

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF AGRICULTURE AND)
CONSUMER SERVICES,)
)
Petitioner,)
)
vs.) Case No. 05-4194
)
DEWIOTT MCDUFFIE, d/b/a DIXIE)
TRANSFER THE MOVERS, a/k/a THE)
MOVERS, a/k/a FAMILY BUDGET)
MOVERS,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was conducted in this case on January 26, 2006, in Tampa, Florida, before Carolyn S. Holifield, a duly-designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Eric H. Miller, Esquire
Department of Agriculture and
Consumer Services
407 South Calhoun Street
Mayo Building, Suite 520
Tallahassee, Florida 32399

For Respondent: DeWriott McDuffie, pro se
4513 North Florida Avenue
Tampa, Florida 33603-3726

STATEMENT OF THE ISSUES

The issues in this case are (1) whether Respondent refused to relinquish the household goods of a shipper in violation of Subsection 507.06(2), Florida Statutes (2004)¹; (2) whether Respondent conducted business under two unregistered names in violation of Subsection 507.03(7), Florida Statutes; (3) whether Respondent included provisions in its contracts which waived or limited protection against damage or loss to household goods, in violation of Subsection 507.07(6)(a), Florida Statutes; and, if so, (4) what penalty should be imposed.

PRELIMINARY STATEMENT

Petitioner, the Department of Agriculture and Consumer Services (Department), issued a three-count Amended Administrative Complaint against Respondent, Dewiott McDuffie, d/b/a Dixie Transfer The Movers, a/k/a The Movers, a/ka/ Family Budget Movers (Respondent). The Department forwarded the matter to the Division of Administrative Hearings on or about November 18, 2005. In a Notice issued December 6, 2005, the case was set for hearing, and the hearing was conducted as noticed.

Prior to the final hearing, the Department filed a motion requesting that the Administrative Law Judge take official recognition of Chapter 507, Florida Statutes, and that Crestview, Florida, is more than 100 miles from Tampa, Florida.²

At the final hearing, the Department presented the testimony of Danielle Brooks, formerly an investigator specialist with the Department, and the deposition testimony of Yalonda Toran. The two-volume deposition transcript of Yalonda Toran was admitted into evidence as the Department's Exhibits 11-A and 11-B. In addition to the foregoing exhibits, the Department's Exhibits 1 through 9 and Exhibit 12 were admitted into evidence. Respondent presented the testimony of Dewiott McDuffie and Anthony McDuffie. Respondent offered no exhibits into evidence.

The hearing Transcript was filed on February 13, 2006. At the conclusion of the hearing, the time for filing proposed recommended orders was set for ten days after the Transcript was filed. The Department timely filed its Proposed Recommended Order and a memorandum of law supporting its Proposed Recommended Order. Respondent filed a Proposed Recommended Order on March 1, 2006.³ Both Proposed Recommended Orders have been considered in preparation of this Recommended Order.

FINDINGS OF FACT

1. At all material times, Respondent was registered with the Department as an intrastate mover with intrastate mover registration number IM434.

2. Respondent's physical business address is 4501 North Florida Avenue, Tampa, Florida 33603-3726.

3. Respondent operates his intrastate moving business under the name "Dixie Transfer The Movers."

Respondents' Failure to Deliver Household Goods

4. Yalonda R. Toran resides at 344 John King Road, Crestview, Florida. Ms. Toran also is employed in Crestview.

5. Charles Beadle is Ms. Toran's uncle who resides at 11122 Whitney Chase Drive, Tampa, Florida.

6. On December 4, 2004, Respondent, personally or through his employees, designees, or agents, contracted to move seven pieces of furniture from Mr. Beadle's residence in Tampa to the home of Ms. Toran in Crestview.

7. The furniture to be moved included a dining table, four chairs, a hutch and base, and a table with a marble top. All of these items were the property of Ms. Toran, having inherited them from her grandmother, and were only used as personal property in the home.

8. On behalf of Ms. Toran, Mr. Beadle engaged Respondent to move the furniture. The reason was that at the time of the transaction, Ms. Toran was in Crestview, and the furniture was in Mr. Beadle's home in Tampa.

9. Mr. Beadle paid the initial \$250.00 required under the contract, and Ms. Toran was to pay the balance of \$250.00 on delivery.

