

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

A 1 MOTORSCOOTERS.COM, LLC AND)
A 1 MOTORSCOOTERS.COM, LLC,)
)
Petitioner,)
)
vs.) Case No. 09-5003
)
ECO GREEN MACHINE, LLC,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a final hearing was conducted in this case on December 18, 2009, in St. Petersburg, Florida, before Administrative Law Judge R. Bruce McKibben of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Stephen G. Mortimer, Esquire
Law Office of Thomas E. O'Hara
1901 Ulmerton Road, Suite 785
Clearwater, Florida 33762-2309

For Respondent: Patcharee Clark, pro se
Ronald Pownall, Interpreter/Spokesman
ECO Green Machine, LLC,
d/b/a ECO Green Machine
7000 Park Boulevard, Suite A
Pinellas Park, Florida 33781

STATEMENT OF THE ISSUE

The issue in this case is whether Petitioner's application to establish a dealership to sell motorcycles manufactured by JMSTAR Motorcycle Company should be approved.

PRELIMINARY STATEMENT

On February 27, 2009, a Notice was published in the Florida Administrative Weekly ("FAW") indicating the desire of Petitioner to establish a dealership to sell JMSTAR motorcycles in Pinellas County, Florida. Respondent filed a protest against the proposed dealership on June 4, 2009. The matter was referred to the Division of Administrative Hearings ("DOAH") and assigned to the undersigned Administrative Law Judge. Upon motion of Petitioner, an Order was issued closing the file due to lack of jurisdiction, i.e., because Respondent's protest was not timely filed. (See A1 Motorscooters.Com, LLC, and A1 Motorscooters.com v. ECO Green Machine, LLC, Case No. 09-3050, DOAH June 29, 2009.) By Order of the Department of Highway Safety and Motor Vehicles ("DHSMV") dated September 11, 2009, the matter was referred back to DOAH due to the fact that Respondent had not been appropriately noticed of the proposed dealership. A final hearing was held at the date and place indicated above.

At the final hearing, Petitioner called two witnesses: Angela Starbuck, supervisor of DHSMV's dealer licensure section;

and Beth Miller. No exhibits were offered into evidence. Respondent appeared pro se through the person of Patcharee Clark; however, due to Clark's difficulty with the English language, Respondent's position was enunciated through the person of Ronald Pownall, service manager for Respondent. There were no exhibits offered into evidence by Respondent.

The parties advised the undersigned that the transcript of the final hearing would not be ordered. The parties asked leave to submit proposed recommended orders on or before January 5, 2010. Petitioner timely submitted a Proposed Recommended Order, which was duly considered in the preparation of this Recommended Order. Respondent had indicated at final hearing that it would not file a Proposed Recommended Order inasmuch as "the facts speak for themselves." As of the date this Recommended Order was completed, Respondent had not filed anything further with the DOAH.

FINDINGS OF FACT

1. Petitioner is a Florida-limited liability company located in Pinellas County, Florida.¹ Petitioner is in the business of selling motorcycles and motorscooters. In February 2009, Petitioner submitted to DHSMV a letter of intent to establish A1 Motorscooters.com, LLC, as a new dealership for the purpose of selling JMSTAR motorscooters. Notice of that

intent was duly published in the February 27, 2009, FAW, Volume 35, Number 8.

2. In its letter of intent to DHSMV, Petitioner did not list Respondent as a dealer with standing to protest its letter of intent. That was due to the fact that Respondent did not appear on the list of licensed dealers provided to Petitioner by DHSMV (as will be discussed more fully herein).

3. Respondent is a Florida-limited liability company doing business in Pinellas County, Florida. It sells different makes of motorcycles. On June 4, 2009, Respondent was made aware of Petitioner's letter of intent (some 98 days after Petitioner's Notice was published). Respondent immediately filed a protest, stating that Respondent was "approved" to sell the same line of motorcycles and that Respondent "just received [their] license and began selling several months ago."

4. In October 2008, Respondent received a Final Order from DHSMV approving Respondent as a dealer for the JMSTAR line of motorcycles. That Final Order gave Respondent a preliminary approval to sell JMSTAR motorcycles, but only upon completion of the application process and issuance of a license by the Department. Respondent's license was, ultimately, issued effective April 21, 2009. Thus, at the time of the FAW Notice as to Petitioner's new dealership, Respondent had been

preliminarily approved, but was not a licensed dealer of JMSTAR motorcycles.

5. Respondent had a prior agreement with SunL Group, Inc. ("SunL"), to sell motorcycles as a franchisee or independent contractor. Under that arrangement, Respondent could sell various kinds of motorcycles, including the JMSTAR line. At some point in time, the agreement between SunL and Respondent was terminated. Further, SunL's dealership license was revoked by DHSMV on June 5, 2009. SunL was not a party to this proceeding, and no one appeared on its behalf.

