

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HIGHWAY)
SAFETY AND MOTOR VEHICLES,)
DIVISION OF MOTOR VEHICLES,)
)
Petitioner,)
)
vs.) CASE NO. 91-0415
)
BERNARD J. HANEY, d/b/a)
SOUTHERN AUTO SALES,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings by its duly designated Hearing Officer, William R. Cave, held a formal hearing in the above-captioned matter on June 26, 1991 in Lakeland, Florida.

APPEARANCES

For Petitioner: Michael J. Alderman, Esquire
Assistant General Counsel
Department of Highway Safety
and Motor Vehicles
Neil Kirkman Building, Rm. A432
Tallahassee, Florida 32399-0504

For Respondent: Charles R. Mayer, Esquire
Post Office Box 267
Highland City, Florida 3384

STATEMENT OF THE ISSUES

Whether Respondent's independent motor vehicle dealer license should be revoked or suspended under the facts and circumstances of this case.

PRELIMINARY STATEMENT

By an administrative complaint dated December 17, 1990 and filed with the Division of Administrative Hearings on January 18, 1991, the Petitioner, Department of Highway Safety and Motor Vehicles, Division of Motor Vehicles (Department) charged the Respondent, Bernard J. Haney d/b/a Southern Auto Sales with violating Section 320.27(9)(b) and (q), Florida Statutes, and as grounds therefor alleged: (a) that Respondent had been arrested several times under his name and the name of William J. Butler; (b) that Respondent while using the name William J. Butler was convicted of uttering a forged instrument, a felony, and sentenced to four years confinement; and (c) that Respondent failed to acknowledge or explain the arrests, conviction or use of fictitious personal identification at anytime during the initial licensure or renewal application

process. Haney filed a Request For Administrative Proceeding with the Department which, along with the Administrative Complaint, was referred to the Division of Administrative Hearings for formal hearing, and this proceeding ensued.

At the hearing, the Department presented the testimony of Neil C. Chamberlin, Nathan Dawson and Gary Floyd (Floyd is not listed as a witness in the Index of the transcript, however, he was called as the Department's witness and his testimony begins on page 156 in Volume II of the transcript). Department's exhibits 1, 2, 3 and 4 were received into evidence. Respondent testified in his own behalf and presented the testimony of Carolyn McDaniel. Respondent's composite exhibit 1 was received into evidence. Respondent's Motion to Dismiss presented at the close of the Department's case in chief was denied.

A transcript of this proceeding was filed with the Division of Administrative Hearings on July 15, 1991. Additional time was allowed the Respondent for filing his proposed findings of fact and conclusions of law and such time added to the time within which the Recommended Order was to be filed. The parties timely submitted their proposed findings of fact and conclusions of law within the extended time frame. A ruling on each of the proposed findings of fact have been made as reflected in an Appendix to the Recommended Order.

FINDINGS OF FACT

Upon consideration of the oral and documentary evidence adduced at the hearing, the following relevant findings of fact are made:

1. On November 16, 1987, the Respondent signed, under oath, an application for an independent motor vehicle dealer license for the business name of Southern Auto Sales which was submitted to the Department, and, based upon that application, the Department issued an independent motor vehicle dealer license, number 7VI-011359, to Respondent d/b/a Southern Auto Sales on November 30, 1987.

2. In the application referred to above, Respondent answered no to the question, Has the applicant or any partner or corporate officer or director:

A. Been arrested on a felony or equivalent charge anywhere?;

B. Been convicted of a felony or equivalent anywhere?

3. In 1988, 1989, and 1990, Respondent submitted to the Department a Short Form Application, commonly referred to as a renewal application, and the Department renewed license number 8VI-011359 in 1988, 9VI-011359 in 1989, and 0VI-011359 in 1990. The number before the prefix VI indicates the year of issuance.

4. Respondent signed each of these renewal applications under oath wherein the affirmation stated " . . . the information contained in this application is true and correct and that nothing has occurred since I filed my last application for a license or application for renewal of said license, as the case may be, which would change the answers given in such previous application." Additionally, the instructions for the renewal application advised the applicant that the short form could be used if the applicant was currently licensed and, among other things, there were no changes in the applicant's personal background such a criminal conviction.

5. Respondent, currently holds an independent motor vehicle dealer license, number 1VI-011359, issued by the Department on May 1, 1991.

