

**STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
PUBLIC UTILITIES AND CARRIERS (“DIVISION”)**

**IN RE: THE RHODE ISLAND PUBLIC
TOWING ASSOCIATION’S PETITION
FOR DECLARATORY JUDGMENT
OR DECLARATORY RULING**

DOCKET NO. D-10-26

**LEGAL MEMORANDUM OF THE
MOTOR CARRIER SECTION OF THE DIVISION OF PUBLIC
UTILITIES AND CARRIERS**

Now comes the Motor Carrier Section of the Division of Public Utilities and Carriers Advocacy Section (“Advocacy Section”) and hereby submits the following memorandum of law in response to the issue presented to the Division by Rhode Island Public Towing for Declaratory Ruling.

I. STATEMENT OF MATERIAL FACTS AND TRAVEL OF CASE

On or about February 15, 2010, the Plaintiff filed a Complaint against Thomas F. Ahern Administrator of the Rhode Island Division of Public Utilities and Carriers (“Division”). The filing of the Complaint was preceded by a series of correspondence between the Plaintiff and the Division. Initially, the Plaintiff informally requested the

Division's opinion regarding its interpretation of certain provisions of the Rhode Island Towing Storage Act, Title 39, Ch. 12.1. The Plaintiff's request was based on the incorrect understanding that the Division had advised the Warwick Police Department that "if the vehicle owner insists on the return of their vehicle, the public tower must forthwith return the vehicle to that owner, even if it is a police department tow and the police department does not consent to and does not authorize release."

In response to the request, on December 21, 2009, the Division replied to the Plaintiff. The Division observed that the question posed to the Division was whether it would be proper "to bill the vehicle owner for the storage fees associated with vehicles held by a certificated tower resulting from a police department-ordered impound." The Division responded that "it would be improper for a certificated towing company to charge the vehicle owner for the storage days directly linked" to such an impound. The Division based this informal opinion on two grounds: (i) the charges were "not authorized" under "any approved tariff" and "no specific authorization for these charges exist under statutory law or the Division's Rules and Regulations Governing the Transportation Provided by Motor Carriers of Property ('Rules')", and (ii) as the vehicle is being "ordered held by a police department, which, in effect prevents the vehicle owner from retrieving his or her vehicle, the police department would be the proper party to bill for these storage services."

Subsequently, the Plaintiff and the Division engaged in a second set of correspondence. On January 11, 2010, the Plaintiff again suggested that it believed the certificated tower does not have any authority to release a vehicle "relative to a Police Department investigation without prior approval of the Police Department." The

Plaintiff also stated its belief that the “vehicle owner is the responsible party for the storage fees.”

On January 20, 2010, the Division responded to the Plaintiff’s January 11, 2010 letter, clarifying that “police departments possess the legal authority to order that a vehicle be impounded” but observing that under the Act and the Rules, “[a] certificated towing company is authorized by law to collect storage rates only when the vehicle owner voluntarily elects to delay the pick-up of his or her vehicle from the tower’s storage lot.” When a vehicle is impounded by the police, “the vehicle owner no longer exercise[s] control over the vehicle.” No authority exists for imposing these involuntary storage fees on vehicle owners.

In the next instance, the Division became a defendant in a Superior Court proceeding when the Plaintiff sued the agency on or about February 15, 2010, seeking a preliminary injunction/declaratory ruling against enforcement of the Division’s “informal opinion.” After several appearances in Superior Court, the matter was then returned to the Agency for determination.

II. QUESTION PRESENTED

Whether the storage fees imposed by a certificated tower on a police department instigated motor vehicle storage impoundment at a private storage lot may be assessed against the owner of said motor vehicle, or is it the liability and financial responsibility of the police department instigating the tow?

