

BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

South Valley Station,)
Yerington, Nevada 89447)

Docket No. A2012-108

OPPOSITION OF THE PUBLIC REPRESENTATIVE TO
UNITED STATES POSTAL SERVICE MOTION TO STRIKE

(March 27, 2012)

I. INTRODUCTION

On March 20, 2012, the Postal Service filed a motion to strike the Public Representative's comments because the Postal Service does not like arguments that the Public Representative makes or how she conducted her due diligence.¹ The Motion also personally attacks the Public Representative by suggesting that the Commission should pursue internal action against the Public Representative for advocating certain positions on behalf of her constituency.

It would be wholly inappropriate for the Commission to allow the Postal Service to silence this Public Representative, and with it, the voice of the general public, merely because the Postal Service does not agree with certain statements made or information provided in Public Representative pleadings. The Commission should ask the Postal

¹ Motion by the United States Postal Service [sic] to Strike Reply Comments of Public Representative, March 20, 2012 (Motion to Strike).

Service, especially in light of its financial difficulties, to constrain its filings to matters related to the instant proceeding.

Under the Commission's rules, motions to strike "are requests for extraordinary relief." 39 CFR 3001.21(c). This Motion to Strike is nothing more than an attempt to harass a non-lawyer² Public Representative into silence, and with it, the general public's best interests.³ The Public Representative urges the Commission to send a strong message that such behavior is not tolerated – so other Public Representatives and other participants do not feel intimidated by the Postal Service.

This reply addresses the Postal Service's unfounded Motion to Strike in more detail. First, it discusses the inappropriateness of an opposing party alleging that a representative is not effectively advocating on behalf of the representative's constituency. Second, it highlights why the Postal Service's allegations of ethical violations are without merit. Third, this response addresses why disciplining the Public Representative for effectively advocating on behalf of the general public would create a chilling effect on all Public Representatives and may deter others from participating in Commission proceedings. Fourth, it explains why having a point of view of the law and facts that differs from that advocated by the Postal Service is acceptable, and even encouraged in our legal system. Finally, this response discusses why the Public Representative's acceptable position regarding the incomplete administrative record filed by the Postal Service is also not a basis to strike the Public Representative's comments.

² The Postal Service apparently recognizes that the undersigned Public Representative is not a lawyer. See Motion to Strike at 7 n.18 ("Postal Service officials have no specific knowledge whether this Public Representative sought or received advice of counsel."). Of course, it would be inappropriate for the Postal Service to inquire into whether this Public Representative received advice of counsel. That may raise serious issues of attorney-client privilege. Likewise, it is no business of the Public Representative as to whether Postal Service counsel received approval of his superiors before filing this Motion to Strike.

³ Indeed, the Public Representative must be fulfilling her mission if the Postal Service believes that it is in its best interest, given its dire financial problems, to waste scarce resources filing a lengthy motion without merit.

II. IT IS INAPPROPRIATE FOR AN OPPOSING PARTY TO ALLEGE THAT A REPRESENTATIVE IS NOT APPROPRIATELY ADVOCATING ON BEHALF OF THE REPRESENTATIVE'S CONSTITUENCY

It is extremely troubling that the Postal Service believes that it has a say in another party's strategy or the arguments that another party may make to the Commission in a particular proceeding. In a criminal proceeding, for example, the prosecutor does not get to tell the judge or jury that defense counsel was incompetent or did not effectively advocate on behalf of his or her client. It is not for an opposing party to evaluate whether another party is effectively representing the other party's interests. Obviously, the opposing party would have ulterior motives in making such a motion – its own interests – rather than the best interests of another party.

By statute, the Commission appointed the undersigned Public Representative to represent the interests of the general public. It did not – and by statute could not – appoint the Postal Service or Postal Service's counsel to represent those interests. Congress recognized that members of the Commission's staff, rather than employees of the Postal Service, were the best entities to represent the interests of general public in proceedings before the Commission.

The Postal Service attempts to use the former Office of Consumer Advocate's (OCA) mission statement as a sword against this Public Representative as if, somehow, the Postal Service has a say in whether the Public Representative is fulfilling her mission to her constituency. Putting aside for a moment the fact that the former OCA's mission statement is probably not applicable to the current Public Representative program, it is not for the Postal Service to decide if the general public is satisfied with a Public Representative's work. That is for the general public to determine and, by proxy, the Public Representative's superiors. This Public Representative does not answer to the Postal Service.

