

STATE OF NORTH CAROLINA
COUNTY OF

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
13CPS09535

<p>GARRETT'S TOWING & RECOVERY LLC, Petitioner,</p> <p>v.</p> <p>NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY, STATE HIGHWAY PATROL, Respondent.</p>	<p>FINAL DECISION</p>
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THIS MATTER comes before the Office of Administrative Hearings on a petition for a contested case hearing under G.S. 150B-23(a) filed on March 5, 2013, by Petitioner, GARRETT'S TOWING & RECOVERY, LLC. The hearing occurred before Administrative Law Judge Beecher R. Gray on September 25, 2013, in High Point, North Carolina. Petitioner's Summary Judgment Motion and Affidavit, filed on September 13, 2013, and Respondent's Response in Opposition were considered, and Petitioner's Summary Judgment Motion was denied at the beginning of this hearing. After hearing the testimony of the witnesses presented for Petitioner and Respondent; reviewing all exhibits and materials presented; and considering all relevant cases, laws, and rules, I make the following:

FINDINGS OF FACT

1. The parties received notice of hearing by certified mail more than 15 days prior to the hearing, and each stipulated on the record that notice was proper.
2. By letter dated January 14, 2013 (R. Ex. 11), Captain M.D. Hayes of the N.C. Department of Public Safety, State Highway Patrol, acting on behalf of Respondent, confirmed to Petitioner that Respondent was removing Petitioner's company, Garrett's Towing & Recovery, LLC, from the Highway Patrol's Rotation Wrecker List in Davidson County. The letter states as grounds for the removal that Petitioner did not have a previously-inspected and approved small wrecker assigned only to the Thomasville Rotation Wrecker List or a previously-inspected and approved large wrecker solely assigned to the Davidson County Large Wrecker Rotation List. Respondent's letter consequently determined that Petitioner was not in compliance with N.C. Administrative Code 14A NCAC 09H.0321(a)(3), (now codified at 14B NCAC 07A.0116(a)(3)), which provides:

- (a) The Troop Commander shall include on the Patrol Rotation Wrecker List only those wrecker services which agree in writing to adhere to the following provisions:

[...]

- (3) Wrecker service facilities and equipment, including vehicles, office, telephone lines, office equipment and storage facilities may not be shared with or otherwise located on the property of another wrecker service and must be independently insured. Vehicles towed at the request of the Patrol must be placed in the storage owned and operated by the wrecker service on the rotation list. A storage facility for a small wrecker shall be located within the assigned zone. For wrecker services with large wreckers the storage facility for vehicles towed with the large wrecker may be located anywhere within the county. To be listed on the large rotation wrecker list, a wrecker service must have at least one large wrecker. To be listed on the small rotation wrecker list, a wrecker service must have at least one small wrecker. In any case where husband and wife or other family members are engaged in the business of towing vehicles and desire to list each business separately on the Patrol wrecker rotation list, the wrecker service shall establish that it is a separate legal entity for every purpose, including federal and state tax purposes.

- 3. The phrase “wrecker service” is defined in 14A NCAC 09H.0308(2) (now codified at 14B NCAC 07A.0103(2)) as follows:

- (2) Wrecker Service. A person or corporation engaged in the business of, or offering the services of, and owning a wrecker service or towing service whereby motor vehicles are or may be towed or otherwise removed from one place to another by the use of a motor vehicle manufactured and designed for the primary purpose of removing and towing disabled motor vehicles.

- 4. Petitioner’s evidence included the testimony of the company’s owners, Terry and Misty Scarlette, as well as the testimony of Douglas Monroe, a former Lieutenant with the State Highway Patrol. Petitioner’s evidence established that:

- a. Petitioner was incorporated as a Limited Liability Company (“LLC”) in North Carolina on April 6, 2000, and operates from three business locations, one each in Guilford, Randolph, and Davidson Counties, all three business locations being a part of and under Garrett’s Towing and Recovery Service, LLC.