III. DISCUSSION

In its review of the statutory section, the Division should be guided by the very well established rules of statutory construction set-forth in a long line of cases handed down from the Rhode Island Supreme Court. The following fundamental principles of statutory construction are dispositive of the issue presented here. The Rhode Island Supreme Court has held in construing a statute that the Court's "ultimate goal" is to give effect to the General Assembly's intent. State v. Menard, 888 A.2d 57, 60 (R.I. 2005). The primary indicia of the Legislature's intent "can be found in the plain language used in the statute." Martone v. Johnston School Committee, 824 A.2d 426, 431 (R.I. 2003). The language of a statute must be given its "plain and ordinary meaning[]." Accent Store Design, Inc. v. Marathon House, Inc., 674 A.2d 1223, 1226 (R.I. 1996). When a statute is silent or ambiguous, the courts should defer to the agency's legal interpretation. City of Providence School Dept. v. Rhode Island State Labor Relations Bd., 2005 WL 1530480, 2 (R.I.Super. 2005) *citing* Labor Ready Northeast, Inc. v. McConaghy, 849 A.2d 340, 345-346 (R.I.2004). Here the Towing Storage Act is silent on the issue of storage fees in a police instigated vehicle "hold."

STATUTORY AUTHORITY

§39-12.1 THE TOWING STORAGE ACT

The Towing Storage Act was enacted by the legislature in the interest of the public with enforcement thereof resting with the Division of Public Utilities. "The General Assembly has given the PUC, by way of the Towing Storage Act, § 39-12.1-1, the well-defined responsibility to protect the public from unreasonable charges at the

hand of the carrier, especially in instances where the towing service has been initiated by law enforcement.” Sterry Street Towing Inc. v. Division of Public Utilities & Carriers, 2005 WL 1109610 (R.I. Super. 2005). Nowhere in the Towing Storage Act, RIGL § 39-12-12.1, et al., is the right to impound vehicles conferred upon the police.

Section 39-12.1-1

The policy and purpose of the statute is to regulate towers for the protection of the public. Inherent in this section is to ensure that owners’ rights of due process are not violated. The police powers, while not derived from this Act, include the right to remove vehicles from the highways.

§ 39-12.1-1 Declaration of purpose and policy. – The legislature hereby finds the following legislation to be in the public interest for these reasons: ...

WHEREAS, The towing and storage of a vehicle without the owner's consent, as is the case in most police instigated tows, requires certain procedures to assure the owner that rights of due process of law are not violated; and ...

WHEREAS, The police powers delegated by the legislature of the state include the power of the police, even without the owner's consent, to have public ways cleared of conditions which, in the opinion of the officer, creates a hazardous condition to the motoring public; to have removed abandoned, abandoned and of no value, and unattended vehicles; to have removed and/or relocated vehicles in violation of parking ordinances; and to have removed any vehicle under control of any person arrested for any criminal offense; and

WHEREAS, The process of selection of the operator of a towing-storage business for police work is unique in that law enforcement, though having the legal duty to order the work, has no legal duty to pay costs and charges connected therewith, the same being the duty of the vehicle owner.

In section 1 of the Act, police may order the removal of vehicles from public highways given certain conditions. The police may order the removal of a vehicle if it creates a hazardous condition, if it is abandoned or unattended, if it violates parking ordinances, or if it is under the control of any person arrested for any criminal offense. The section also states that the police have the legal duty to order the work, but not to pay the costs associated with removal of the vehicle. Silent in this section, however, is the issue of police “holds.” Once the vehicle is removed, police duty to clear the highway is complete. The vehicle owner then pays the towing fees and any storage fee that may be due when they are ready to retake the vehicle. Nothing in the Towing Storage Act allows for storage fees to accrue if the owner is not allowed to retake the vehicle due to a police “hold” on the vehicle.

Section 39-12.1-3

This section of the Towing Storage Act controls the removal of abandoned, abandoned and of no value, and unattended vehicles.

§ 39-12.1-3 Removal of abandoned, abandoned and of no value, and unattended vehicles. – (a) Any member of any police department or the owner or person in control of private property *may*¹ order the removal of any abandoned or unattended vehicle or, any member of any police department, upon completion of a vehicle survey report, as defined in this chapter, may order the removal of any abandoned vehicle of no value by a certificated tower and may instruct the certificated tower to remove said vehicle to its own place of storage.

