

Agenda: Item 8

Consideration of Hearing Officer's Recommendations in Taxi Commission v. James Neilly: [ACTION] - Consideration of Hearing Officer's Decision to Revoke P-16 Permit 897, National Taxi Company, Violation of Section 1081(b) of the San Francisco Municipal Police Code

CITY AND COUNTY OF
SAN FRANCISCO



TAXI COMMISSION
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JORDANNA THIGPEN, EXECUTIVE DIRECTOR

TO: Honorable Commissioners
FROM: Jordanna Thigpen
RE: Items 7, 8, 9, and 10 on the agenda
Date: 9.19.8

Due to the voluminous nature (>300 pages) of the cases that are on for tonight's hearing, the Commission has attached the hearing officer's decision only to the complaint for Items 7, 8, 9, and 10.

Copies of the case are available at the Commission office. Commissioners have been requested to come to the office and review the documents. Copies will be available at the Commission hearing for public viewing.

HEARING OFFICER: Henry Epstein, for the San Francisco Taxicab Commission
DATE of HEARING: 10 AM, June 15, 2007
ROOM 408, City Hall, 1 Dr. Carlton Goodlett Place, San Francisco, California
94102

Permit Holder: Mr. James Neilly
Color Scheme: National Cab Company
Type of Permit: Medallion: #897
Date Granted: February 13, 1997
Investigating Officer: Mr. Jack Brodnax, Commission designee
Complainant: The San Francisco Taxicab Commission

Representation:

Geoffrey Rotwein, Esq. represented Mr. Neilly
Mr. Jack Brodnax investigated the case for the Commission as its designee.
Ms. Jordanna Thigpen, then Deputy Director, further investigated the case,
represented the Commission at the hearing, and submitted post-hearing
documents.

I. CASE SUMMARY

Mr. Neilly was charged with submitting false waybills in 2005 and 2006 in order to disguise his non-compliance with the Prop. K full-time driving requirement (the FTDR).

In March 2004, Mr. Neilly was suspended for three months and put on probation for three years by the Board of Permit Appeals for a prior FTDR violation. Beginning in August 2, 2004, Mr. Neilly was subject to quarterly audits by the S.F. Taxicab Detail [the Detail].

The Board of Appeals made Mr. Neilly subject to automatic revocation in the event audits showed that he failed to meet the FTDR. However, after auditing Mr. Neilly in late 2004, 2005 and 2006, the Detail found that Mr. Neilly complied with the FTDR for those years.

Notwithstanding the Detail's determination, beginning in late 2006 the Commission staff (the Commission) challenged the Detail's audits. It re-examined Mr. Neilly's waybills for 2005 and 2006 and found evidence of fraud.

Mr. Neilly argued that he was entitled to rely on the Detail's audits and that the Commission should be estopped from further action against him.

The hearing officer declined to accept this argument given that the Commission presented evidence of discrepancies between Mr. Neilly's waybills and airport records. These discrepancies raised a reasonable inference of fraud. Estoppel, as an equitable doctrine, demands that whoever claims it has clean hands.

Nevertheless, the Commission was able to establish only three instances of probable fraud. Mr. Neilly likely misled the Commission by submitting three false waybills during 2005, hindering the Commission's ability to monitor Mr. Neilly's compliance with the FTDR.

The hearing officer imposed fines for three violations within one year of Rule 4.A.12 and 4.A.1, totaling **\$1375**.

However, the hearing officer found that these three instances, without more evidence, were insufficient to support automatic revocation under the March 2004 Board of Permit Appeals order or mandatory revocation for fraud under MPC 1090(iv).

The hearing officer also recommended that the Commission bring a new complaint if it discovers evidence of violations for 2007.

Finally, in light of the troubling waybills, and Mr. Neilly's history of non-compliance with the FTDR, the hearing officer recommended continuing supervision of Mr. Neilly in the form of quarterly audits for two additional years, with an extremely strong presumption for revocation if Mr. Neilly fails to fill out waybills correctly; the Commission discovers further evidence of fraud; or Mr. Neilly otherwise fails to satisfy the FTDR

II. THE PROP K AUDITS and RE-AUDITS (see also EXHIBITS, V)

A. AUDIT FOR 2004

1. April 20 and June 20, 2005, conducted by Sgt. Vincent Simpson, the Detail: **57** shifts for August through December 2004, after suspension lifted; hours driven are not indicated. The Detail appears to accept the 57 shifts as sufficient for the pro-rated five month period (although neither "Passed" nor "Prop K violation" is checked on the audit sheet). The Commission takes no action against Mr. Neilly.

B. AUDITS FOR 2005

1. February 8, 2006, conducted by Sgt. Vincent Simpson, the Detail: 98 shifts; **809** hours
2. December 21, 2006, conducted by Jack Brodnax (presumably 2005, although year not indicated on audit sheet): 0 shifts; **0** hours
3. April 20, 2007, conducted by Jordanna Thigpen: 94 shifts; **777** hours

C. AUDITS FOR 2006

1. February 22, 2007, conducted by Officer Paul Makaveckas, the Detail: 89 shifts; **852.25** hours
2. April 20, 2007, conducted by Jordanna Thigpen: 89 shifts; **858** hours

III. SUMMARY OF COMPLAINT and AMENDED COMPLAINT

A. Complaint of January 23, 2007

A Complaint was filed on January 23, 2007 by Jack Brodnax, then a Commission Management Assistant, after he found no waybills for Mr. Neilly during an audit on December 21, 2006, presumably covering Mr. Neilly's driving during 2005. (No year was entered on the audit sheet.). Apparently Mr. Brodnax was unaware of an earlier audit for 2005 made on February 8, 2006 by Sgt. Vincent Simpson of the Detail. At that time, Sgt. Simpson found that Mr. Neilly satisfied the FTDR with 809 hours.

