STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CHRYSLER GROUP, LLC,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case Nos. 10-1968
	)	10-1969
JERRY ULM DODGE, INC., d/b/a	)	10-1970
JERRY ULM DODGE CHRYSLER JEEP,	)	
AND FERMAN ON 54, INC., d/b/a	)	
FERMAN CHRYSLER DODGE AT	)	
CYPRESS CREEK,	)	
	)	
Respondents.	)	
	)	

RECOMMENDED ORDER

Administrative Law Judge (ALJ) Daniel Manry conducted the final hearing of these cases for the Division of Administrative Hearings (DOAH) on August 4, 2010, in Tallahassee, Florida.

APPEARANCES

For Petitioner: J. Andrew Bertron, Esquire
Nelson Mullins Riley & Scarborough, LLP
3600 Maclay Boulevard South, Suite 202
Tallahassee, Florida 32312

Robert D. Cultice
Qualified Representative
Wilmer Cutler Pickering Hale
and Door
60 State Street
Boston, Massachusetts 02109

For Respondents: Robert Craig Spickard, Esquire
Kurkin Forehand Brandes, LLP
800 North Calhoun Street, Suite 1B
Tallahassee, Florida 32303

STATEMENT OF THE ISSUE

The issue is whether Petitioner's establishment of North Tampa Chrysler Jeep Dodge, Inc. (North Tampa), as a successor motor vehicle dealer for Chrysler, Jeep and Dodge line-makes (vehicles) in Tampa, Florida, is exempt from the notice and protest requirements in Subsection 320.642(3), Florida Statutes (2009),[1] pursuant to Subsection 320.642(5)(a).

PRELIMINARY STATEMENT

On March 19, 2010, Jerry Ulm Dodge, Inc., d/b/a Jerry Ulm Dodge Chrysler Jeep (Ulm), and Ferman on 54, Inc., d/b/a Ferman Chrysler Dodge at Cypress Creek (Ferman) (collectively Respondents), filed a Petition for Determination that Chrysler Group LLC Has Established an Additional Motor Vehicle Dealership in Violation of Section 320.642, Florida Statutes (the Petition) with the Department of Highway Safety and Motor Vehicles (the Department). The Petition styled Ulm and Ferman as the petitioners. On April 13, 2010, the Department forwarded the Petition to DOAH, where the matter was assigned three case numbers for the separate Chrysler, Jeep and Dodge vehicles involved. By Order of Consolidation dated May 5, 2010, the cases were consolidated. DOAH subsequently reversed the parties in the style of the cases to designate Chrysler Group, LLC, as Petitioner and Ulm and Ferman as Respondents.

At the final hearing, Petitioner presented the testimony of three witnesses and submitted 21 exhibits. Respondents called no witnesses and submitted 30 exhibits. The identity of the witnesses and exhibits and the rulings regarding each are reported in the Transcript of the hearing filed with DOAH on August 20, 2010. The parties timely filed their respective Proposed Recommended Orders on August 30, 2010.

FINDINGS OF FACT

1. Petitioner manufactures and sells Chrysler, Jeep and Dodge vehicles to authorized Chrysler, Jeep and Dodge dealers. Ulm is a party to Dealer Sales and Service Agreements with Petitioner for Chrysler, Jeep and Dodge vehicles. Ulm sells Chrysler, Jeep and Dodge vehicles at 2966 North Dale Mabry Highway, Tampa, Florida 33607.

2. Ferman is a party to Dealer Sales and Service Agreements with Petitioner for Chrysler, Jeep and Dodge vehicles. Ferman sells Chrysler, Jeep and Dodge vehicles at 24314 State Road 54, Lutz, Florida 33559.

3. It is undisputed that Petitioner has had four dealers in the Tampa metro market for a significant number of years. Petitioner's primary competitors also have had four or more dealers in the Tampa metro market. By appointing North Tampa as a successor dealer to Bob Wilson Dodge Chrysler Jeep (Wilson),

Petitioner seeks to maintain the status quo of four Chrysler dealers in the Tampa metro market.

4. In April 2008, Petitioner had four dealers in the Tampa metro market that each sold and serviced Chrysler, Jeep and Dodge vehicles. The four dealers were: Ulm, Ferman, Courtesy Chrysler Jeep Dodge, and Wilson.

5. On April 25, 2008, Wilson filed a Chapter 11 petition in United States Bankruptcy Court in the Middle District of Florida (the Bankruptcy Court). At or about the same time, Wilson closed its doors and ceased selling and servicing Chrysler, Jeep and Dodge vehicles.

6. The filing of Wilson's bankruptcy petition precipitated an automatic stay under Section 362 of the Bankruptcy Code. The automatic stay prevented Petitioner from terminating Wilson's franchise and dealer agreements (dealer agreements). But for Wilson's bankruptcy filing, Petitioner would have sent Wilson a notice of termination when Wilson closed its doors and ceased dealership operations.