6. Respondent, using the name William J. Butler, was arrested and charged in December 1977 with uttering a forgery. The Respondent pled guilty to the charge of uttering a forgery in April 1978 before the Circuit Court, Harrison County, Mississippi and was sentenced to four years in the Mississippi Department of Corrections.

7. In 1978, the Respondent, using the name William J. Butler, was arrested and charged with uttering a forgery. Respondent was subsequently convicted and sentenced by the Circuit Court, Jackson County, Mississippi to four years in the Mississippi Department of Corrections, said sentence to run concurrently with the sentence imposed by the Circuit Court, Harrison County, Mississippi.

8. William J. Butler and Bernard J. Haney, the Respondent in this case, are one in the same person.

9. On October 25, 1979, after serving only approximately 1 1/2 years of the two four-year sentences, Respondent was paroled by the Mississippi Parole Board with conditions for supervision made a part of the parole.

10. In 1981 Respondent sought and received treatment for alcoholism, having been an alcoholic for a period of twenty years. After treatment, with the help of Alcoholics' Anonymous, Respondent has maintained a life of sobriety.

11. In November 1988 a Warrant for Retaking a Paroled Prisoner was issued against Respondent, and he was recommitted to the Mississippi Department of Corrections for "absconding supervision" of his parole. However, with the help of some "new" friends, gained after his treatment for alcoholism, Respondent was incarcerated for only a short period, and was "honorably discharged" from the Mississippi Department of Corrections on December 20, 1984.

12. The Harrison County charge of uttering a forgery was in connection with a check for \$169.92, and the Jackson County charge of uttering a forgery was in connection with a check for \$139.36.

13. There is nothing stated in the Discharge Certificate that should have led the Respondent to believe or understand that his criminal record had been expunged and his rights restored upon receiving his "honorable discharge" from the Mississippi Department of Corrections in December 1984. However, considering the circumstances surrounding his commitment in the first place, his recommitment in 1984 and his immediate release thereafter, Respondent's testimony that such was his belief and understanding is credible.

14. There is insufficient evidence to show that at the time of his initial application for licensure in 1987 or at the time of his renewal applications in 1988, 1989 and 1990, that Respondent acted fraudulently or willfully misrepresented the facts when he answered no to the questions concerning any prior arrests or convictions for a felony.

15. After the release in 1979 and up to the date of his initial application for licensure, the Respondent's criminal record is clear except for the arrest in 1984 where the charges were dropped but the arrest resulted in his recommitment. From the date of his initial application until the date of the hearing the Respondent's criminal record is clear except for an arrest in 1990

concerning charges of tampering with an odometer. Apparently, these charges have been dropped and the matter handled civilly through the Polk County Citizen Dispute Settlement Center.

CONCLUSIONS OF LAW

16. The Division of Administrative Hearings has jurisdiction over the parties to, and the subject matter of, this proceeding pursuant to Section 120.57(1), Florida Statutes.

17. Section 320.27(9), Florida Statutes, empowers the Department to suspend or revoke the license of the Respondent upon proof that he has failed to comply with any of the enumerated acts listed in Section 320.27(9)(a) through (5), Florida Statutes, with sufficient frequency so as to establish a pattern of wrongdoing on the part of the Respondent.

18. The administrative complaint charges Respondent with violating Section 320.27(9)(b) and (q), Florida Statutes, which provides as follows:

(b) Commission of fraud or willful
misrepresentation in application for or in
obtaining a license.

. . . .

(q) Conviction of a felony.

19. In disciplinary proceedings, the burden is upon the regulatory agency to establish facts upon which its allegations of misconduct are based by clear and convincing evidence. *Ferris v. Turlington*, 510 So.2d 293 (Fla. 1987). In the instant case the Department has clearly shown that Respondent was charged, arrested and convicted on two separate charges of uttering a forgery which is a felony and sentenced to two four-year sentences. Also, the Department has clearly shown that Respondent failed to advise the Department of his arrests and the felony convictions in his initial application in 1987 wherein he obtained an independent motor vehicle dealer license. What the Department has not clearly shown is that: (a) the Respondent acted fraudulently or willfully misrepresented facts in filing his initial application for licensure and renewals thereof; or (b) the Respondent's failure to comply with the provisions of Section 320.27(9)(b) and (q), Florida Statutes, was with such sufficient frequency so as to establish a pattern of wrongdoing on his part. The Department has failed to sustain its burden of proof.