Notwithstanding Sgt. Simpson's earlier audit, Mr. Neilly was charged with violating the Prop. K Full Time Driving Requirement (the FTDR) during 2005.

Mr. Brodnax's alleged that "Mr. Neilly had a total of 4 violations of the [FTDR] within 7 calendar years." He noted that the Commission had revoked Mr. Neilly's medallion on April 29, 2003. However, this revocation was later overturned by a March 10, 2004 Board of Appeals order which suspended Mr. Neilly's medallion for three months and put him on probation for three years beginning on or about August 2, 2004, subject to quarterly audits by the Detail. The Board of Appeals mandated automatic revocation in the event that Mr. Neilly did not meet the FTDR during the probationary period.

On January 26, 2007, Mr. Dan Hinds, President of National Cab Company, addressed a letter to Mr. Brodnax stating that although the 2005 waybills had been misplaced, he was willing to testify under oath that Mr. Neilly met his 2005 driving requirement, and that Mr. Neilly, subject to the quarterly audit by the Taxi Detail, had timely turned them over to the Detail [Exbt K]

On February 2007, Mr. Hinds produced two sets of waybills purporting to be Mr. Neilly's for 2005. These are ostensibly the waybills that Sgt. Simpson had previously audited on February 8, 2006 finding 809 total hours. [Exbt Q]

B. Amended Complaint of April 23, 2007

Fourteen months after Sgt. Simpson's passing audit, on April 20, 2007, Ms. Jordanna Thigpen, then Deputy Director of the Commission re-audited Mr. Neilly's 2005 waybills and found only 777 shifts, below the FTDR of 800 for the year. She also alleged numerous instances of fraud in the waybills for 2005 and 2006.

On April 23, 2007, an Amended Complaint was filed by Heidi Machen, then Executive Director, based on Ms. Thigpen's re-audit. She alleged that Mr. Neilly failed to satisfy the FTDR for 2005 and called for automatic revocation under the March 10, 2004 Board of Appeals ruling. In addition, Ms. Machen alleged that Mr. Neilly's waybills for both 2005 and 2006 contained evidence that Mr. Neilly knowingly made false statements or concealed information from the Commission. She called for mandatory revocation under MPC 1090(iv) - in addition to automatic revocation under the terms of the March 2004 Board of Appeals ruling.

The amended Complaint also charged Mr. Neilly with violation of MPC 1138, failure to keep accurate and legible waybills, as well as several other violations, summarized below.

IV. SUMMARY of VIOLATIONS in the AMENDED COMPLAINT

The Amended Complaint cited Mr. Neilly under the following provisions:

S.F. Municipal Police Code [MPC]

- i. 1081(b) failure to meet the FTDR for 2005
- ii. 1090(i) failure to meet the FTDR for 2005
- iii. 1090 (iv) fraud: knowingly making false statements or concealing information from the Commission
- iii. 1138 inaccurate waybills

Violation of S.F. Taxicab Commission Rules and Regulations

- i. 4.A.1 medallion holders must comply with all laws
- ii. 4.A.12 hinder, delay, or knowingly make false or misleading statements to the Taxicab Commission
- iii. 6.A.1 permit holders must comply with all laws

The Commission requested fines in the amount of \$6,619.46 for violations of the Rules and Regulations, as follows:

\$4500	for 18 counts under 4.A.12.
\$2069.46	for 18 counts under MPC 1138 (subsequently withdrawn) ¹
<u>\$50</u>	for violating 4.A.1 and 6.A.1 each

Total: \$6619.46 (to \$4550)

V. EXHIBITS

¹ Ms. Thigpen advised the hearing officer that currently only the SFPD may issue fines for MPC 1138.

1. Amended Complaint, Heidi Machen, Executive Director, Taxicab Commission designee, April 23, 2007

Attachments to Amended Complaint:

- A. 2005 Taxi Commission Prop. K Audit Worksheet (dated April 20, 2007, conducted by Jordanna Thigpen)
- B. Original 2005 Taxi Commission Prop. K Audit Worksheet (dated December 21, 2006, conducted by Jack Brodnax); no year date "2005" on Audit sheet
- C. 2006 Prop. K Audit Worksheet (dated April 20, 2007, conducted by Jordanna Thigpen)
- D. 2004 SFPD Prop. K Audit Worksheet (no date: conducted by Sgt. Simpson)
- E. 2005 SFPD Prop. K Audit Worksheet (dated February 8, 2006, conducted by Sgt. Simpson)
- F. 2006 SFPD Prop. K Audit Worksheet (dated February 22, 2007, conducted by Sgt. Simpson)
- G. San Francisco International Airport Record Transaction Log, reflecting 2006 entries for Cab #897
- H. San Francisco International Airport Chronological Entries by Date and Taxi Number, reflecting 2005 entries for Cab #897
- I. Various Waybills - **2005:** 4/22/5; 5/20/5; 5/22/5; 5/27/5; 6/10/5; 6/19/5; 8/15/5; 9/12/5; 10/17/5; 10/22/5; 10/31/5 (2); 11/5/5; 11/19/5 **2006:** 1/7/6; 1/14/6; 2/11/6; 5/28/6; 9/16/6; 10/1/6
- J. Letter from Paul Mackaveckas to Jack Brodnax, January 29, 2007
- K. Letter from Dan Hinds to Jack Brodnax, January 26, 2007
- L. October 3, 2002: Complaint, Taxi Commission v. James Neilly
SFPD Formal Reprimand signed by Mr. Neilly, March 13, 2001
- M. April 29, 2003: Decision to Revoke
- N. March 10, 2004: Notice of Decision and Order from the Board of Permit Appeals in Appeal of James Neilly v. Taxi Commission
- O. April 15, 2004: Notice of Decision and Order Re: Appeal of James Neilly

