law judge for a decision
 - OR b) I ask for a Commission decision based solely on the information I provide above.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing, including information I have presented on any attachments, is true and correct.

Dated: _____ [month/day/year], at _____ [city, state]

Name of Respondent (company) – please print

Signature of Applicant

RCW 9A.72.020:

“Perjury in the first degree. (1) A person is guilty of perjury in the first degree if in any official proceeding he makes a materially false statement which he knows to be false under an oath required or authorized by law. (2) Knowledge of the materiality of the statement is not an element of this crime, and the actor’s mistaken belief that his statement was not material is not a defense to a prosecution under this section. (3) Perjury in the first degree is a class B felony.”