10. The contract for moving Ms. Toran's furniture was at "carrier's convenience." This means Respondent, as the carrier, would deliver the furniture at such time as he had a sufficient load to transport in the direction of Crestview and was not required to make a separate trip solely to deliver Ms. Toran's furniture.

11. Notwithstanding the "carrier's convenience" provision in the contract, Ms. Toran believed the furniture would be delivered on December 4, 2004, the same day as it was picked up.

12. Between December 6, 2004, and January 31, 2005, Ms. Toran had several conversations with Respondent's employees concerning when the furniture delivery would be scheduled.

a. On December 6, 2004, Ms. Toran called Respondent's business telephone number and spoke with "Anthony." "Anthony" is Anthony McDuffie, Respondent's son, who is active in Respondent's business. Ms. Toran was told that the furniture would be delivered in about two weeks.

b. After the furniture was not delivered within the stated two weeks, Ms. Toran called Respondent's business number and again spoke with Anthony. During this conversation, Anthony told Ms. Toran that her furniture was not on a truck, that he had no control over its loading, and that she would have to discuss the matter with the owner, who he identified as "Bill." Ms. Toran then spoke to the person identified as "Bill" who told

her that he would check into the matter and then call her regarding the status of her furniture. However, Ms. Toran never received such a phone call.

c. A few days after the telephone communication described in paragraph 11-b., Ms. Toran, again, spoke with Anthony. During this telephone conversation, Anthony told Ms. Toran that Respondent's business was slow and that the furniture was still not on the truck. Anthony also told Ms. Toran that he would check on the furniture delivery, but was noncommittal on a definite delivery date. Anthony said the furniture might be delivered in two weeks, but that he did not know. Finally, Anthony told Ms. Toran he would contact her when the furniture actually was in transit.

d. After the two-week period elapsed without any contact from Respondent, Ms. Toran again called Respondent's business number and spoke with an unidentified individual who was unable to provide any information or assistance. In a subsequent call she placed to the business number during the week of January 31, 2005, Ms. Toran spoke to Anthony, who told her the furniture would be delivered "that weekend," which would have been the period of February 5 through 6, 2005. Anthony further said Ms. Toran would be called when the moving truck was in her area.

e. Neither Respondent nor his agents or employees ever initiated contact with Ms. Toran about the delivery of her furniture.

13. Ms. Toran's furniture was not delivered during the weekend of February 5 through 6, 2005, the time specified by Anthony.

14. At approximately 7:15 a.m., local time, on Monday, February 7, 2005, Respondent's employees appeared at Ms. Toran's residence in Crestview and stated they had her furniture for delivery. Ms. Toran received no advance notice that the truck was in Crestview and that it would appear at that time. Ms. Toran did not agree for delivery at that time, as she was preparing to leave for work.

15. The driver of the truck, Respondent's employee, told Ms. Toran the balance of the contract must be paid, in cash, before they would unload the furniture. Ms. Toran stated she did not have cash at that time because she had no advance warning of their arrival and instead offered to have the cash payment ready on the following day, February 8, 2005. The driver requested that she contact Respondent's office in Tampa to discuss the situation.

16. Ms. Toran called the Tampa office and spoke with an individual whom she believed was Anthony, advising him that she did not have cash at that moment and offering to get the cash

and pay the following day, February 8, 2005. This request was refused.

17. Ms. Toran then asked for sufficient time to obtain cash and pay that day. Ms. Toran objected to Respondent's holding her furniture for over two months and now refusing to wait for her to make the payment after failing to provide advance notice of arrival.

18. Respondent's representative refused to allow additional time for Ms. Toran to obtain cash to pay the balance and told her the truck would leave with her furniture still aboard.

19. After completing her conversation with Respondent's office, Ms. Toran then told the driver she would pay by personal check. At the time she offered payment by personal check, Ms. Toran had sufficient funds in the bank. Also, Ms. Toran's personal checks included her name and address printed on the front.

20. The driver said he must consult with Respondent's office in Tampa. Without further discussion with Ms. Toran about payment or the delivery, Respondent's employees left with her furniture and did not return.

21. Without explanation, Respondent's employees declined to accept a personal check from Ms. Toran in payment of the required contract amount.