P. Complaint, Taxi Commission v. James Neilly, January 23, 2007.

Q. Neilly Waybills, 2005-2006 (submitted with Amended Complaint):

Packet 1: 2005 Waybills submitted by Mr. Dan Hinds

Packet 2: 2006 Waybills submitted by Mr. Dan Hinds

Packet 3: 2006 Waybills

2. Additional Exhibits

R. Legal memorandum re Order to Show Cause by Citee James Neilly, submitted by G. Rotwein, Esq., June 15, 2007

S. Supplemental Memorandum by Citee James Neilly re Order to Show Cause, by G. Rotwein, Esq., July 17, 2007; waybill attachments and National Cab driver rosters

T. San Francisco International Airport Transaction logs for 2005

U. Declaration under penalty of perjury by Larry Johnson, Operations Manager for Ampeco System Parking at SFO

V. Handwriting sample reflecting waybill format, written and submitted by James Neilly at the June 15, 2007 hearing

VI. DISPARATE AUDITS FOR THE YEARS 2005 and 2006: Commission Staff versus the Detail

After the March 2004 Appeals Board ruling imposed a three month suspension and quarterly audits for three years, the record shows no further action by the Commission against Mr. Neilly until December 21, 2006 when Mr. Brodnax performed his audit of Mr. Neilly's waybills showing no shifts and no hours. In the Complaint Mr. Brodnax identified the calendar year of the audit as 2005; however, there is no indication of the specific year on the audit sheet itself, evidence of sloppy record keeping. Mr. Brodnax was not made available at the hearing, or by declaration, to explain this omission.

As noted above, Mr. Brodnax's December 21, 2006 "blank" audit was preceded by a completely independent audit by Sgt. Simpson of the Detail in February 2006. Sgt. Simpson clearly indicates the year audited is 2005 and credits Mr. Neilly with 809 hours, satisfying the FTDR for 2005.

It is noteworthy that Sgt. Simpson was responsible for conducting quarterly audits of Mr. Neilly pursuant to the March 2004 Board of Appeals ruling.

Notwithstanding Sgt. Simpson's passing audit, Ms. Thigpen undertook a re-audit of Mr. Neilly's waybills for 2005. The audit was conducted on April 20, 2007, over fourteen months after Sgt. Simpson's audit. It showed that Mr. Neilly drove four fewer shifts (94) and thirty-two fewer hours (777) than indicated on Sgt. Simpson's audit.

Mr. Neilly objected to the Commission's effort to revisit Sgt. Simpson's 2005 audit.

A. The 2005 Audit: Chain of custody and Estoppel Defenses

Mr. Neilly raised an evidentiary and an estoppel defense. Mr. Neilly argued that given alleged breaks in the chain of custody (the evidentiary claim) the Commission should be estopped from using the Ms. Thigpen's later audit to challenge Sgt. Simpson's earlier one.

At the hearing and in his post-hearing brief, Mr. Neilly raised questions regarding who had possession and control of the waybills from the time Sgt. Simpson audited them until the Commission re-audited them fourteen months later. He argued that breaks in the chain of custody may have accounted for the thirty-two hour shortfall between the first and second audits.² Mr. Neilly argued that the Commission should be estopped from proceeding on the basis of Ms. Thigpen's later audit.

² There was conflicting evidence presented as to who had custody of the waybills. The record contains a statement from Dan Hinds, President of National Cab, which the Taxi Commission staff submitted as Exhibit K of the Amended Complaint:

Following Mr. Neilly's suspension in 2004, he was placed on probation and subject to quarterly reviews of his way bills by [the Detail]. Mr. Neilly, submitted his 2005 waybills in a timely manner to the taxi detail, and his way bills were reviewed and approved by the detail. The waybills themselves, perhaps because of the procedural changes entailed in the review by the detail were apparently misplaced. However, I am willing to testify under oath that Mr. Neely met his 2005 driving requirement.

According to the Amended Complaint, Mr. Hinds eventually "produced two series of waybills that he alleges belong to Mr. Neilly for calendar year 2005." Mr. Hinds also testified at the hearing that he may have misplaced the waybills. Therefore, if there was, *arguendo*, a break in the chain of custody, it may not have been the responsibility of the Commission or the Detail.

Officer Makeveckas' stated [see p. 10] that it was his practice not to retain the waybills after each quarterly audit was completed. That would place custody and control of at least some sets of quarterly waybills – for 2006 - in Mr. Neilly's hands (if and when he received them by mail). It was not possible to determine if this was Sgt. Simpson's practice as well.

There is some merit to the estoppel argument regarding Mr. Neilly's total driving hours, although not on the charge of fraud. Mr. Neilly made a *prima facie* case that he was entitled to rely on Sgt. Simpson's audit for 2005. However, in what sense he actually relied on it is arguable (see the estoppel analysis below). His stronger defense is his evidentiary one.

The hearing officer holds that Sgt. Simpson's audit was the more reliable one and thus better evidence of Mr. Neilly's driving because it was performed closer to 2005, the year audited. Mr. Neilly deserves the benefit of the doubt as to any purported shortfall in the second audit.

Moreover, even if there were no breaks in the chain of custody and the Commission's second audit were accurate, on its face Mr. Neilly's driving record for 2005 does not constitute an egregious violation of Prop. K. At 777 hours, the alleged shortfall is *de minimis*.