7. Wilson's cessation of business adversely impacted Petitioner. In relevant part, Petitioner lost sales and lacked a necessary fourth dealer to provide service to Chrysler, Jeep and Dodge customers in the Tampa metro market. Petitioner desired to reopen a dealership at or close to the former Wilson

location as soon as possible to mitigate or eliminate the economic loss.

8. During the automatic stay, Petitioner was legally precluded from unilaterally appointing a successor dealer to Wilson. Wilson still had valid dealer agreements for the Chrysler, Jeep and Dodge vehicles and, therefore, was still a dealer.

9. During the automatic stay, Wilson attempted to sell its existing dealership assets, including the Chrysler, Jeep and Dodge dealer agreements. Any attempt by Petitioner to appoint a successor dealer or even negotiate with a successor dealer, would have undermined Wilson's efforts to sell the dealerships and maximize the estate for the benefit of the creditors. A sale of the dealership required the consent of Wilson and Wilson's largest creditor, Chrysler Financial.

10. Petitioner did everything it could to accelerate a sale. However, Petitioner was not a party to the sale negotiations and had no ability to require or force Wilson to sell the dealership or its assets to any particular party or to do so within any particular time period. A preponderance of the evidence does not support a finding that Petitioner did anything to intentionally, or inadvertently, delay or manipulate the timing of a sale.

11. On July 30, 2008, Petitioner filed a motion with the Bankruptcy Court to lift the automatic stay. The motion also sought the termination of Wilson's dealer agreements.

12. Petitioner filed the motion in the Bankruptcy Court in an attempt to hasten the sale negotiations. Petitioner also wanted to be able to terminate the dealer agreements as quickly as possible in the event that a sale was not consummated.

13. The Bankruptcy Court did not initially grant Petitioner's motion. The court wanted to allow time for a sale of the dealership to proceed. During 2008 and early 2009, Wilson continued to negotiate with potential buyers for the dealership.

14. On January 8, 2009, Wilson's motor vehicle dealer license expired. It became apparent to Petitioner that a sale of Wilson's assets would be unlikely.

15. Petitioner again asked the Bankruptcy Court to grant Petitioner's motion to lift the stay. On February 9, 2009, the Bankruptcy Court entered an order granting Petitioner's motion to lift the stay. However, the order did not terminate Wilson's dealer agreements.

16. On February 16, 2009, within a week of the entry of the order lifting the stay, Petitioner sent Wilson a notice of intent to terminate Wilson's dealer agreements. Wilson received the notice of termination on February 23, 2009, and the

termination became effective on March 10, 2009. A preponderance of evidence does not support a finding that Petitioner attempted to manipulate or delay the timing of the termination of Wilson's dealer agreements.

17. Petitioner began working on establishing a replacement dealership as soon as Wilson's dealer agreements were terminated. Establishing a replacement dealership is a lengthy process that primarily involves finding a suitable dealer candidate, finding a suitable location and facility, and making sure that the candidate has the necessary capital to start and maintain the dealership.

18. Petitioner talked to several potential candidates to replace the Wilson dealership, including Jerry Ulm, the principal of one of the complaining dealers in these cases. By letter dated June 24, 2009, Mr. Ulm advised Petitioner that he opposed the opening of a successor dealership for anyone else but wanted the successor dealership for himself should Petitioner decide to proceed.

19. Petitioner determined that Petitioner would not be able to locate the successor dealership at the former Wilson facility. Petitioner considered several potential alternative locations for the successor dealership, including property offered by Ferman.

20. Ferman had a vacant site on Fletcher Avenue in Tampa, Florida, which Ferman leased from a third party unrelated to this proceeding. Ferman offered to sublease the property to Petitioner. In a letter to Petitioner's real estate agent dated July 17, 2009, Ferman stated Ferman's understanding that Petitioner intended to use the property to establish a Chrysler, Jeep and Dodge dealership.

21. Petitioner ultimately decided to locate the dealership at 10909 North Florida Avenue in Tampa, Florida. It is undisputed that this location is less than two miles from the former Wilson location.

22. Before establishing the successor dealership, however, Petitioner wrote a letter to the Department on February 5, 2010 (the letter). The letter requested the Department to confirm that the establishment of the successor dealership would be exempt under Subsection 320.642(5)(a)1. from the notice and protest requirements in Subsection 320.642(3).

23. The letter explained that Wilson had filed bankruptcy and ceased operations and that the bankruptcy had prevented Petitioner from terminating Wilson and appointing a successor dealership. The letter also provided the relevant dates of the bankruptcy, the lifting of the stay, and the termination of Wilson dealer agreements and advised the Department of

Petitioner's intent to locate the successor dealership within two miles of Wilson's former location.