RECOMMENDATION

Having considered the foregoing findings of fact and conclusions of law, it is,

RECOMMENDED that the Department enter a Final Order dismissing the administrative complaint filed herein.

DONE and ENTERED this 27th day of August, 1991, in Tallahassee, Florida.

WILLIAM R. CAVE
Hearing Officer
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, FL 32399-1550
(904) 488-9675

Filed with the Clerk of the
Division of Administrative Hearings
this 27th day of August, 1991.

APPENDIX TO RECOMMENDED ORDER

The following constitutes my specific rulings pursuant to Section 120.59(2), Florida Statutes, on all of the Proposed Findings of Fact submitted by the parties in the case.

Rulings on Proposed Finding of Fact
Submitted by the Petitioner

1. - 9. Adopted in Findings of Fact 5, 6, 7, 8, 1, 1, 2, 3, and 4, respectively.

10. Stated more as an argument than a finding of fact, otherwise rejected since there was no substantial competent evidence in the record to prove that there was fraudulent or willful misrepresentation of the facts in the application.

Rulings on Proposed Findings of Fact
Submitted by the Respondent

Respondent's Proposed Recommended Order is divided into three principal parts: (a) Proposed Findings of Fact; (b) Comments on Testimony and Evidence; and (c) Proposed Conclusions of Law. Only the Proposed Findings of Fact will be addressed to in this Appendix.

1. Adopted in substance in Finding of Fact 1.

2. - 3. Unnecessary.

4. Adopted in substance in Finding of Fact 1.

5. - 7. Covered in Preliminary Statement.

8. Conclusion of Law.

9. Covered in the Preliminary Statement, otherwise unnecessary.

10. Covered in the Preliminary Statement.

11. - 12. Covered in the Preliminary Statement, otherwise unnecessary or not material or relevant.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

ALL PARTIES HAVE THE RIGHT TO SUBMIT WRITTEN EXCEPTIONS TO THIS RECOMMENDED ORDER. ALL AGENCIES ALLOW EACH PARTY AT LEAST 10 DAYS IN WHICH TO SUBMIT WRITTEN EXCEPTIONS. SOME AGENCIES ALLOW A LARGER PERIOD WITHIN WHICH TO SUBMIT WRITTEN EXCEPTIONS. YOU SHOULD CONTACT THE AGENCY THAT WILL ISSUE THE FINAL ORDER IN THIS CASE CONCERNING AGENCY RULES ON THE DEADLINE FOR FILING EXCEPTIONS TO THIS RECOMMENDED ORDER. ANY EXCEPTIONS TO THIS RECOMMENDED ORDER SHOULD BE FILED WITH THE AGENCY THAT WILL ISSUE THE FINAL ORDER IN THIS CASE.

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AGENCY FINAL ORDER

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STATE OF FLORIDA
DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES

DEPARTMENT OF HIGHWAY
SAFETY AND MOTOR VEHICLES
DIVISION OF MOTOR VEHICLES,

CASE NO.: 91-0415

Petitioner,

vs.

BERNARD J. HANEY d/b/a/
SOUTHERN AUTO SALES,

Respondent.
_____ /

FINAL ORDER

This matter is before the Department pursuant to s. 120.57(1)(b) 10, Fla. Stat., for the purpose of considering the Hearing Officer's Recommended Order and Petitioner's Exceptions To Recommended Order. Authority to enter this Final Order is pursuant to the delegation to the Executive Director, Rule 15-1.012 F.A.C., and his designation of the undersigned.

Upon review of the Recommended Order, the Exceptions, and after a review of the complete record in this case, the Department makes the following findings and conclusions:

RULINGS ON EXCEPTIONIONS

1. The Department accepts Petitioner's Exception 1. Based upon a review of the complete record, and particularly pages 180-197 and 211-216 of the transcript of hearing, the Department finds that the second sentence of Finding of Fact 13 is not supported by competent substantial evidence and is therefore rejected. Haney testified that he assumed everything had been dropped (T-184) and that no one told him he was not convicted (T-195). The discharge certificate (part of Pet. Ex. 4) that Haney received in December, 1984, states that he was convicted in Circuit Court in Harrison and Jackson County and sentenced to four years (T-215). This testimony, together with findings 6, 7, 11 and 12 provide competent substantial evidence to support the first sentence of finding paragraph 13, but not the second sentence, which is hereby rejected.