At the hearing, Ms. Thigpen argued vigorously that even a small shortfall constituted a violation under the Board of Appeals probationary ruling which she maintained required strict compliance.

On the other hand, Ms. Thigpen testified at the hearing that Mr. Neilly had complied with all quarterly audits since they began in August 2004 and declined to contest Mr. Neilly's driving record for 2004.

Mr. Neilly argued that Sgt. Simpson's audit of his driving record for 2005 should also be upheld.

Mr. Neilly argued that he was entitled to rely on the Detail's audits, not re-audits by the Commission. It was the Detail that was charged with making quarterly audits of Mr. Neilly by the Board of Appeals Order of March 10, 2004. Moreover, Sgt. Simpson himself had signed the original reprimand of January 20, 2000 and filed the original Complaint against Mr. Neilly on October 3, 2002 charging him with violating three counts of the FTDR. Sgt. Simpson appears to have followed Mr. Neilly from the time he first came to the attention of the Detail, through his revocation, his successful appeal of that revocation, and through the disciplinary period. Sgt. Simpson signed off on Mr. Neilly's audit sheet for 2004, following the end of his suspension in August of that year. Sgt. Simpson audited him again in 2005. Once Sgt. Simpson acknowledged that Mr. Neilly satisfied the FTDR for 2005, Mr. Neilly argued that he was entitled to rely on that acknowledgement, and the Commission was estopped from proceeding against him for 2005.

Mr. Neilly may have made a *prima facie* case for equitable estoppel on the total number of hours for 2005. However, the hearing officer holds that estoppel does not apply to the issue of fraud. As an equitable doctrine the one who claims it must have clean hands. If the Commission subsequently turned up evidence of fraud in Mr. Neilly's waybills, it should not be estopped from proceeding on that charge. If the evidence suggested dirty

hands, Mr. Neilly cannot invoke estoppel. Of course, if fraud is proved, the total hours claimed towards satisfying the FTDR would be reduced, commensurate with the fraud

There are additional reasons why Mr. Neilly's estoppel defense fails on the issue of re-auditing his waybills for fraud.

VII. EQUITABLE ESTOPPEL FAILS ON THE ISSUE OF FRAUD

Mr. Neilly cites *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462 at 496-497:

The government may be bound by an equitable estoppel in the same manner as a private party. When the elements requisite to such an estoppel against a private party are present and, in the considered view of a court of equity, the injustice which would result from the failure to uphold an estoppel is of sufficient dimension to justify any effect upon public interest or policy which would result in the raising of an estoppel. [Exbt S]

The hearing officer finds that one of the requisite elements of estoppel is missing in this case: detrimental reliance by Mr. Neilly on Sgt. Simpson's audit. Mr. Neilly again quotes Mansell:

The vital principle is that he who by his language or conduct leads another to do what he would not otherwise have done shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of position is sternly forbidden. It involves fraud and falsity, and the law abhors both. [Quoting *Seymour v. Oelrichs* (1909) 156 Cal at p. 795.

Mansell identifies two co-variables: G [the government] induces P to do something other than he would have done; then G changes its position and penalizes P for doing what G induced him to do.

Mr. Neilly did not "do what he would not otherwise have done" in reliance on Sgt. Simpson's audits. According to his testimony and the waybills he submitted, Mr. Neilly continued to drive the required hours, not to his detriment but to his benefit.

In regard to 2005, after Sgt. Simpson's quarterly audits were completed, Mr. Neilly did nothing differently. He did not subsequently change his conduct in reliance on the audits, i.e., reduce his hours only to be penalized by the government.

If Sgt. Simpson's 2005 audit had uncovered a shortfall, Mr. Neilly would have been at risk of revocation all during 2005. Instead, Sgt. Simpson passed him on the FTDR. If Sgt. Simpson had found that Mr. Neilly failed to fulfill the FTDR, failed to alert him to this fact, and Mr. Neilly had relied on the audit to drive the same amount or less the following year, only to have the Commission penalize him later, that would be different. Mr. Neilly could claim detrimental reliance on a lax standard made strict *post facto*. However, that issue is moot. On their face, Mr. Neilly waybills indicate that he increased his driving hours in 2006.

Moreover, in requesting new audits, and penalties based on them, the Commission did not change its own position on the Prop. K FTDR requirement nor the penalties attached for failing to comply with it.

It is impossible to see how Mr. Neilly was disadvantaged by relying on the passing 2005 quarterly audits or those of 2006. The only way Mr. Neilly would have been disadvantaged was if the Detail appeared to countenance fraud and relying on that lenience Mr. Neilly continued to commit fraud, only to be disciplined for it later by the Commission. But that is hardly an argument Mr. Neilly could make in equity.

Findings

1. Mr. Neilly's equitable estoppel defense fails. The Commission did not induce Mr. Neilly to do what he would not otherwise have done.
2. The Commission is not precluded from re-evaluating Mr. Neilly's waybills for 2005 and 2006 on the issue of fraud

VIII. THE 2006 AUDITS

The 2006 audits were conducted by Officer Paul F. Makaveckas of the Detail who evidently took over from Sgt. Simpson after the latter became ill in early 2006. An April 20, 2007 fax from Officer Makaveckas to Mr. Brodnax reads as follows:

As per our conversation, I first met with Mr. Neilly back in June of '06 when he brought in waybills to be counted as a condition of his probation. The last time I met with him was in October of '06. Each time Mr. Neilly presented me with original waybills and after I completed the audits I mailed his waybills back to him at his home address. Mr. Neilly is not due to come see me again until February '07 for the rest of '06. [Exhibit J, the Amended Complaint]

On February 22, 2007, Officer Makaveckas completed his audit of Mr. Neilly for 2006, finding a total of 89 shifts and 852.25 hours, apparently satisfying the FTDR.

