

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ITALICA MOTORS, INC., AND HOUSE)
OF SCOOTERS, INC.,)
)
Petitioners,)
)
vs.) Case No. 08-6425
)
LOON'S LAGOON, LLC.,)
)
Respondent.)
_____)

RECOMMENDED ORDER

On March 10, 2009, an administrative hearing in this case was held via telephone before Lawrence P. Stevenson, Administrative Law Judge, Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioners: Adriana DeLima, pro se
Italica Motors, Inc.
5001 Southwest 135 Avenue
Miramar, Florida 33027

Orestes Nunez, pro se
Orestes Nunez, d/b/a House of Scooters
6370 North Highway US 1
Melbourne, Florida 32940

For Respondent: Gregory G. Shonk, pro se
Loon's Lagoon, LLC
234 Highway A1A
Satellite Beach, Florida 32937

STATEMENT OF THE ISSUE

The issue is whether Petitioners are entitled to a motor vehicle dealership that is proposed to be located in Melbourne, Florida.

PRELIMINARY STATEMENT

On October 17, 2008, Italica Motors, Inc. and House of Scooters, Inc. (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. No dealer of the same line-make filed a petition or complaint protesting the application within thirty days after publication of the notice in the Florida Administrative Weekly. On November 24, 2008, the Department of Highway Safety and Motor Vehicles, Division of Motor Vehicles (Department) issued a final order granting a license to House of Scooters, Inc. to sell the motorcycles manufactured by Thaizhou Zhongneng Motorcycle Co. Ltd. (ZHNG) from its location in Melbourne, Florida.

By letter filed with the Department on December 22, 2008, Loon's Lagoon, LLC (Respondent) filed a protest of Petitioners' application. The letter, signed by Loon's Lagoon managing owner Gregory Shonk, stated that his company never received the statutorily required mailed copy of the notice from the Department and therefore should be allowed to challenge the issuance of the license to Petitioners despite the running of

the thirty-day period. By letter dated December 23, 2008, the Department referred the matter to DOAH to assign an administrative law judge 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."

The hearing was convened as scheduled, via a telephone conference call. Orestes Nunez, proprietor of House of Scooters, testified on behalf of Petitioners. Petitioners' Exhibits 1 through 5 were admitted into evidence. Gregory Shonk testified on behalf of Respondent, and offered no exhibits.

By agreement, the record of the proceeding was held open for ten days to give Mr. Shonk an opportunity to secure affidavits from Department witnesses. No such affidavits were submitted. An order closing the record was entered on March 27, 2009, and the parties were given until the close of business on April 6, 2009, to submit proposed recommended orders.

The hearing was not transcribed. No party submitted a proposed recommended order. All references to the Florida Statutes are to the 2008 edition unless otherwise indicated.

FINDINGS OF FACT

1. Respondent is an existing franchised dealer of motorcycles manufactured by ZHNG.

2. Petitioners have proposed the establishment of a new dealership to sell the same line and make of motorcycles as those sold by Respondent.

3. Respondent's dealership is located at 234 Highway A1A, Satellite Beach, Florida 32937.

4. Petitioners' proposed dealership would be located at 6370 North Highway US 1, Melbourne Florida 32940.

5. The proposed dealership is within a 12.5-mile radius of Respondent's dealership. Satellite Beach and Melbourne are both in Brevard County.

6. Petitioners admitted that they did not provide the name of Respondent's business to the Department for purposes of notifying the existing dealer of Petitioner's intent to establish a new dealership of the same line-make. For this reason, Respondent never received the standard letter of notice from the Department. Respondent filed its petition as soon as its ownership learned of the proposed new ZHNG dealership.

7. Orestes Nunez, principal owner of House of Scooters, testified that he had no way of knowing the names of every dealer that is selling the ZHNG line-make because the scooters are brought into this country by four different importers and sold under different names.

8. None of the scooters are marketed under the name "ZHNG." Mr. Nunez' proposed dealership would sell the scooters

under the name "Italica," whereas other dealers sell the ZHNG scooter under other names. Mr. Nunez testified that he was able to provide the Department the names of other "Italica" dealers, but could not provide the names of every dealer selling ZHNG scooters.

9. Petitioners conceded that they could not establish that Respondent is not providing adequate representation of the ZHNG line-make within the territory at issue. Petitioners' only basis for disputing the protest was that it was not timely filed.