- b. Petitioner's insurance policy was admitted into evidence as P. Ex. 8; Captain Babb, testifying on behalf of Respondent, stated that Petitioner properly was insured.
 - c. Captain Babb also testified that Respondent treats this Petitioner as operating three (3) separate wrecker services, as defined and used in 14B NCAC 07A.0116(a)(3) and 14B NCAC 07A.0103(2), and therefore violates the prohibition against sharing of facilities, equipment, or storage facilities of *another wrecker service*. (emphasis added).
 - d. Petitioner began participating in the Highway Patrol's Rotation Wrecker List for Randolph and Davidson Counties in 2000 and for Guilford County in 2004. In 2009, the State Highway Patrol removed Petitioner from the Davidson County large wrecker rotation list.
 - e. By agreement of the parties following Petitioner's petition for a contested case (09 CPS 06104), Petitioner was added back to the Davidson County large wrecker rotation in or about April 2010. Petitioner continued to service the wrecker rotation list for all three counties until November 2012 when Respondent again removed Petitioner from the Davidson County list for large and small wrecker service. Petitioner appealed Respondent's action.
 - f. Throughout its period of operation, Petitioner normally serviced the wrecker lists for Guilford, Randolph, and Davidson Counties by using seven vehicles, which included two small wreckers, two large wreckers, and three rollbacks.
 - g. During its period of service on the wrecker lists for the three counties, Petitioner did not have any incident where it failed to provide service as requested in a timely fashion.
 - h. According to the testimony of former state trooper Douglas Monroe, Petitioner operated a respected company maintaining full compliance with the rules codified under N.C. Administrative Code 14B NCAC 07A.0116(a)(3) for participation in the State Highway Patrol rotation wrecker service.
5. Respondent's evidence included the testimony of Captain Jeffrey Babb and First Sergeant D.B. Garland. Respondent's evidence established that Respondent did remove Petitioner from the Davidson County wrecker rotation list in November 2012 as set forth in R. Ex. 6 and confirmed that decision in January 2013 as set forth in R. Ex. 11.
 6. According to the testimony of Captain Babb and First Sergeant Garland on behalf of Respondent, Respondent removed Petitioner from the list because Petitioner failed to comply with the requirements of N.C. Administrative Code 14B NCAC 07A.0116(a)(3) by (1) failing to assign one small and one large wrecker for use exclusively in Davidson County and by (2) sharing facilities and equipment with another wrecker service.

Based upon the foregoing findings of fact, I make the following:

CONCLUSIONS OF LAW

1. The parties properly are before the Office of Administrative Hearings.
2. Petitioner's use of three business locations--one each in Davidson, Guilford, and Randolph Counties--does not violate the rules cited by Respondent because all three business locations used by Petitioner are under one Limited Liability Company, and Petitioner's use of three business locations does not constitute a sharing arrangement with another wrecker service.
3. Respondent acted erroneously and failed to act as required by its own rules by removing Petitioner from the Davidson County wrecker list as contained in Respondent's Exhibits 6 and 11 in that N.C. Administrative Code 14A NCAC 09H.0321(a)(3) and 14A NCAC 09H.0308(2) (now codified at 14B NCAC 07A.0116(a)(3) and 14B NCAC 07A.0103(2), respectively) do not contain provisions requiring Petitioner to designate a small and large wrecker for use solely in Davidson County--or in any other county--and do not prohibit one corporation from having three business locations for its wrecker service. Respondent's treatment of Petitioner's three business locations under one LLC as constituting three unrelated wrecker services is erroneous as a matter of law.
4. Petitioner is one corporation operating in three locations and does not share facilities or equipment with "another wrecker service" as that term is defined by 14B NCAC 7A.0103(2) (previously 14A NCAC 09H.0308(2)); Petitioner therefore complies with the rules under N.C. Administrative Code 14B NCAC 07A.0116(a)(3) (previously 14B NCAC 09H.0321(a)(3)).

FINAL DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, I find that Respondent's interpretation of its rules in this case is erroneous and that Respondent did not act as required by its own rules. Petitioner has been harmed by the action of Respondent in this case and is entitled to relief in the form of reinstatement to the top of the Davidson County wrecker rotation list until such time as Petitioner adequately has been compensated for its erroneous exclusion from that list. Respondent is directed to refrain from requiring Petitioner to designate a small or large wrecker for use solely in one county as a condition precedent to Petitioner's participation in Respondent's Rotation Wrecker Service List, until such time as Respondent properly amends its rule to include such provisions in a manner that does not exceed its statutory authority and jurisdiction.

NOTICE

Under the provisions of North Carolina General Statute 150B-45, any party wishing to appeal the final decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of Wake County or in the Superior Court of the county in which

the party resides. **The appealing party must file the petition within 30 days after being served with a written copy of the Administrative Law Judge's Final Decision.** In conformity with the Office of Administrative Hearings' rule, 26 N.C. Admin. Code 03.0102, and the Rules of Civil Procedure, N.C. General Statute 1A-1, Article 2, **this Final Decision was served on the parties the date it was placed in the mail as indicated by the date on the Certificate of Service attached to this Final Decision.** N.C. Gen. Stat. §150B-46 describes the contents of the Petition and requires service of the Petition on all parties. Under N.C. Gen. Stat. §150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal is initiated in order to ensure the timely filing of the record.

This the 25th day of October, 2013.

Beecher R. Gray
Administrative Law Judge