(b) The last registered owner and/or the legal owner, or the person who left a vehicle in a position so that the vehicle becomes abandoned, abandoned and of no value, or unattended shall be liable for all reasonable costs of recovery, towing, and storage in accordance with the certificated towers' tariff.

¹ Emphasis added.

(c) Any member of a police department observing a vehicle on or near a public way which appears to be abandoned, abandoned and of no value, or unattended shall tag the vehicle by affixing securely to the vehicle a colored form, or by using an easily observable sticker. The tag or sticker shall show:

(1) The date and time of tagging, and the name and telephone number of the police department;

(2) That the vehicle will be removed pursuant to this chapter unless the vehicle is removed after forty-eight (48) hours; provided, however, the police officer may order the immediate removal of the vehicle without prior tagging as provided in this section if it is parked illegally, causes traffic congestion or hazard or when the operator is not allowed to continue to operate the vehicle after having been detained for operating in violation of the law.

(d) No person in possession of a vehicle which, in the opinion of the police officer in charge of the scene, needs to be removed to another location, shall be denied the right to have any certificated tower of his or her choice attend to the removal; provided, however, that allowing the choice of certified tower does not cause a continuation of traffic congestion or of a hazardous condition on the highway which the police officer is able to eliminate by other means. When the hazardous condition has been eliminated, the person's choice shall be employed to remove the vehicle to the place selected by the person in possession.

In this section, the language indicates that the owner of the vehicle is responsible for the charges incurred during the removal of the vehicle along with the storage fees incurred there from. This issue is not in dispute. The debated issue surfaces when the owner is prevented from retaking the vehicle because of the need for a police release. There is no provision in this section for the accrual of storage fees when the owner may not retake the vehicle. The reading of 39-12.1-3(d) bolsters this proposition. An owner may select any certificated tower to remove the vehicle and bring it to a location selected by the owner. The legislative intent is clear in that the owner may take the vehicle at any time.

Section 39-12.1-4

Similarly, the Notice provision of the Act reflects the intent of the legislature with the inclusion of a tower mandate to release the vehicle when the owner appears, proves ownership and pays charges. No provision exists for the payment of storage fees when the owner cannot retrieve the vehicle due to a police hold.

§ 39-12.1-4 ... (b) A certificated tower removing an abandoned or unattended vehicle shall notify within fourteen (14) days thereof, by registered mail, return receipt requested, the last known registered owner of the vehicle and all lienholders of record at the address shown in the records of the appropriate registry in the state in which the vehicle is registered that the vehicle has been taken into custody. The notice shall be substantially in the form provided in § 39-12.1-13 and shall describe:

... (6) That the registered and/or legal owner *may retake possession*² at any time during business hours by appearing, proving ownership, and paying all charges due the certificated tower pursuant to its published tariff.

In tota re perspecta, these sections of the Towing Storage Act, do not provide for charges arising from storage due to the police instigated "hold."

§39-12 MOTOR CARRIERS OF PROPERTY

In addition to the applicable Towing Storage Act, Chapter 12 of Title 39 includes salient law related to the presented issue. Chapter 12, Motor Carriers of Property, was promulgated to regulate transportation of property by motor carriers upon public highways. The Department of Public Utilities and Carriers is charged with the regulation thereof. Sections 39-12-11 and 39-12-12 address tariffs and rates of common carriers. Inherent in these sections is the imposition of a duty by the common carriers to observe

² Emphasis added

just and reasonable rates and charges. Section 39-12-11 prohibits a common carrier from collecting greater compensation for service than the filed tariffs permit. This would prevent the unreasonable charging of storage fees when the owner is prevented from retaking their vehicle due to a police "hold."

Section 12 also confers authority to the administrator to exercise discretion with regard to rates and charges therein. The administrator may reject any tariff filed with him that is not consistent with the regulations. R.I.G.L. §39-12-11. Additionally, the administrator "may establish...such reasonable rules and regulations as he or she may deem necessary." R.I.G.L. §39-12-12. Sections 39-12-11 and 39-12-12, when evaluated independently, authorize the administrator to exercise discretion in allowing modifications with respect to tariffs in special or peculiar circumstances. Therefore authority rests with the administrator with respect to the storage fees charged.