On April 20, 2007, Jordanna Thigpen, then Deputy Director, re-audited Mr. Neilly's waybills and similarly counted 89 shifts, as well as 5.75 additional hours, totaling 858 hours, again sufficient to satisfy the FTDR.

On its face, the question of how many total hours Mr. Neilly drove for 2006 is moot, since both the Detail and the Commission found an almost identical total: Officer Makeveckas found 852.25 hours and on re-audit Ms. Thigpen found 858 hours, an increase.

Nevertheless, if Mr. Neilly's waybills contain evidence of fraud it may be sufficient to trigger a separate administrative penalty against him, viz. mandatory revocation under MPC 1090(iv). Of course, a finding of fraud would also invalidate the FTDR totals for 2005 and/or 2006 and trigger automatic revocation under the Permit Appeals board ruling.

IX. THE COMMISSION'S ALLEGATION OF FRAUD

The Amended Complaint alleged that despite Sgt. Simpson's and Officer Makaveckas' imprimaturs, Mr. Neilly's waybills were rife with fraud. As evidence of this, it pointed discrepancies in handwriting and numerous cases in which entries on the waybills failed to correspond to airport records.

Mr. Neilly forthrightly volunteered to handwrite a waybill at the hearing to demonstrate that his handwriting corresponded to the handwriting on his waybills. Although the hearing officer is not a handwriting expert, the sample Mr. Neilly submitted appeared consistent with the majority of his waybills for 2005 and 2006, although some waybills contrasted with the sample. On the waybills his signature is sometime printed, sometimes in cursive, and sometimes a hybrid of the two as on the sample Mr. Neilly wrote out. He signed the sample Neilly, James. The waybills are sometimes signed *James Neilly*; sometimes *Neilly, James*; at other times *Neilly, James*. [Exbt V].

Finding

The Commission did not prove on the basis of his handwriting that Mr. Neilly forged his waybills.

More probative evidence is available in the comparison between the times on the airport records and the times and places on the waybills. However, two sets of airport records that the Commission submitted to support its allegations were subject to a foundational challenge by Mr. Neilly.

X. CHALLENGE TO THE AIRPORT RECORDS: LACK OF FOUNDATION

A. Admissibility of The Ground Transportation Unit (GTU) Transaction Logs ("the logs") [Exbt G]

The Commission argued that Mr. Neilly's waybills were inconsistent with S.F.O. Grand Transportation records. On some days, the GTU records indicated that cab 897 was at the airport but Mr. Neilly's waybills did not contain an "SFO" entry. On other days, Mr. Neilly had "SFO" entries on his waybills, but cab 897 was not recorded on GTU records.

Mr. Neilly challenged the legal foundation for admitting the GTU records, some of which (for 2006) were contained in Exhibit G of the Amended Complaint and an additional set of which (for 2005) was submitted by the Commission, post-hearing on June 29, 2007. [Exbt T]. These records are sometimes referred to as the "Transaction Logs;" the hearing officer will use that term or "GTU records" or "GTU transaction records" interchangeably.³

³ The parties created some confusion in referring to various airport records. A different set of airport records was submitted for 2005 as Exhibit H in the Amended Complaint. These are titled "Chronological Entries by Date and Transaction Number." However,

The hearing officer finds that the GTU records are admissible. Mr. Larry Johnson, Operations Manager for Ampco System Parking submitted a comprehensive and credible declaration detailing the steps by which the GTU records were collected, detailing several purely mechanical steps and one manual one.

Although submitted at the behest of Ms. Thigpen, the hearing officer holds that Mr. Johnson's declaration was impartial. For example, he described how a driver could arrive at the airport to drop off a passenger but leave without registering in the transaction log, a crucial fact in Mr. Neilly's defense.

Mr. Johnson went on to declare how he produced the records for the Commission using controlling software (the Parking and Revenue Control System).

Mr. Johnson signed his statement under penalty of perjury. The hearing officer holds that the records have been sufficiently authenticated for an administrative hearing.

Finding

Both Mr. Johnson's declaration and the records it supports, viz., the GTU transaction logs for 2005 and 2006 [Exhibit G] are properly admitted into evidence.

B. Admissibility of The Airport "Chronological Entries by Date and Transaction Number" [Exhibit H]

No authentication was provided for Exhibit H, the S.F. airport records entitled "Chronological Entries by Date and Transaction Number." The hearing officer excludes them as lacking foundation. In addition, Mr. Neilly correctly pointed out that the times on the "Chronological Entries" differed from that of the GTU transaction logs, arguing that they were unreliable.⁴ In any event, Ms. Thigpen submitted the 2005 GTU transaction logs post-hearing, suggesting that they were meant to supersede the Chronological Entries. Given that the discrepancies between the two sets of documents, and the fact that

they are also referred to as "the GTU records" or "the GTU printout" in the Amended Complaint, creating confusion with the GTU transaction logs authenticated by Mr. Johnson. The 2005 "Chronological Entries" were not given a proper foundation and the hearing officer has excluded them. For his part, Mr. Neilly also refers to "other records, e.g. the Ampco Transaction Logs" which he appears to distinguish from the GTU transaction logs. [Exbt S, Post-hearing memo, p.2]. To avoid confusion, the hearing officer uses "GTU records" to refer solely to the transaction logs produced by Mr. Johnson. These are the only airport records that are used in this decision to compare to Mr. Neilly's waybills.

