

BEFORE THE TENNESSEE REGULATORY AUTHORITY

IN RE: **April 11, 2013**
)
PROCEEDING AGAINST DAVID ANDREWS)
FOR ALLEGED VIOLATIONS OF TENN. CODE)
ANN. SECTION 65-4-501 *et seq.*, KNOWN AS)
THE TENNESSEE DO-NOT-FAX-LAW)

DOCKET NO.
12-00052

ORDER

This matter came before Vice Chairman Herbert H. Hilliard, Director Kenneth C. Hill, and Director Sara Kyle of the Tennessee Regulatory Authority (the “Authority” or “TRA”) at a regularly scheduled Authority Conference held on March 13, 2013, to consider evidence that David Andrews violated Tenn. Code Ann. § 65-4-501 *et seq.* on one hundred thirteen occasions between December 18, 2008 and April 13, 2012 and what, if any, penalty to impose.

BACKGROUND

On October 24, 2012, TRA Consumer Services Division (“CSD”) investigative staff requested that the Directors appoint a hearing officer to determine whether a show cause proceeding against David Andrews for violations of Tenn. Code Ann. § 65-4-501 *et seq.* should be initiated. The Directors appointed a hearing officer in this matter on October 24, 2012. On January 24, 2013, the hearing officer issued an order.¹ The *Show Cause Order* required Mr. Andrews to appear at the March conference and show cause why he is not liable for violations of the Tennessee Do-Not-Fax law, which prohibits sending unsolicited facsimile advertisements to any person in Tennessee without the recipient’s express permission.² Investigative Staff served Mr. Andrews with notice of

¹ *Order Requiring David Andrews to Show Cause Why a Cease and Desist Order and/or Fine Should Not Be Imposed for Violations of Tenn. Code Ann. § 65-4-501 et seq. Tennessee’s Do-Not-Fax Law (“Show Cause Order”)* (January 24, 2013).

² Tenn. Code Ann. § 65-4-501(5).

this hearing at all addresses that could be identified for him.³ On March 1, 2013, the hearing officer issued a *Notice of Hearing and Order to Appear* (“*Notice to Appear*”) which was sent to Mr. Andrews.⁴

The Tennessee Do-Not-Fax law states “[N]o person shall transmit or cause another to transmit an unsolicited facsimile advertisement....”⁵ The TRA is authorized to impose a civil penalty in the amount of two thousand dollars (\$2,000) per violation of Tenn. Code Ann. § 65-4-502(a).⁶

MARCH 13, 2013 AUTHORITY CONFERENCE

At the regularly scheduled Authority Conference on March 13, 2013, the CSD presented evidence to the panel that Mr. Andrews had violated Tenn. Code Ann. § 65-4-501 *et seq.* No representative of Mr. Andrews was present in response to the *Show Cause Order* or *Notice to Appear*.⁷ The CSD described the efforts made to notify Mr. Andrews of the *Show Cause Order* and *Notice to Appear*.⁸ The CSD requested that the panel impose the maximum civil penalty of \$226,000 and order that Mr. Andrews cease and desist sending unsolicited facsimiles into Tennessee.

TRA Rule 1220-1-2-.17 states:

- (1) Failure of a party to attend or participate in a pre-hearing conference, hearing or other stage of a contested case proceeding, after due notice thereof, shall be cause for finding such party in default, pursuant to T.C.A. § 4-5-309. Failure to comply with an order of the Authority or a Hearing Officer may be deemed a failure to participate in a contested case and, therefore, be cause for finding a party in default.
- (2)
 - (a) Upon entry into the record of the default of the petitioner at a contested case proceeding, the petition shall be dismissed.
 - (b) Upon entry into the record of the default of a respondent at a contested case proceeding, the matter shall be tried as unopposed relative to such respondent.

³ Transcript of Proceedings, p. 6 (March 13, 2013).

⁴ *Notice of Hearing and Order to Appear* (March 1, 2013).

⁵ Tenn. Code Ann. § 65-4-502(a).

⁶ Tenn. Code Ann. § 65-4-504(a).

⁷ Transcript of Proceedings, p. 6 (March 1, 2013).

⁸ *Id.* See also *Affidavit of Ectory Lawless* (March 1, 2013) outlining efforts to contact and serve the *Show Cause Order* and *Notice to Appear* on David Andrews.

- (3) Where the case is unopposed, the petitioner has the burden of making out a prima facie case, which may be done on the basis of written filings. In order to carry out statutory policies, however, the Authority or Hearing Officer may require further proof.

Based upon TRA Rule 1220-1-2-.17, the panel found that David Andrews failed to participate in the proceeding and was in default. Further, based on the evidence presented in this docket, the panel found that thirty-one (31) consumers received at least one hundred thirteen (113) separate unsolicited facsimiles advertising various vacation packages from an unidentified entity.⁹ These advertisements all had the same “respond to” number.¹⁰ Investigative staff determined that these facsimiles were in fact sent by David Andrews.¹¹ Mr. Andrews’ conduct violated Tenn. Code Ann. § 65-4-501 *et seq.*

Therefore, pursuant to Tenn. Code Ann. § 65-4-502(a), the panel voted unanimously to require David Andrews to pay \$226,000 immediately and to cease and desist sending unsolicited facsimile advertisements into the state of Tennessee.

IT IS THEREFORE ORDERED THAT:

1. David Andrews shall immediately cease and desist sending or causing to be sent any facsimile advertisements into the state of Tennessee; and
2. David Andrews shall immediately pay a fine of two hundred twenty six thousand dollars (\$226,000) representing a two thousand dollar (\$2,000) fine per violation of Tenn. Code Ann. § 65-4-502(a).

Vice Chairman Herbert H. Hilliard and Director Kenneth C. Hill concur. Director Sara Kyle voted with the majority but resigned her position prior to issuance of this order.

ATTEST:



Earl R. Taylor, Executive Director

⁹ *Affidavit of Charles Pemberton*, p. 1 (March 1, 2013).

¹⁰ *Id.* at 8.

¹¹ *Id.* at 8-9.