24. The letter asked the Department to confirm that the establishment of a successor dealership would be exempt if it was established within one year of March 10, 2009, when Petitioner terminated the Wilson dealer agreements. By separate e-mails dated February 9 and 12, 2010, the Department twice confirmed that it had consulted with counsel and determined that the establishment of a successor dealership to Wilson in the manner outlined by Petitioner would be exempt. Petitioner relied on this confirmation by the Department before proceeding with the appointment of a successor dealership.

25. On February 24, 2010, Petitioner sent a second letter to the Department, stating Petitioner's intention to appoint North Tampa as the replacement and successor dealer for Wilson (the second letter). In the second letter, Petitioner again asserted its understanding that the establishment of North Tampa was exempt from the relevant statutory requirements for notice and protest.

26. On February 24, 2010, Petitioner also submitted to the Department an application for a motor vehicle dealer license for North Tampa. On March 3, 2010, the Department issued a license to North Tampa for the Chrysler, Jeep and Dodge vehicles at 10909 North Florida Avenue in Tampa, Florida.

27. On March 7, 2010, North Tampa opened for business. North Tampa has operated successfully and continuously and employs approximately 30 individuals at the site.

CONCLUSIONS OF LAW

28. DOAH has jurisdiction over the subject matter and parties in these cases. §§ 120.569 and 120.57(1), Fla. Stat. (2010). DOAH provided the parties with adequate notice of the final hearing.

29. Petitioner is a "manufacturer," "distributor," and "licensee" defined in Subsections 320.60(5), (8), and (9). Ulm and Ferman are "motor vehicle dealers" defined in Subsection 320.60(11)(a). Ulm and Ferman's Dealer Sales and Service Agreements with Petitioner constitute "franchise agreements" defined in Subsection 320.60(1). The Department is the state agency responsible for licensing and regulating motor vehicle dealers, manufacturers, and distributors. § 320.011.

30. Section 320.642 generally requires a licensee that proposes to establish an "additional motor vehicle dealership" to give notice of its intention to the Department. The Department publishes the notice in the Florida Administrative Weekly and mails the notice to the same line-make dealers in the same and contiguous counties. § 320.642(1). A same line-make dealer with standing may protest the proposed establishment of an additional motor vehicle dealership. § 320.642(3).

31. Section 320.642 provides an exemption from the general requirements for notice and protest. Upon the satisfaction of certain conditions, the opening or reopening of a dealership is not considered an "additional motor vehicle dealer" and is not subject to notice and protest. Subsection 320.642(5)(a) provides, in relevant part:

> The opening or reopening of the same or a successor motor vehicle dealer within 12 months is not considered an additional motor vehicle dealer subject to protest within the meaning of this section, if:
>
> 1. The opening or reopening is within the same or an adjacent county and is within 2 miles of the former motor vehicle dealer location;
>
> 2. There is no dealer within 25 miles of the proposed location or the proposed location is further from each existing dealer of the same line-make than the prior location is from each dealer of the same line-make within 25 miles of the new location;
>
> 3. The opening or reopening is within 6 miles of the prior location and, if any existing motor vehicle dealer of the same line-make is located within 15 miles of the former location, the proposed location is no closer to any existing dealer of the same line-make within 15 miles of the proposed location; or
>
> 4. The opening or reopening is within 6 miles of the prior location and, if all existing motor vehicle dealers of the same line-make are beyond 15 miles of the former location, the proposed location is further than 15 miles from any existing motor vehicle dealer of the same line-make.

32. If the opening or reopening of the same or a successor dealer meets one of the geographic requirements in Subsection 320.642(5)(a), which is undisputed in these cases, then the opening or reopening does not constitute an additional motor vehicle dealer if the opening or reopening occurs "within 12 months." The statute does not define the event that starts the 12-month period. For example, the statute does not state whether the "12 months" starts from: (i) the termination of the former dealership's license; (ii) the termination of the former dealership's franchise agreement; or (iii) the cessation of business by the former dealership. The statute also does not define what constitutes an "opening or reopening," such as, for example: (i) applying for a license; (ii) the issuance of a license; (iii) obtaining a franchise agreement with a licensee; or (iv) opening for business with the public.

33. Florida Administrative Code Rule 15C-7.004(4)(a)[2] specifies at least one event that begins the 12-month exemption period and the reopening of the successor dealer:

> If the license of an existing franchised motor vehicle dealer is revoked for any reason, or surrendered, an application for a license to permit the reopening of the same dealer or a successor dealer within twelve months of the license revocation or surrender shall not be considered the establishment of an additional dealership if one of the conditions set forth in Section 320.642(5) is met by the proposed dealer.