10. Under all the circumstances, it is found that Respondent's protest was timely filed and that Respondent has standing to protest the establishment of the proposed dealership.

CONCLUSIONS OF LAW

11. DOAH has jurisdiction over the parties to and the subject matter of this proceeding. §§ 120.569 and 120.57(1), Fla. Stat.

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

13. Subsection 320.642(1), Florida Statutes, provides:

(1) Any licensee who proposes to establish an additional motor vehicle dealership or permit the relocation of an existing dealer

to a location within a community or territory where the same line-make vehicle is presently represented by a franchised motor vehicle dealer or dealers shall give written notice of its intention to the department. Such notice shall state:

(a) The specific location at which the additional or relocated motor vehicle dealership will be established.

(b) The date on or after which the licensee intends to be engaged in business with the additional or relocated motor vehicle dealer at the proposed location.

(c) The identity of all motor vehicle dealers who are franchised to sell the same line-make vehicle with licensed locations in the county or any contiguous county to the county where the additional or relocated motor vehicle dealer is proposed to be located.

(d) The names and addresses of the dealer-operator and principal investors in the proposed additional or relocated motor vehicle dealership.

Immediately upon receipt of such notice the department shall cause a notice to be published in the Florida Administrative Weekly. The published notice shall state that a petition or complaint by any dealer with standing to protest pursuant to subsection (3) must be filed not more than 30 days from the date of publication of the notice in the Florida Administrative Weekly. The published notice shall describe and identify the proposed dealership sought to be licensed, and the department shall cause a copy of the notice to be mailed to those dealers identified in the licensee's notice under paragraph (c). (Emphasis added.)

14. The underscored provisions make it clear that a licensee proposing to establish an additional dealership must provide the Department with the names of all dealers franchised to sell the same line-make vehicle in the county where the new franchise is proposed. The franchised dealers are then entitled to receive direct notice from the Department of the proposed new dealership. Through no fault of its own, Respondent did not receive direct notice in this case. It is concluded that Petitioners' failure to meet this statutory duty should not be held to deprive Respondent of its right to file a protest pursuant to Subsection 320.642(3), Florida Statutes, as an affected dealership. Under all the circumstances presented in this case, Respondent's protest was timely filed.

15. Subsection 320.642(2), Florida Statutes, establishes the standards of review to determine if establishment of a new, competing motor vehicle franchise should be granted. Subsection 320.642(2)(a), Florida Statutes, 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.

16. Pursuant to Subsection (3)(b)1. of Section 320.642, Florida Statutes, "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 (2)(a)1. of the statute.

17. Respondent is an existing motor vehicle dealer who has standing to file a protest of the proposed new dealership in this case.

18. The burden is therefore on Petitioners to prove that there is "inadequate representation" in the community or territory of the proposed new dealership, according to the criteria set forth in Subsection 320.642(2)(b), Florida Statutes.

19. Petitioners conceded that they could not meet the burden of proving inadequate representation in the community or territory of the proposed new dealership.

20. The approval sought by Petitioners 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 enter a final order denying the establishment of Petitioners' proposed franchise.

DONE AND ENTERED this 8th day of April, 2009, in Tallahassee, Leon County, Florida.

Lawrence P. Stevenson

LAWRENCE P. STEVENSON
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 8th day of April, 2009.

COPIES FURNISHED:

Electra Theodorides-Bustle, Executive Director
Department of Highway Safety and
Motor Vehicles
2900 Apalachee Parkway
Tallahassee, Florida 32399-0500

Robin Lotane, General Counsel
Department of Highway Safety and
Motor Vehicles
2900 Apalachee Parkway
Tallahassee, Florida 32399-0500

Adriana De Lima
Italica Motors, Inc.
5001 Southwest 135 Avenue
Miramar, Florida 33027

Greg G. Shonk
Loon's Lagoon, LLC
234 Highway A1A
Satellite Beach, Florida 32937

Orestes Nunez
Orestes Nunez, d/b/a House of Scooters
6370 North Highway US 1
Melbourne, Florida 32940

Michael James Alderman, Esquire
Department of Highway Safety and
Motor Vehicles
Neil Kirkman Building, Room A-432
2900 Apalachee Parkway
Tallahassee, Florida 32344

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.