2. The Department accepts Petitioner's Exception 2. Based upon a review of the complete record, the Department rejects Finding of Fact 14 and substitutes in its place the following:

14. There is sufficient evidence to show that at the time of his initial application for licensure in 1987 and at the time of his renewal applications in 1988, 1989 and 1990, that Respondent acted fraudulently or wilfully misrepresented the facts when he answered no to the questions concerning any prior arrests or convictions for a felony.

The Department accepts the construction of "willful" as set forth in State of Florida, Department of Highway Safety and Motor Vehicles v. Taylor, 456 So. 2d 550, 552 (Fla. 3d DCA, 1984). The rejection of the second sentence of Finding of Fact 13 eliminates the basis for any excuse of Respondent in failing to disclose his prior arrest and conviction. Thus, he acted consciously and wilfully in completing the application and renewal forms without the necessary disclosure.

3. The Department accepts Petitioner's exception 3 regarding the Conclusions of Law. The Department concludes that Respondent wilfully misrepresented facts in filing his initial application for licensure and subsequent renewals.

Furthermore, the Department concludes that Respondent did so with sufficient frequency so as to establish a pattern of wrongdoing. Respondent engaged in such a pattern by filing renewals for 1988, 1989 and 1990, following his initial non-disclosure in 1987.

In addition, the Department concludes that the two felony convictions incurred by Respondent adequately establish a pattern of wrongdoing as contemplated by s. 320.27(9) Fla. Stat. The Department relies on the provisions of ss. 320.27(9)(s), 320.27(3) and 320.605 Fla. Stat., in concluding that these convictions are sufficient for license revocation, based upon the seriousness of felony conduct and the need to protect the public welfare by unscrupulous motor vehicle dealers. A similar determination was made by the Department involving a single conviction in Department of Highway Safety and Motor Vehicles v. Dick's Auto Sales, Case No.: 90-0175, Amended Final Order entered August 29, 1990, Supplement entered September 24, 1990.

FINDINGS OF FACT

1. Except as modified above, Findings of Fact set forth in the Recommended Order are approved and adopted and incorporated herein.

2. There is competent substantial evidence to support the Findings of Fact of the Department.

CONCLUSIONS OF LAW

1. The Department has jurisdiction of this matter pursuant to ss, 120.57(1) and 320.27, Fla. Stat.

2. Paragraphs 1-3 of the Conclusions of Law set forth in the Recommended Order are approved, adopted and incorporated herein.

3. The Department accepts paragraph 4 of the Conclusion of Law, except for the last two sentences thereof on page 8 of the Recommended Order, as determined by the ruling of Petitioner's exception 3.

PENALTY

Based upon the foregoing Finding of Fact and Conclusions of Law it is hereby ORDERED and ADJUDGED that:

1. Respondent is guilty of a violation of s. 322.27(9)(b) and (q), Fla. Stat.

2. Respondent's motor vehicles dealer license is hereby revoked. This penalty is appropriate based upon a review of the complete record and the following reasons:

a. The seriousness of the underlying offenses and the continued pattern of their misrepresentation, as it relates to the business of operating a motor vehicle dealership in the context of s. 320.605, Fla. Stat.

b. The rejection of the second sentence of Finding of Fact 13 and modification of Finding 14.

c. The recognition that upon a showing of good cause and proof of rehabilitation and compliance with s. 320.27(3), Fla. Stat., Respondent is entitled to seek reinstatement of its license. Section 320.273, Fla. Stat.

DONE AND ORDERED this 6 day of January, 1992, in Tallahassee, Leon County, Florida.

CHARLES J. BRANTLEY, Director
Division of Motor Vehicles
Department of Highway Safety
and Motor Vehicles
Neil Kirkman Building
Tallahassee, Florida 32399-0504

NOTICE OF APPEAL RIGHTS

Judicial review of this order may be had pursuant to section 120.68, Florida Statutes, in the District Court of Appeal for the First District, State of Florida, or in any other District Court Appeal of this state in an appellate district where a party resides. In order to initiate such review, one copy of the Notice of Appeal must be filed with the Department and the other copy of the Notice of Appeal, together with the filing fee, must be filed with the court within thirty days of the filing date of this order as set out above, pursuant to Rule 9.110, Rules of Appellate Procedure.

Copies furnished to:

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