III. THE POSTAL SERVICE'S ALLEGED ETHICAL CONDUCT VIOLATIONS ARE WITHOUT MERIT

The Postal Service and its counsel make allegations that the undersigned Public Representative violated the Model Rules of Professional Conduct for lawyers. In this section, the Public Representative explains why a non-lawyer cannot violate a lawyer's ethical obligations, and even if the Public Representative were a lawyer, the Public Representative did not violate any applicable ethical rules for lawyers.

A. A Non-Lawyer Cannot Violate a Lawyer's Ethical Obligations

The Postal Service appears to allege that the Public Representative must follow the model rules of professional conduct for lawyers. To state the obvious, non-lawyers are not bound by rules of professional conduct for lawyers.⁴ The Public Representative in this case is not a lawyer and, as such, cannot be brought in front of a state's bar association for violating a lawyer's ethical obligations, such as, for example, the obligation that "a lawyer's fee shall be reasonable." D.C. Rules of Prof'l Conduct R. 1.5(a).

B. Even if the Public Representative Were a Lawyer, the Public Representative's Actions are Explicitly Allowed Under the Applicable Ethical Rules for Lawyers

Even if the Public Representative were a lawyer, she clearly did not violate any applicable ethical rules for lawyers. As every law student knows, the Model Rules of Professional Conduct for lawyers cited by the Postal Service are just that, model rules. They have not been adopted in their entirety by any state bar association in the United States. Each state and Federal court bar adopts its own rules of professional conduct, which can and do differ considerably from the Model Rules.

⁴ Of course, the Commission does not require a representative to be a lawyer to file pleadings in cases before the Commission. See 39 CFR 3001.6.

The Commission has also adopted its own set of ethical rules for regulating lawyers' conduct. Former Chairman Dan G. Blair stated in one of his Presiding Officer's Rulings that "[s]ince the Commission is located in the District of Columbia, attorneys' practicing in front of the Commission must follow the current D.C. Rules of Professional Conduct."⁵

With respect to a lawyer's obligations in contacting individuals in the context of a legal proceeding, the applicable rule is Rule 4.2 of the D.C. Rules of Professional Conduct entitled "Communication Between Lawyer and Person Represented by Counsel." That section clearly states that

During the course of representing a client, **a lawyer may communicate about the subject of the representation with a nonparty employee of an organization without obtaining the consent of that organization's lawyer.** If the organization is an adverse party, however, prior to communicating with any such nonparty employee, a lawyer must disclose to such employee both the lawyer's identity and the fact that the lawyer represents a party that is adverse to the employee's employer.

D.C. Rules of Prof'l Conduct R. 4.2(b) (emphasis added). The comments to Rule 4.2 are also instructive. Comment 2 states that "[a]lso, parties to a matter may communicate directly with each other and a lawyer having independent justification for communicating with the other party is permitted to do so." D.C. Rules of Prof'l Conduct R. 4.2(b) cmt. 2. Clearly, Comment 2 bolsters the Public Representative's position that, as a party, who is not a lawyer, it is completely appropriate for her to discuss matters directly with other parties and their employees.

Comment 4 to D.C. Rules of Professional Conduct R. 4.2 states:

The rule does not prohibit a lawyer from communicating with employees of an organization who have the authority to bind

⁵ See Docket No. C2008-3, Presiding Officer's Ruling Denying Motion of Bank of America Corporation to Limit the Scope of this Proceeding or Disqualify Counsel, Ruling No. C2008-3/31, October 31, 2008.

the organization with respect to the matters underlying the representation if they do not also have authority to make binding decisions regarding the representation itself. A lawyer may therefore communicate with such persons without first notifying the organization's lawyer. See D.C. Bar Legal Ethics Committee Opinion No. 129.