OTHER JURISDICTIONS

While Rhode Island Courts have not addressed the issue, other jurisdictions have held that vehicle owners are not responsible for the cost of storage for police instigated "holds."

In Louisiana, the First Circuit Court of Appeals held that an owner was unreasonably denied access to his vehicle after the police placed a "hold" on the vehicle. The owner attempted to retrieve his vehicle, but could not obtain a police release. The Court held that "a vehicle cannot be considered unclaimed during the time a police 'hold' is in effect[.]" Jordan v. City of Baton Rouge, 529 So.2d 412, 416 (1988). The plaintiff was not responsible for the expenses incurred from the impound.

In Ohio, the Court of Appeals “ordered the police to pay the towing and storage fees that had accrued while the vehicle was impounded.” Dayton Police Department v. Pitts, 2010 WL 1267885 (Ohio App.2 Dist). The Court found that “the police department had primary control over and made an explicit choice concerning the manner and cost of the vehicle storage.” Id. The Court also noted that by ordering the police to pay for the cost of storage it would encourage them to “expedite the release of vehicles.” Id.

IV. SUMMARY AND CONCLUSION

The legislature makes several things very clear. Under 39-12.1-1, the legislature, acting on behalf of the motoring public, has delegated to the police the motoring public’s authority to choose a specific towing-storage business to move vehicles in four (4) specified circumstances only:

- (1) when needed, to clear public ways of conditions that create a hazardous situation for the motoring public;
- (2) to remove “abandoned, abandoned and of no value, and unattended vehicles” from the public ways;
- (3) to remove and/or relocate illegally parked vehicles; and,
- (4) to remove any vehicle under the control of any person arrested for any criminal offense.

The Act does not authorize the police to direct the retention of any vehicle once the four (4) specified actions have been completed.

This section delegates similar authority to private property owners, to allow them to have vehicles removed from their property. That is, they have this authority under only one set of circumstances rather than four. Clearly there is no expectation that they could also require towers to hold on to a towed vehicle indefinitely, yet the actual delegation of authority is similar to the delegation language used for the police.

While the police have no legal duty to pay for the work they order, they only have the authority under 39-12.1-1 to order a vehicle removed; there is no authority under this section, real or implied, to have a vehicle impounded. Thus, if the police direct that a vehicle be held until they are ready to have it released, they must be exercising police authority granted under some other provision of law. The exemption from paying the towing-storage business applies only to work ordered under 39-12.1-1. Thus, in order for the police to be exempt for storage fees attributable to an impound directed under another section of law, that other section of law would also have to shift the cost to the vehicle owner. This exemption does not apply.

The police can only choose the towing-storage business to be used if there is no one in possession of the vehicle the police want to have relocated or removed. If there is someone present who has possession of the vehicle, or who can legally assume possession of the vehicle, that person and not the police gets to decide who will conduct the actual tow and the place the vehicle will be towed to (unless the police have no other means of quickly eliminating traffic congestion or removing a hazardous condition). Clearly, the legislature did not intend to give the police primary control over all vehicles towed nor did it intend to allow the police to routinely impound vehicles under this statute. The only thing the police are authorized to do is decide who will tow a vehicle if there is no one else around in possession of that vehicle. In those limited circumstances, in the actual absence of someone in possession, the police may decide on the place the vehicle may be towed to.

For the foregoing reasons, storage fees may not be assessed against the owner of said motor vehicle by a certificated tower on a police department instigated motor vehicle storage impoundment at a private storage lot.

Terrence Mercer
Associate Administrator
Division of Public Utilities and Carriers

By his attorney,



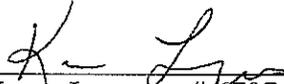
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CERTIFICATE OF SERVICE

I certify that on September 27, 2010, a copy of the within Brief was filed with the Division of Public Utilities Clerk and copies were mailed of the within document via first class mail, postage prepaid upon the following:

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