⁴ It is unclear whether the "Chronological entries" registered in or out times; either way the times were inconsistent with entry and exit times registered by the GTU transaction logs.

the GTU logs contain both entry and exit times, the hearing officer holds that the GTU transaction logs are better evidence.

Finding

The Airport “Chronological Entries” are inadmissible for lack of foundation.

XI. DUE PROCESS CHALLENGE TO THE COMPLETE SET OF GTU RECORDS FOR 2005 and 2006 SUBMITTED POST-HEARING

Because the Amended Complaint relied mainly on the “Chronological Entries” for its allegations against Mr. Neilly regarding 2005 Mr. Neilly argued that subsequent recourse to the GTU records for 2005, post-hearing, violated due process. The hearing officer declines to accept this argument. Mr. Neilly had sufficient notice and sufficient time post-hearing to respond to the complete set of GTU records for 2005 and 2006 - indeed he did so vigorously in his post-hearing brief.⁵

Finding

Mr. Neilly failed to sustain a due process objection to the GTU records for 2005 and 2006.

XII. MR. NEILLY’S WAYBILLS VERSUS THE GTU TRANSACTION LOGS, 2005 AND 2006 ON THE ISSUE OF FRAUD

In the Amended Complaint, Ms. Thigpen gives many examples of allegedly fraudulent waybills submitted by Mr. Neilly. The hearing officer examined all of these examples. In the analysis that follows, most of Ms. Thigpen’s allegations are resolved in Mr. Neilly’s favor, with some troubling exceptions (in bold print, below).

The analysis that follows is based on the GTU transaction logs for both 2005 and 2006 as compared shift by shift with Mr. Neilly’s waybills for those years. In addition, the National Drivers’ Roster and the WB’s of other drivers of cab 897 were examined.

A. 2005

April 22, 2005

GTU: cab 897 arrives SFO 12:57; exits 13:04

WB: Time Out: 5:15; Time In 3:30

⁵ Mr. Neilly made an additional objection in his hearing brief: that the FTDR had been voided in the SF City Charter. [Exbt. R]. The hearing officer found no merit in this objection.

Fare: Polk to 11th/Howard 12:00 – 12:25
Illegible? to ? (appears to be in SF): 1:30-1:40

Resolution: Amended Complaint relies on excluded Exhibit H (“Chronological Entries...”) which puts 897 at SFO at 12 noon with no corresponding WB entry at SFO. However, the 12 noon entry conflicts with GTU entry and exit at 12:57 and 13:04. If Mr. Neilly’s WB reflects a 5:15PM to 3:30AM shift, there is no inconsistency.

May 20, 2005

GTU: cab 897 arrives/exits SFO 10:28-10:30; 12:04-12:21; 13:12-13:15

WB: Time Out: 6:30; Time In 12. All fares on SF streets

Resolution: Amended Complaint relies on excluded Exhibit H (“Chronological Entries...”) which puts 897 at SFO at 12:38 PM with no corresponding WB entry at SFO at that time. However 12:38 PM conflicts with GTU times, above. Moreover, Neilly’s WB only inconsistent with GTU times if assumed he drove late morning, early afternoon. However, Neilly’s WB likely reflects 6:30PM to midnight shift. Harris, other 897 driver begins shift at 6:25AM according to his WB.

May 22, 2005

GTU: cab 897 arrives/exits SFO 8:21-9:38; 20: 47-21:40; 23:31-23:59

WB: Time Out: 7:30; Time In 4:30. All fares SF between 7:30-4:30; no SFO entries

No Resolution: If shift starts 7:30AM, WB would likely reflect morning SFO entry/exit. If shift starts 7:30PM, WB would likely reflect evening SFO entries/exits. Cab 897 is at the airport three times and Mr. Neilly’s WB’s do not reflect even one visit. Nevertheless, Mr. Neilly argues that he could be in the airport parking lot and register in the GTU without picking up a fare from SFO and entering it in his WB, i.e., by “deadheading” back to SF. However, merely going to SFO from SF without a fare (and thus not entering a fare on his WB) and waiting in the lot for from one half to two hours, only to “deadhead” back to SF (again without recording a fare in his WB) is much less likely.

May 27, 2005

GTU: cab 897 arrives/exits SFO 10:28-11:31

WB: Time Out: 6:00; Time In: 12. All fares SF between 6-12; no SFO entries

Resolution: Neilly clearly began shift 6PM; other driver of cab 897, Demisse, entered on National Cab log for AM shift, and Demisse’s WB shows 5AM start. Also Demisse’s WB reflects fare from SFO about 12 PM. No inconsistency.

June 10, 2005

GTU: cab 897 arrives/exits SFO 9:57-10:43AM and 11:16-11:18AM

WB: Time Out: 4:30; Time In: 12. All fares between 4:30 and 12; no SFO entries

Resolution: Same as above, Neilly begins shift at 4:30PM; National logs have Demisse in AM, Neilly in PM. Demisse WB reflects fare at SFO 12:50PM. No inconsistency.

June 11, 2005

GTU: cab 897 arrives/exits SFO 12:24-13:10

WB: Time Out: 6:30; Time In: 4:30. All fares between 12 and 4:30; no SFO entries

No Resolution: National logs and Demisse's WB put Demisse in AM; Neilly drives PM. Neilly has fare around 12:30 between Broadway and "Imax" [?] near time GTU has 897 at airport. Demisse at airport in AM.

June 19, 2005

GTU: cab 897 arrives/exits SFO 10:32-11:32

WB: Time Out: 6:30; Time In: 4:30. All fares between 6:30 and 4:30; no SFO entries

Resolution: Demisse date stamped WB at 4:09 AM; at SFO about 9AM on his WB. Neilly hours 6:30PM to 4:30AM not coincident with SFO entry in late morning.