D.C. Rules of Prof'l Conduct R. 4.2(b) Cmt. 4. As the Postal Service repeatedly argues, the only actual decision maker with authority to bind the Postal Service in post office closing cases is its Vice President of Delivery and Post Office Operations. Because the Public Representative did not speak to Mr. Granholm on this matter, no lawyer's ethical obligation has been violated.⁶

Additionally, the information sought by the Public Representative through Postal Service employees in this proceeding is information that would be obtainable under the Freedom of Information Act. As comment 9 explains, obtaining such information through an organization's employees without the approval of counsel is entirely appropriate. Rule 4.2

does not apply to the situation in which a lawyer contacts employees of an organization for the purpose of obtaining information generally available to the public, or obtainable under the Freedom of Information Act, even if the information in question is related to the representation. For example, a lawyer for a plaintiff who has filed suit against an organization represented by a lawyer may telephone the organization to request a copy of a press release regarding the representation, without disclosing the lawyer's identity, obtaining the consent of the organization's lawyer, or otherwise acting as paragraphs (a) and (b) of this rule require.

⁶ It also bears noting that the vast majority of the Public Representative's communications with a "Postal Service employee" were those of a Postmaster, who is in fact a petitioner in this case. Even under the Postal Service's strained legal theory, the Public Representative should be free to contact other petitioners.

D.C. Rules of Prof'l Conduct R. 4.2(b) Cmt. 9 (emphasis added). Accordingly, had the Public Representative been a lawyer, she clearly did not violate any applicable ethical rules for lawyers.

C. Postal Service Counsel Cannot Shirk Its Responsibilities to Notify its Employees of its Litigation Policies

If Postal Service counsel has a litigation policy of requiring its employees to avoid speaking with Public Representatives, it needs to let its employees know of that policy and be responsible for its implementation. It is inappropriate and unfair to require the Public Representative to go beyond what is legally required (even more so than what is required for lawyers) and avoid all contact with individuals who may have information relevant to a case. The Public Representative needs to be able to act within the bounds of the law to advocate on behalf of the general public. It should not be hampered in this responsibility by also being required to act in the best interests of Postal Service counsel as well.

IV. GRANTING THIS MOTION WOULD CREATE A CHILLING EFFECT THAT WOULD RIPPLE THROUGHOUT THE ENTIRE PUBLIC REPRESENTATIVE PROGRAM AND MAY DETER OTHER PARTICIPANTS FROM COMMUNICATING INFORMATION TO THE COMMISSION

The Postal Service is apparently not content with merely asking the Commission to silence the voice of the general public in this proceeding. It is also suggesting it is appropriate for the Commission to reprimand the Public Representative for her strategy in advocating on behalf of her constituency. The Postal Service's Motion to Strike asks the Commission to "pursu[e] any additional internal action that the Commission may conclude is warranted" against the Public Representative." Motion to Strike at 2. The Postal Service seems to be requesting that the Commission or the Public Representative's supervisors take some sort of negative disciplinary action. Such a request is out of line and without foundation.

As discussed above, it is completely improper for the Postal Service to tell an opposing party's representative that it is not appropriately advocating on behalf of its client or constituency. It is even more disturbing for the Postal Service to suggest that the Commission take internal personnel action against an individual for advocating on behalf the general public in a way that is not pleasing to the Postal Service.

Indeed, if a Public Representative could have internal personnel disciplinary action taken against them by the Commission or their supervisors merely because of the positions they are advocating in a proceeding, the threat of such action would create a chilling effect on the entire public representative program. The "ethical wall" that exists between Public Representatives and the Commission as a decision-making body would crumble. Public Representatives would cease taking positions they thought might be contrary to current Commission positions for fear of reprisal or the risk of being fired. The real loser in this situation, of course, would be the general public, who would lose their statutorily mandated advocate. The potential for adverse disciplinary action may also deter other parties from participating in Commission proceedings or providing relevant information to the Commission.

V. HAVING A POINT OF VIEW OF THE LAW AND FACTS THAT DIFFERS FROM THAT ADVOCATED BY THE POSTAL SERVICE IS NOT A BASIS TO STRIKE THE PUBLIC REPRESENTATIVE'S COMMENTS

The Postal Service spends a great deal of its motion stating its view that the Public Representative is "incorrect" about the applicability of certain federal laws and regulations in this case. The Public Representative believes that the Postal Service is wrong in its interpretation of the law and facts in those circumstances.⁷ This should not be surprising to anyone.

