

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PEACE INDUSTRY GROUP, INC.,)
AND MOBILITY TECH, INC.,)
)
 Petitioners,)
)
vs.) Case No. 08-1627
)
DISCOUNT SCOOTERS, INC.,)
)
 Respondent.)

)

RECOMMENDED ORDER

Pursuant to notice, a hearing was conducted in this case before Carolyn S. Holifield, a duly-designated Administrative Law Judge of the Division of Administrative Hearings on October 7, 2008, in Tampa, Florida.

APPEARANCES

For Petitioners: No appearance

For Respondent: Brooke S. Gentile
Discount Scooters, Inc.
5908 North Armenia Avenue
Tampa, Florida 33603

STATEMENT OF THE ISSUE

The issue is whether Petitioners should be permitted to establish an additional dealership for the sale of motorcycles manufactured by Astronautical Bashan Motorcycle Manufacturer Company, Ltd., at 5720 North Florida Avenue, Tampa, Florida.

PRELIMINARY STATEMENT

On March 7, 2008, a notice was published in the Florida Administrative Weekly that pursuant to Section 320.642, Florida Statutes (2007),¹ Petitioner, Peace Industry Group, Inc. ("Peace Industry"), intended "to allow the establishment of [Petitioner] Mobility Tech, Inc. ["Mobility Tech"], as a dealership for the sale of motorcycles manufactured by Astronautical Bashan Motorcycle Manufacture Company, Ltd. (BASH), at 5720 North Florida Avenue, Tampa (Hillsborough County), Florida 33604. . . ." On March 31, 2008, Respondent, Discount Scooters, Inc. ("Respondent"), filed with the Department of Highway Safety and Motor Vehicles ("Department") a "petition or complaint" protesting the establishment of the additional dealership at the proposed location. The matter was referred to the Division of Administrative Hearings on April 3, 2008, to conduct the final hearing.

This final hearing was scheduled for October 7, 2008. Petitioners and Respondent were provided with written notice in accordance with Subsection 120.569(2)(b), Florida Statutes. The notice, in the form of a Notice of Hearing, was mailed on May 27, 2008, to Petitioners and to Respondent at their respective addresses of record.

As noted above, the final hearing in the case was held, as noticed, on October 7, 2008. Despite the undersigned's waiting

about an hour to convene the hearing, Petitioners did not appear to present their case. Respondent appeared at hearing through its representative, Brooke S. Gentile.

Respondent presented the testimony of Brooke S. Gentile, owner of Discount Scooters, Inc., and offered and had four exhibits received into evidence.

The proceeding was recorded, but was not transcribed. Neither of the parties submitted proposed recommended orders.

FINDINGS OF FACT

Based on the evidence adduced at hearing and the record as a whole, the following Findings of Fact are made:

1. On March 7, 2008, the Florida Administrative Weekly published a notice that Peace Industry Group intended to allow the establishment of Mobility Tech as a dealership for the sale of motorcycles manufactured by BASH at 5720 North Florida Avenue in Tampa (Hillsborough County), Florida. The notice also stated that the "new point" location for the proposed dealership is in a "county of more than 300,000 population, according to the latest population estimates of the University of Florida, Bureau of Economic and Business Research."

2. Respondent is an existing franchised dealer of motorcycles manufactured by BASH.

3. Respondent's dealership is located at 5908 North Armenia Avenue in Tampa, Florida.

4. The driving distance between Respondent's dealership and the location of the new dealership that Peace Industry proposes to establish is 2.05 miles.

CONCLUSIONS OF LAW

5. The Division of Administrative Hearings has jurisdiction of the subject matter of and the parties to this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2008).

6. The Department is the agency responsible for regulating the licensing and franchising of motor vehicle dealers. § 320.60 through 320.70, Fla. Stat.