22. Respondent's employees refused to unload Ms. Toran's furniture after she offered payment by personal check.

23. Respondent continues to retain possession of Ms. Toran's furniture.

Respondent's Registration of Fictitious Name

24. Respondent registered "Dixie Transfer The Movers" as a fictitious name with the Florida Department of State, Division of Corporations.

25. In his registration renewal application filed with the Department on November 19, 2004, Respondent stated his business name as "Dixie Transfer The Movers" and struck through the names "Family Moving & Storage," "Golden Rule Moving," and "Movers Moving & Storage." The application thus does not include the names "The Movers Moving & Storage" or "Family Budget Movers."

26. On January 3, 2005, the Department issued Respondent's registration certificate. The registration certificate issued by the Department included only the name "Dixie Transfer The Movers," as stated in Respondent's registration renewal application.

27. In the Verizon 2004 telephone directory, published in November 2004, and effective for the period November 2004 through November 2005, Respondent advertised his moving services separately under the names "The Movers Moving & Storage" and "Family Budget Movers." In the advertisements for each name,

"The Movers Moving & Storage" and "Family Budget Movers," Respondent's Florida intrastate mover registration number IM434 was used.

28. Respondent failed to register "The Movers Moving & Storage" as a fictitious name with the Department in his license renewal of December 2004.

29. Respondent failed to register "Family Budget Movers" as a fictitious name with the Department in his license renewal of December 2004.

30. An advertisement placed in the yellow pages is effective for a whole year and cannot be changed once published. Respondent chose to advertise under the names "The Movers Moving & Storage" and "Family Budget Movers" prior to November 2004, when the Verizon yellow pages were published and distributed for the year 2004-2005. However, Respondent did not include these additional names when he filed his application to renew his registration certificate. Therefore, for the period from January 3, 2005, until at least the publication and distribution of the Verizon yellow pages for 2005-2006, Respondent advertised under "The Movers Moving & Storage" and "Family Budget Movers" without having registered these names with the Department.

Terms and Conditions of Respondent's Contract

31. Respondent's contract for the move of Ms. Toran's furniture includes the following provision related to the method of payment for the moving services:

Section 2. Payment:

(A) All charges are payable in cash, cashier's check and/or personal check. Note: Personal checks are subject to Company approval. The Company reserves the right to refuse any personal checks at their discretion.^[4]

32. Respondent's contract for the move of Ms. Toran's furniture limits the company's liability as follows:

Section 3. Liability of the Company:

* * *

(c) The company is not responsible for any fragile articles injured or broken, unless packed by its employees and unpacked by them at the time of delivery and in no event shall the company be liable except for its own negligence. The company will not be responsible for mechanical or electrical functioning of any articles such as but not limited to pianos, radios, phonographs, television sets, clocks, barometers, mechanical refrigerators or air conditioners whether or not such articles are packed or unpacked by the company.

* * *

(g) The company shall not be responsible for loss of or damage to any article contained in drawers, or in packages, cases or containers not packed and unpacked by the employees of the company unless such containers are opened for the company

inspection and then only for such articles that are specifically listed by the customer and are receipted for the company or its agent.

(h) In no event shall the company be responsible for loss or damage to documents, stamps, securities, specie or jewelry unless a special agreement in writing is made between the customer and the company with respect to such articles.

33. The form used to prepare the contract for Ms. Toran's move is a standard form Respondent uses, and the above-quoted provisions in the contract appear in all of his moving contracts.

CONCLUSIONS OF LAW

34. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding pursuant to Chapter 120, Florida Statutes (2005).

35. Subsection 507.09(1), Florida Statutes, authorizes the Department to impose administrative remedies and penalties on a mover or person employed by a mover who has violated any provision of Chapter 507, Florida Statutes.

36. Upon finding a mover has violated any of the provisions of Chapter 507, Florida Statutes, the Department is authorized to impose penalties including, but not limited to, an administrative fine not to exceed \$5,000.00 per violation, revocation or suspension of a registration, directing Respondent

to cease and desist from certain activities, or placing Respondent on probation. § 507.09(1), Fla. Stat.

37. For the violations alleged in the Amended Administrative Complaint, the Department has sought penalties that may include revocation of Respondent's registration and imposition of the maximum administrative penalty of \$5,000.00 for each of the alleged violations. Therefore, in order to prevail in this proceeding, the Department must prove by clear and convincing evidence that Respondent committed the violations alleged in the Amended Administrative Complaint. Department of Banking and Finance, Division of Securities and Investor Protection vs. Osborne Stern and Co., 670. So. 2d 292 (Fla. 1996).