August 15, 2005

GTU: No record of 897 at SFO

WB: Time Out: 3:00; Time In: 11:30. Fare, SF to SFO, at 6:20 to 6:30[?], ostensibly PM

Resolution: Mr. Neilly could have taken fare to SFO, but "deadheaded" back without being recorded by the GTU.

September 12, 2005

GTU: No record of 897 at SFO

WB: Time Out: 2:00; Time In: 10:00. Fare, SF to SFO, at 5:40 to 6:15, ostensibly PM

Resolution: Mr. Neilly could have taken fare to SFO, but "deadheaded" back without being recorded by the GTU.

October 17, 2005

GTU: No record of 897 at SFO

WB: Time Out: 3:30; Time In: 11:30. Fare, SF to SFO, at 6:15 to 6:45 [?], ostensibly PM

Resolution: Mr. Neilly could have taken fare to SFO, but "deadheaded" back without being recorded by the GTU.

October 22, 2005

GTU: cab 897 at SFO 9:41-1034; 12:28-13:27; 14:07-14:09

WB: Time Out: 1:10; Time In: 11:10. No SFO fares

No Resolution: National schedule shows Mr. Neilly worked PM, as does date stamp on WB of 12:35PM. Mr. Neilly enters 1:10 as "Time out," records first fare at about 2:20 in SF. Mr. Neilly could not be starting out in SF between 12:35 and 1:10PM and be clocked in at the airport between 12:28 and 1:27PM. In addition, 897 is clocked in at the airport between 2:07 and 2:09PM when Mr. Neilly is entering his first fare at about 2:20PM at Main Street in SF.

November 5, 2005

GTU: cab 897 at SFO 9:35-10:18; 11:57-12:19

WB: Time Out: 2PM; Time In: 12AM. No SFO fares.

Resolution: National schedule shows Mr. Neilly driving 897 during PM; Demissie AM. Demissie's WB shows him driving from about 5:40AM to 1:45PM with an SFO fare at about 1:30PM.

November 19, 2005

GTU: No record of 897 at SFO

WB: Time Out: 3:30; Time In: 12:45

Resolution: No GTU record of 897 at SFO and no SFO entries on WB⁶

Additional Discrepancy: Halloween, October 31, 2005

⁶ Excluded Exbt. H registered Mr. Neilly at SFO at 6:25PM

The Amended Complaint alleges that Mr. Neilly submitted two overlapping WB's for October 31, 2005, evidence of fraud.

Time out on the first WB is 10:15, time in 7:30; the second WB shows time out at 2:30, time in 10:30 [Exbt. I, Amended Complaint].

Resolution: Mileage on the first WB is 123,544 to 123,580; mileage on the second WB is 123,580 to 123,615 indicating no gap or overlap. The National roster shows Mr. Neilly working both AM and PM on October 30, 2005 and again in the AM on October 31st. A possible sequence is that Mr. Neilly worked 10:15AM to 7:30PM on the 30th (mistakenly entering it as the 31st) and then drove again on the 31st from 2:30AM to 10:30AM. It would be more likely that he drove from 2:30PM to 10:30PM on the 31st (Halloween) but the National schedule shows him driving the AM shift on the 31st.

It is difficult to reconcile Mr. Neilly's driving hours on October 31st with the AM designations on the National schedules for that date. However, this discrepancy is not sufficient to support an inference of probable fraud on Mr. Neilly's part in light of the fact that the mileage readings dovetail.

B. 2006

January 7, 2006

GTU: cab 897 arrives SFO 9:09AM, exits 9:12AM

WB: Time Out: 5:00; Time In 3:00. No SF fare; in SF c. 9AM

Resolution: Commission has not proved Neilly worked in AM; National schedule shows Neilly worked PM although his WB has no AM/PM; other driver "Anyanwunwa" appears to have been at airport although his waybill also omits AM/PM

January 14, 2006

GTU: cab 897 arrives SFO 9:30AM, exits 10:46AM

WB: Time Out: 5:50; Time In: 4:00. No SF fare

Resolution: Commission has not proved Neilly worked in AM.

February 11, 2006

GTU: cab 897 arrives SFO 12:10PM, exits 12:45PM

WB: Time Out: 3:30; Time In: 1:30

Resolution: Commission has not proved Neilly worked noon hour when GTU has him at SFO. Neilly's WB show him starting work a few hours later, if WB is PM.

May 28; September 16; October 1, 2006

GTU: no record for cab 897 any of these days

WB: SFO fares for each of these days

Resolution: SFO fares on WB's may reflect real trips to airport but cab 897 may have "deadheaded", i.e., returned to SF without picking up fare; thus not recorded in GTU logs.

XIII. CONCLUSIONS and FINDINGS

The hearing officer is unable to reconcile Mr. Neilly's waybills with the GTU logs for **May 22, 2005; June 11, 2005; and October 22, 2005**. For each of these dates Mr. Neilly's waybills effectively "hindered the ability of the Taxicab Commission or their designee in a matter relating to regulatory compliance," i.e., in enforcing the Prop. K FTDR. [Rule 4.A.12]. These waybills misrepresent Mr. Neilly's actual driving on those three days. As such, they are a violation of 4.A.12, even without reaching the issue of whether Mr. Neilly "knowingly made false or misleading statements" by submitting them. The submission of false waybills obstructs the Commission in its effort to enforce Prop. K.