6. When Petitioner filed its letter of intent with DHSMV, it asked for and received a list of all authorized dealers of JMSTAR motorcycles so that those dealers could be appropriately notified. DHSMV provided a list to Petitioner. Respondent was not on the list because, at that time, Respondent was not yet a licensed dealer of JMSTAR motorcycles. (Apparently SunL was a licensed dealer and could have protested Petitioner's letter of intent, but there is no evidence that it did so.)

7. Respondent did not provide any credible testimony or other competent evidence at final hearing as to the impact of Petitioner's proposed dealership on Respondent, nor were any of the review criteria set forth in Florida Statutes concerning the approval or denial of a new dealership discussed by either party.

CONCLUSIONS OF LAW

8. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding pursuant to Sections 120.569 and 120.57(1), Florida Statutes (2009).²

9. This matter was transferred to DOAH from DHSMV after the prior case was closed "for the sole purpose of determining the propriety of the protest [by Respondent] regarding issues specifically within the purview of [S]ections 320.642 and 320.699, Florida Statutes." See letter from the dealer license section administrator dated June 5, 2009.

10. Section 320.699, Florida Statutes, addresses the process for obtaining an administrative hearing and states:

(1) A motor vehicle dealer, or person with entitlements to or in a motor vehicle dealer, who is directly and adversely affected by the action or conduct of an applicant or licensee which is alleged to be in violation of any provision of ss. 320.60-320.70, may seek a declaration and adjudication of its rights with respect to the alleged action or conduct of the applicant or licensee by:

(a) Filing with the department a request for a proceeding and an administrative hearing which conforms substantially with the requirements of ss. 120.569 and 120.57; or

(b) Filing with the department a written objection or notice of protest pursuant to s. 320.642.

(2) If a written objection or notice of protest is filed with the department under paragraph (1)(b), a hearing shall be held not sooner than 180 days nor later than 240 days from the date of filing of the first objection or notice of protest, unless the time is extended by the administrative law judge for good cause shown. This subsection shall govern the schedule of hearings in lieu of any other provision of law with respect to administrative hearings conducted by the Department of Highway Safety and Motor Vehicles or the Division of Administrative Hearings, including performance standards of state agencies, which may be included in current and future appropriations acts.

11. Section 320.642, Florida Statutes, sets forth the process for establishing a new motor vehicle dealership. That section states in pertinent part:

(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. The notice must 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 and 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 the notice the department shall cause a notice to be published in the Florida Administrative Weekly. The published notice must state that a petition or complaint by any dealer with standing to protest pursuant to subsection (3) must be filed within 30 days following the date of publication of the notice in the Florida Administrative Weekly. The published notice must 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). The licensee shall pay a fee of \$75 and a service charge of \$2.50 for each publication. Proceeds from the fee and service charge shall be deposited into the Highway Safety Operating Trust Fund.

Florida Statutes clearly require a proposed licensee to identify all currently franchised dealers. Those dealers with standing to protest are required to file a complaint within 30 days of the FAW Notice. In this case, Respondent was not a licensed, franchised dealer at the time Petitioner's Notice in the FAW was filed. Therefore, Respondent did not have standing to protest the proposed dealership.

12. The Department may provide to applicants, as a courtesy, a list of any approved, but unlicensed, dealers in the

same line-make. There is no requirement that it do so, and why it would do so is unclear since the approved dealers do not have standing to file a protest. In this case, DHSMV did not initially identify Respondent to Petitioner, but did so upon receipt of the case from DOAH on remand. DHSMV then accepted Respondent's protest, but sent the protest back to DOAH for a determination of standing. It is clear Respondent does not have standing in this case.

13. The remainder of Section 320.642, Florida Statutes (specifically subsection (2)(b)1. through 11.), addresses the determination of whether existing franchised dealers are providing adequate representation in the community for the line-make at issue. Inasmuch as Respondent does not have standing to file a protest, that portion of the statute is not relevant to this case.

14. Petitioner did not address the elements in Subsections 320.642(2)(b)1. through 11, Florida Statutes. However, in light of Respondent's lack of jurisdiction to protest the proposed dealership, Petitioner did not have a further burden to prove or to address those elements.

RECOMMENDATION

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

RECOMMENDED that a final order be entered by the Department of Highway Safety and Motor Vehicles denying Respondent, ECO Green Machine, LLC's, protest of Petitioner, Al Motorscooter.com, LLC's, proposed dealership.

DONE AND ENTERED this 12th day of January, 2010, in Tallahassee, Leon County, Florida.



R. BRUCE MCKIBBEN
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 12th day of January, 2010.

ENDNOTES

^{1/} There was no explanation at final hearing as to why Al Motorscooters.com, LLC, is listed twice in the style of this case. Inasmuch as that mystery is not necessary to the findings made herein, it is of no consequence.

^{2/} All references to the Florida Statutes herein shall be to the 2009 codification.

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.