38. In adopting Chapter 507, Florida Statutes, the Legislature specifically intended " . . . to secure the satisfaction and confidence of shippers and members of the public when using a mover." § 507.02(3), Fla. Stat. The act is interpreted liberally to establish the law governing intrastate moving in Florida. § 507.02(1), Fla. Stat.

39. Count One of the Amended Administrative Complaint alleges that Respondent violated Subsection 507.06(2), Florida Statutes, which states in pertinent part:

A mover may not refuse to relinquish household goods to a shipper or fail to place the goods inside a shipper's dwelling

based on the mover's refusal to accept an acceptable form of payment.

40. Section 507.01, Florida Statutes, defined the terms "household goods," "mover," and "shipper" as follows:

(7) "Household goods" means personal effects or other personal property found in a home, personal residence, storage facility, or other location, including property in a storehouse or warehouse facility that is owned or rented by a shipper or shipper's agent, but does not include freight or personal property moving to or from a factory, store, or other place of business.

(8) "Mover" means any person who engages in the transportation or shipment of household goods for compensation.

(9) "Shipper" means any person who uses the services of a mover to transport or ship household goods.

41. Subsection 507.05(6), Florida Statutes, lists the acceptable forms of payment for moving services governed by Chapter 507, Florida Statutes. That subsection states:

(6) Acceptable forms of payment. A mover shall accept a minimum of two of the three following forms of payment:

(a) Cash, cashier's check, money order, or traveler's check;

(b) Valid personal check, showing upon its face the name and address of the shipper or authorized representative; or

(c) Valid credit card, which shall include, but not be limited to, Visa or MasterCard.

A mover shall clearly and conspicuously disclose to the shipper in the estimate and contract for services the forms of payments the mover will accept from those categories described in paragraphs (a)-(c).

42. As defined by statute, Respondent is a "mover," Ms. Toran is a "shipper," and her furniture items constitute "household goods." § 507.01, Fla. Stat.

43. The clear and convincing evidence established that Ms. Toran offered to pay the balance of her moving charges by a valid personal check. There is no dispute that Ms. Toran's name as well as her current address and telephone number were pre-printed on the check. Nonetheless, the clear and convincing evidence established that Respondent and/or his employees refused to accept payment by Ms. Toran's valid personal check.⁵

44. The clear and convincing evidence established that after Respondent and/or his employees refused to accept Ms. Toran's valid personal check, Respondent also refused to relinquish Ms. Toran's furniture or place the household goods in her house. Instead, Respondent's employees returned the furniture to Tampa, where, as of the day of the final hearing, it remained in storage.

45. The Department met its burden of proof and established by clear and convincing evidence that Respondent violated Subsection 507.06(2), Florida Statutes, as alleged in Count One of the Amended Administrative Complaint.

46. Count Two of the Amended Administrative Complaint alleges that Respondent violated Subsection 507.03(7), Florida Statutes, by conducting business in names that were not registered with the Department.

47. Subsection 507.03(7), Florida Statutes, states:

No registration shall be valid for any mover transacting business at any place other than that designated in its application, unless the department is first notified in writing in advance of any change of location. A registration issued under this act shall not be assignable, and the mover shall not be permitted to conduct business under more than one name except as registered. A mover desiring to change its registered name or location or designated agent for service of process at a time other than upon renewal of registration shall notify the department of such change.

48. The clear and convincing evidence established that Respondent was registered with the Department as "Dixie Transfer The Movers," but conducted business in two names that were not registered with the Department. The clear and convincing evidence established that in the yellow pages of the telephone book, Respondent listed its registration number with two separate unregistered businesses, "The Movers Moving & Storage" and "Family Budget Movers."

49. The Department met its burden of proof and established by clear and convincing evidence that Respondent violated

Subsection 507.03(7), Florida Statutes, as alleged in Count Two of the Amended Administrative Complaint.

50. Count Three of the Amended Administrative Complaint alleges that Respondent violated Subsection 507.04(1), Florida Statutes, by including in its contract provisions which waive or limit the protection against damage or loss to household goods.