However, it is likely that Mr. Neilly submitted these three waybills knowing that he was making a "false statement or concealing information from the Taxi Commission." [MPC 1090(iv)] Therefore it is a close call whether Mr. Neilly should be subject to mandatory revocation under the parallel language of MPC 1090(iv). Nevertheless, because the Commission was able to present only three instances of likely fraud, the hearing officer declines to revoke under MPC 1090(iv).

Findings

By a preponderance of the evidence, Mr. Neilly committed three violations, within one year, of Rule 4.A.12.

By violating Rule 4.A.12, Mr. Neilly also committed three counts of Rule 4.A.1 which requires medallion holders to comply with all relevant codes.⁷

Notwithstanding these three violations and other evidence of discrepancies between Mr. Neilly's waybills and the GTU records for 2005 and 2006, the Commission failed to prove by a preponderance of the evidence that Mr. Neilly fell short of the FTDR for 2005

⁷ The SF Charter; MPC; Traffic Codes of the City and County of S.F.; Ca Vehicle Code the Taxicab Commission Rules and Regulations, etc..

or 2006. The Commission examined twenty dates on which it found Mr. Neilly's waybills suspect. Three violations in twenty days amount to a fifteen percent deficit in shifts. Mr. Neilly depended on driving hours rather than shifts to meet the FTDR. Nevertheless, if fifteen percent is deducted from 808 hours for 2005, and fifteen percent from 858 hours for 2006, Mr. Neilly may be presumed to have driven only 687 hours in 2005 and 729 hours for 2006, well below the FTDR.

However, the hearing officer is reluctant to base a decision to revoke on a formula that calculates a percentage reduction of driving hours over two years. The Commission staff needed to provide more rigorous data regarding Mr. Neilly's driving hours than the sampling it presented.

Finding

The Commission failed to prove by a preponderance of the evidence that Mr. Neilly violated MPC 1081(b) for 2005 or 2006.

XIV. RECOMMENDED DECISION

Under Section 1090 of the S.F. Municipal Police Code, the Taxicab Commission may penalize any taxicab permit issued under Article 16 for good cause, after a noticed hearing. "Good cause" includes, but is not limited to cases in which 'the permittee violated any applicable statute, ordinance, rule or regulation pertaining to the operation of licensing of the vehicles and services regulated by [Article 16], including any rules and regulations enacted by the Chief of Police pursuant to this Article."

Mr. James Neilly, having been provided a noticed hearing and an opportunity to fully contest the charges against him, good cause exists to impose the following orders under the evidence and arguments contained in this decision.

The hearing officer recommends that the record be left open in this case for the year 2007 in case new evidence emerges regarding Mr. Neilly's compliance with MPC 1081(b) for that period. If so, the Commission may file a new or amended Complaint in light of new evidence. Such charges may include, but are not restricted to MPC 1081(b) or MPC 1090 (iv) or Rule 4.A.12.

The hearing officer also recommends that Mr. Neilly be placed on two years' probation, from the date the Commission adopts this recommendation, during which time the Commission staff shall conduct quarterly audits of Mr. Neilly's waybills and evaluate any other relevant evidence of his compliance with MPC 1081(b) and MPC 1090(iv), or Rule 4.A.12, as well as all other Commission Rules and MPC regulations referenced on p. 4 of this decision.

If during two or more quarterly audits during any twelve month period there is evidence that Mr. Neilly has failed to comply with the FTDR (pro rated for the audited period) a new disciplinary hearing shall be held in which Mr. Neilly's permit shall be subject to an

extreme presumption for revocation.⁸ The quarterly audits may begin at any time following the Taxicab Commission's adoption of this proposed decision and may include 2007.

In addition to probation, Mr. Neilly shall be subject to fines for the following violations:

4.A.12, three counts within one year:

May 22, 2005:	\$250
June 11, 2005:	\$400
October 22, 2005	\$500

4.A.1, three counts within one year:

May 22, 2005:	\$ 25
June 11, 2005:	\$ 50
October 22, 2005	\$150

Total: \$1375

Given Mr. Neilly's past history of non-compliance with the FTDR, and the violations found above, the hearing officer recommends the following additional disciplinary measures:

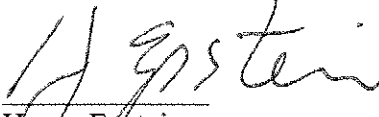
Mr. Neilly shall keep accurate and legible waybills in full and strict compliance with all requirements of MPC 1138 **a-n**, with special attention to **(e)**, mandatory entry of **AM** and **PM** for start and conclusion of shifts.⁹ Any waybill that does not contain **a-n** and the

⁸ Note that the 12 month period need not be a calendar year, and the quarters are intended simply as three month periods and need not correspond to fiscal or administrative quarters.

⁹ Drivers of taxicabs and motorized rickshaws shall keep an accurate and legible waybill, which waybill shall set forth the following information:

- (a) Date of waybill;
- (b) Driver's name;
- (c) Vehicle number and vehicle license number;
- (d) Number of medallion issued by the Police Department;
- (e) Time driver began for period covered by waybill;
- (f) Starting mileage of the taxicab for period covered by waybill;
- (g) Starting meter units for the period covered by the waybill;
- (h) Ending time for the period covered by the waybill;
- (i) Ending mileage of the taxicab for the period covered by the waybill;
- (j) Ending meter units for the period covered by the waybill;
- (k) Number of passengers for each trip;
- (l) The origin and destination of each trip;

AM/PM designation shall not be credited towards the FTDR and shall give rise to a *prima facie* presumption of fraud.



Henry Epstein
Hearing Officer
San Francisco
Taxicab Commission

August 18, 2008

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- (m) The charges authorized and made for each trip;
 - (n) The time of hire and discharge for each trip.