On a daily basis, lawyers, federal and state agencies, legislators, and others disagree on interpretations of various aspects of the law and the facts as applied to

⁷ The Public Representative will be filing supplemental comments on the merits of this case addressing these circumstances.

those laws. Routinely, opposing parties disagree. One party advocates one position and another party advocates an opposite position. Such is the nature of the adversarial process and litigation in our society. Courts and other decision makers are tasked with reviewing those opposing viewpoints and making the final determinations in those cases as to the correct interpretations. It is surprising, however, that the Postal Service does not believe that the decision maker, the Commission, is capable of reviewing all of the arguments and making a determination as to which one is correct. Instead, the Postal Service wants to silence the general public's voice and unilaterally remove the Public Representative's viewpoints from consideration. This is completely inappropriate. The Postal Service should not be able to ask the Commission to remove points of view that it does not agree with any more than it would be appropriate for any party, including the Public Representative, to ask the Commission to strike the Postal Service's pleadings that set forth arguments that the Public Representative believes will not prevail.

VI. THE PUBLIC REPRESENTATIVE'S POSITION THAT THERE ARE MATERIAL DEFECTS AND OMISSIONS IN THE ADMINISTRATIVE RECORD IS NOT A BASIS TO STRIKE THE PUBLIC REPRESENTATIVE'S COMMENTS

The Postal Service also wants to strike the Public Representative's comments and silence the general public's voice because the Postal Service disagrees with the Public Representative's view of what should be included in the Administrative Record as part of the "record on review." Once again, it appears that the Postal Service believes that any points of view that are contrary to the Postal Service's must be silenced.

In her comments, the Public Representative has asserted that certain key pieces of information are ambiguous or missing from unclear the Administrative Record that the Postal Service filed with the Commission in this case. That is, she is arguing that the record filed by the Postal Service is not the complete "record on review" under 39 CFR 3025.21. The Public Representative firmly believes that the Commission is entitled to the full "record on review" and has included relevant missing information, where

appropriate, as part of the filing of her comments to help the Commission determine whether particular provisions of law apply.⁸

The record on review is not determined unilaterally by the Postal Service. It is determined by the Commission after hearing all arguments from all interested parties.⁹ The Postal Service does not get to choose which arguments the Commission should refrain from hearing.

Additionally, the Postal Service's final determination must be supported by "substantial evidence" under 39 U.S.C. 404(d)(5)(c). The Public Representative should be free to argue that the final determination is not supported by substantial evidence through the use of contrary evidence. The Postal Service does not get to decide what evidence the Public Representative may use in advocating on behalf of the general public.¹⁰

⁸ Under 39 U.S.C. 404(d)(5)(A), the Commission is required to overturn Final Determinations that are "otherwise not in accordance with the law." The Public Representative has outlined in her comments (and will further clarify in her forthcoming supplemental comments) the relevant information to help the Commission determine if certain actions of the Postal Service are "otherwise not in accordance with the law."

⁹ Additionally, the "record on review" as determined by the Commission is explicitly defined to include "[a]ll documents submitted in the appeal proceeding." See 39 CFR 3025.112(a)(4). This would include those documents and pleadings submitted by the Petitioner and other participants.

¹⁰ The Postal Service also suggests that the Commission does not have jurisdiction under 404(d) to respond to a complaint on behalf of disabled members of the public. See Motion to Strike at 9. First, the Commission has an obligation to overturn Final Determinations that are "not in accordance with the law." See 39 U.S.C.404(d)(5)(A). Postal Service violations of Federal statutes that protect the disabled or other special needs individuals would certainly qualify as actions that are "not in accordance with the law." Second, the Commission does have jurisdiction to hear certain types of complaints under 39 U.S.C. 3662 or appoint an investigator under 39 CFR 3030.21 or 3031.12 to investigate certain matters. As part of her comments, the Public Representative brought certain troubling issues to the Commission's attention in case the Commission sought to have a Public Representative initiate a complaint or appoint an investigator to pursue the matter further.

VII. CONCLUSION

For the reasons discussed above, the Public Representative urges the Commission to deny the Postal Service's Motion to Strike and send a strong message to the Postal Service that such behavior is not tolerated – so other Public Representatives and other participants do not feel intimidated by the Postal Service.

Respectfully Submitted,

/s/ Robert Sidman

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/s/ Manon A. Boudreault

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