

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LS MOTORSPORTS, LLC, AND WILD)
HOGS SCOOTERS AND MOTORSPORTS,)
LLC,)
)
Petitioners,)
)
vs.) Case No. 08-5825
)
ACTION ORLANDO MOTORSPORTS,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Administrative Law Judge (ALJ) Daniel Manry conducted the final hearing of this case for the Division of Administrative Hearings (DOAH) on April 6, 2009. The representative for Respondent and the court reporter attended the hearing in Orlando, Florida. The ALJ conducted the hearing by video teleconference from Tallahassee, Florida.

APPEARANCES

For Petitioners: (No appearance)

For Respondent: James Sursely, President, pro se
Action Orlando Motor Sports
306 West Main Street
Apopka, Florida 32712

STATEMENT OF THE ISSUE

The issue is whether Petitioners are entitled to a proposed motor vehicle dealership in Seminole County, Florida.

PRELIMINARY STATEMENT

On October 24, 2008, the petitioners published a Notice of Publication for a New Point Franchise Motor Vehicle Dealer in a County of More than 300,000 Population in the Florida Administrative Weekly. Respondent timely filed a protest with the Department of Highway Safety and Motor Vehicles (the Department).

By letter dated November 18, 2008, the Department referred the matter to DOAH to conduct a hearing "for the sole purpose of determining the propriety of the protest regarding issues specifically within the purview of Sections 320.642 and 320.699, Florida Statutes [(2008)]."¹

At the hearing, neither of the petitioners appeared, and neither submitted any evidence. Respondent appeared through its corporate officer. Respondent did not request a transcript of the hearing. The time for submitting proposed recommended orders expired on April 16, 2009. Neither party filed a proposed recommended order.

FINDINGS OF FACT

1. DOAH provided the parties with adequate notice of the final hearing. On December 11, 2008, DOAH mailed a Notice of Hearing to each of the parties, scheduling the final hearing for April 6, 2009. No Notice was returned as undelivered. No party objected to a final hearing on April 6, 2009.

2. On December 11, 2008, DOAH also issued an Order of Pre-hearing Instructions that, in relevant part, required the parties to file a pre-hearing stipulation which was to include a list of witnesses and exhibits to be called and submitted at the final hearing. No party complied with the Order.

3. The documents forwarded to DOAH by the Department support the findings. The Notice of Publication for a New Point Franchise Motor Vehicle Dealer in a County of More than 300,000 Population was published in the Florida Administrative Weekly, Volume 34, Number 43, on October 24, 2008. On behalf of Respondent, Mr. James Sursely timely filed a protest letter dated November 7, 2008, with Ms. Nalini Vinayak, the administrator at the Department responsible for receiving such protests.

4. The remaining facts are undisputed in this proceeding. The proposed new point franchise motor vehicle dealer is for a line-make identified in the record as Chunfeng Holding Group Co. Ltd. (CFHG) motorcycles. The proposed location is in Seminole County, Florida. Seminole County has a population in excess of 300,000.

5. The proposed new point franchise motor vehicle dealer is located at 3311 West Lake Mary Boulevard, Lake Mary, Florida. Respondent owns and operates an existing CFHG dealership that is located at 306 West Main Street, Apopka, Orange, County,

Florida, 32712. The proposed dealership is within a 12.5-mile radius of Respondent's dealership.

6. Respondent has standing to protest the establishment of the proposed dealership. The petitioners submitted no evidence that Respondent is "not providing adequate representation" of the same line-make motor vehicles in the community or territory.

CONCLUSIONS OF LAW

7. DOAH has jurisdiction over the parties to and the subject matter of this proceeding. §§ 120.569 and 120.57(1). DOAH provided the parties legally, sufficient notice.

8. The Department is the agency responsible for regulating the licensing and franchising of motor vehicle dealers in the state. §§ 320.60 through 320.70. The petitioners and Respondent each operate motorcycle dealerships in the state.

9. Subsection 320.642(1) 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 to establish a new franchise. The statute also provides that any affected dealership may protest the establishment of a new franchise in its territory.

10. Subsection 320.642(2) establishes the standards of review to determine if establishment of a new, competing motor

vehicle franchise should be granted. Subsection 320.642(2)(a) provides in relevant part:

An application for a motor vehicle dealer license in any community or territory shall be denied when:

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.

11. Pursuant to Subsection 320.642(3)(b)1., "if the proposed additional . . . motor vehicle dealer is to be located in a county with a population of more than 300,000," as in the instant case, then any existing motor vehicle dealer of the same line-make whose licensed franchise location is within a radius of 12.5 miles of the proposed additional dealer has standing to file a protest within the meaning of Subsection 320.642(2)(a)1.

12. Subsection 320.642(8) provides:

The department shall not be obligated to determine the accuracy of any distance asserted by any party in a notice submitted to it. Any dispute concerning a distance measurement asserted by a party shall be

resolved by a hearing conducted in accordance with ss. 120.569 and 120.57.

13. Respondent's assertion in its protest letter that the proposed franchise is within 12.5 miles of the existing franchise location is not a disputed issue of fact. Respondent is an existing motor vehicle dealer who has standing to file a protest of the proposed new dealership in this case.

14. The burden of proof is on the petitioners. The petitioners must show by a preponderance of the evidence that there is "inadequate representation" in the community or territory of the proposed new dealership in accordance with the criteria prescribed in Subsection 320.642(2)(b).

15. The petitioners failed to satisfy their burden of proof. The petitioners submitted no evidence at the final hearing.

RECOMMENDATION

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

RECOMMENDED that the Department enter a final order denying the establishment of the proposed franchise dealership.

DONE AND ENTERED this 21st day of April, 2009, in
Tallahassee, Leon County, Florida.



DANIEL MANRY
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 21st day of April, 2009.

ENDNOTE

^{1/} References to subsections, sections, and chapters are to
Florida Statutes (2008) unless otherwise stated.

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.