51. Subsection 507.04(1), Florida Statutes, states in pertinent part:

(1) A mover operating in this state shall maintain current and valid cargo legal liability valuation and insurance coverage which includes:

(a) Coverage for cargo legal liability for loss or damage to household goods arising or resulting from the negligence of the mover, its employees, or agents, in an amount not less than \$10,000 per shipment.

* * *

(c) A limitation on the release of a mover's liability for the value of a shipper's goods at a rate not less than 60 cents per pound per article. This limitation of liability shall be disclosed to the shipper in writing at the time the estimate or contract for services is executed prior to the provision of any moving or accessorial services. The disclosure shall also inform the shipper of the opportunity to reject or select additional valuation, including the cost and coverage of such additional valuation.

52. Subsection 507.07(6)(a), Florida Statutes, states in pertinent part:

It is a violation of this act to:

* * *

(6)(a) Include in any contract any provision purporting to waive or limit any right or benefit provided to shippers under this act.

53. Subsection 507.04(1), Florida Statutes, quoted above, specified the minimum terms for releasing a mover's liability for damages and limits any release of Respondent's liability to not less than \$0.60 per pound, per article.

54. Notwithstanding the provisions of Subsections 507.04(1)(a) and (c), the clear and convincing evidence established that Respondent's form contract, including the form used for Ms. Toran's move, includes a pre-printed provision that purports to state grounds under which Respondent disclaims any liability for damages to the shipper's goods. See Section 3 of Respondent's contract quoted in paragraph 32.

55. The Department has established by clear and convincing evidence that Respondent's standard/form contract includes provisions which purport to waive or limit the shipper's rights or benefits as it relates to the mover's legal liability. Thus, the Department has met its burden and proved that Respondent violated Subsection 507.07(6), Florida Statutes, as alleged in Count Three of the Amended Administrative Complaint.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Department enter a final order finding that Respondent violated Subsections 507.06(2), 507.03(7), and 507.07(6)(a), Florida Statutes, as alleged in the Amended Administrative Complaint and imposing the following sanctions:

1. Imposition of an administrative fine in the amount of \$5,000.00 and revocation of Respondent's Intrastate Mover's Certificate. However, Respondent may mitigate this penalty as provided below in paragraph 2.

2. Mitigation. If Respondent delivers to Ms. Toran the furniture withheld from her, places the furniture into her dwelling, and provides the Department (through its counsel) with verification from Ms. Toran that her complaint has been satisfied prior to the entry of the final order, it is recommended that the penalty imposed in paragraph 1 be mitigated to the following:

a. Imposition of a reduced administrative fine in the amount of \$2,500.00.

b. Respondent's Intrastate Mover's Certificate be placed on a period of probation for one year, conditioned on Respondent's satisfying all consumer complaints arising during the period of probation.

c. Respondent shall adopt and utilize a form of contract which meets all requirements of Chapter 507, Florida Statutes.

DONE AND ENTERED this 4th day of May, 2006, in Tallahassee, Leon County, Florida.

Carolyn S. Holifield

CAROLYN S. HOLIFIELD
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 4th day of May, 2006.

ENDNOTES

1/ All references to Florida Statutes are to Florida Statutes (2004) unless otherwise indicated.

2/ The latter request was to establish that Yalonda Toran, the complainant in this case, was unavailable to appear at hearing in Tampa due to her residing in Crestview.

3/ On March 2, 2006, the Department filed a Motion to Strike Respondent's Late-Filed Proposed Recommended Order. The motion to strike was denied.

4/ As noted in endnote 5, this provision limits a right or benefit to the shipper, Ms. Toran, under Subsection 507.05(6), Florida Statutes. However, the Amended Administrative Complaint does not allege that this is a factual basis for Respondent's violation of Subsection 507.07(6), Florida Statutes. Thus, this fact will not be considered as a violation of the latter provision.

5/ Respondent included a provision in its contract to move Ms. Toran's furniture which states Respondent will accept payment by ". . . cash, cashier's check, and/or personal check. . . ." However, the contract then limits payment options by stating that "the company reserves the right to refuse any check at their [sic] discretion." This provision of the contract is contrary to Subsection 507.05(6), Florida Statutes. According to that statutory provision, to be valid, the check must show on its face the name and address of the shipper or authorized representative.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.