7. Peace Industry Group and Mobility Tech are seeking the Department's approval of a proposal to establish a new dealership for the sale of motorcycles manufactured by BASH at 5720 North Florida Avenue in Tampa, Florida, pursuant to Section 320.642, Florida Statutes.

8. Subsection 320.642(1), Florida Statutes, requires a motor vehicle dealer who proposes to establish an additional motor vehicle dealership within an area already represented by the same line-make vehicle to give written notice to the Department of its intent. The Department is then required to publish the notice in the Florida Administrative Weekly. § 320.642, Fla. Stat.

9. Subsection 320.642(2)(a), Florida Statutes, provides that approval of a motor vehicle dealer's proposal to establish

an additional dealership within an area where the same line-make dealer is represented shall be denied if:

1. A timely protest is filed by a presently existing franchised motor vehicle dealer with standing to protest as defined in subsection (3); and

2. The licensee fails to show that the existing franchised dealer or dealers who register new motor vehicle retail sales or retail leases of the same line-make in the community or territory of the proposed dealership are not providing adequate representation of such line-make motor vehicles in such community or territory. The burden of proof in establishing inadequate representation shall be on the licensee.

10. Subsection 320.642(3), Florida Statutes, sets forth the requirements an existing franchised motor vehicle dealer must meet in order to have standing to protest a proposed additional dealership. That section provides in pertinent part:

(3) An existing franchised motor vehicle dealer or dealers shall have standing to protest a proposed additional or relocated motor vehicle dealer where the existing motor vehicle dealer or dealers have a franchise agreement for the same line-make vehicle to be sold or serviced by the proposed additional or relocated motor vehicle dealer and are physically located so as to meet or satisfy any of the following requirements or conditions:

* * *

(b) If the proposed additional or relocated motor vehicle dealer is to be located in a county with a population of

more than 300,000 according to the most recent data of the United States Census Bureau or the data of the Bureau of Economic and Business Research of the University of Florida:

1. Any existing motor vehicle dealer or dealers of the same line-make have a licensed franchise location within a radius of 12.5 miles of the location of the proposed additional or relocated motor vehicle dealer; or

11. In this case, the evidence established that Respondent is an existing motor vehicle dealer which has a franchise agreement for the same line-make vehicle to be sold by the proposed additional motor vehicle dealer. The record also established that the proposed additional motor vehicle dealer is to be located in a county with a population of more than 300,000 according to the most recent data of the Bureau of Economic Research of the University of Florida. Finally, the evidence established that Respondent, the existing dealership, has a licensed franchise location within a radius of 12.5 miles of the location of the proposed additional motor vehicle dealer.

12. For the reasons stated in paragraph 11, Respondent has standing to file a protest in this case.

13. Where, as in this case, Respondent filed a protest and established that it has standing to do so, Petitioners, as licensees, must meet the burden of proof enunciated in Subsection 320.642(2)(a)2., Florida Statutes. According to that

provision, Respondent must establish that the existing franchised dealer is not providing adequate representation of the line-make motor vehicles in the subject territory.

14. In this case, Petitioners, as licensees, failed to appear at the hearing after proper notice of the hearing was issued. Thus, no evidence was presented to establish that Respondent was not providing adequate representation of the line-make motor vehicles in the territory in which the proposed dealership intends to locate. Absent such evidence, Petitioners failed to meet their burden of proof.

15. Having failed to meet their burden of proof, the establishment of the proposed new dealership should be denied.

RECOMMENDATION

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

RECOMMENDED that the Department of Highway Safety and Motor Vehicles issue a final order denying Petitioners, Peace Industry Group, Inc., and Mobility Tech, Inc.'s, approval to establish a new BASH motorcycle dealership at 5720 North Florida Avenue, Tampa, Florida.

DONE AND ENTERED this 19th day of November, 2008, 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 19th day of November, 2008.

ENDNOTE

1/ All references are to 2007 Florida Statutes, unless
otherwise indicated.

COPIES FURNISHED:

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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.