34. Wilson's motor vehicle dealer license expired on January 8, 2009, after Wilson failed to renew its license. It is undisputed that January 8, 2009, is the date Wilson "surrendered" its license within the meaning of Rule 15C-7.004(4)(a).

35. North Tampa submitted its license application to open at the successor location on February 24, 2010, more than 12 months after January 8, 2009. For reasons stated hereinafter, however, the doctrine of equitable tolling operates to extend the 12-month period in Subsection 320.642(5)(a). See Machules v. Department of Administration, 523 So. 2d 1132, 1134 (Fla. 1988) (for the general judicial rule applying equitable tolling in administrative proceedings).

36. The judicial doctrine of equitable tolling applies to state agencies and administrative proceedings when warranted by the facts. Most judicial decisions requiring administrative agencies to apply the doctrine of equitable tolling involve the late filing of a petition. Brown v. Department of Financial Services, 899 So. 2d 1246, 1247 (Fla. 4th DCA 2005) (Because late filing of a petition was not jurisdictional, appellate court remanded to agency for hearing on facts relevant to equitable tolling.); Avante, Inc. v. Agency for Health Care Administration, 722 So. 2d 965, 966 (Fla. 1st DCA 1998) ("[I]f [petitioner on remand] demonstrates facts that demand the

application of the doctrine of equitable tolling, the Agency must accept the Petition for Formal Hearing as timely filed."); Haynes v. Public Employees Relations Commission, 694 So. 2d 821, 822 (Fla. 4th DCA 1977) ("PERC should have held a hearing to determine whether [petitioner's] claims justify application of the doctrine of equitable tolling.").

37. In Conley Subaru, Inc. v. Performance Motors, 16 F.A.L.R. 341, 1993 WL 943671, Case No. 92-6942 (DOAH November 3, 1993)(DHSMV Final Order; December 22, 1993), the Department ruled, on facts indistinguishable from these cases, that equitable tolling extends the 12-month period in Subsection 320.642(5)(a) when the predecessor dealer files bankruptcy. The predecessor Subaru dealer held a Subaru franchise agreement and motor vehicle dealer license agreement when it filed a Chapter 11 petition in bankruptcy. The automatic stay operated to prevent any action by Subaru to terminate the dealer agreements. While the bankruptcy was pending, the Department terminated the dealer's license on a date that was more than 12 months prior to the date that a license application was submitted to the Department for a successor dealer. During the bankruptcy, the predecessor dealer attempted, unsuccessfully, to assign and sell its Subaru franchise agreement.

38. After the sale did not occur, and some nine months after the filing of the petition, Subaru filed a motion with the bankruptcy court for relief from the automatic stay to terminate the predecessor dealer's franchise agreement. One week after the bankruptcy court granted the motion, Subaru sent a notice of termination to the predecessor dealer. After terminating the predecessor dealer's agreement, Subaru appointed a successor dealer at a location within two miles of the location of the predecessor dealer. The successor dealer's complete license application was not submitted until almost 16 months after the Department terminated the predecessor dealer's license.

39. In Conley, the Department acknowledged that under a literal construction and application of Rule 15C-7.004(4)(a) the successor dealer's complete license application must have been submitted within 12 months of the termination of the predecessor dealer's license in order for the reopening to be exempt from notice and protest. However, the Department determined that equitable tolling was applicable to extend the 12-month period:

> Such a [literal] construction does not take into account the impediment of the bankruptcy proceeding wherein Subaru is prevented from asserting its right to terminate the dealership agreement with [the dealer] and proceed to timely select and negotiate with a successor dealer until some nine months after the 12-month time limit had begun to run. The results of such a construction and application of the rule are rather harsh considering that Subaru,

> through no fault of its own, was prevented by the bankruptcy proceeding from timely moving forward to meet the time limit set out in the rule.
>
> This is clearly a case where the doctrine of equitable tolling is applicable. . . .
>
> In applying the doctrine of equitable tolling in this case, the 12-month period would begin to run on . . . the effective date of the termination of [the predecessor dealer's] dealership agreement by Subaru, the first date on which Subaru could begin the process of selecting and negotiating with a successor dealer.

Conley at paragraphs 32-34.

40. There is no substantive difference between the facts in Conley and these cases. The refusal to apply equitable tolling in these cases would violate the principle of administrative stare decisis. Villa Capri Association, Ltd. v. Florida Housing Finance Corp., 23 So. 3d 795, 798 (Fla. 1st DCA 2009), citing Brookwood-Walton County Convalescent Ctr. v. AHCA, 845 So. 2d 223, 229 (Fla. 1st DCA 2003) ("An agency's failure to follow its own precedent which contains similar facts is contrary to established administrative principles and sound public policy.") (internal quotes omitted). See also Velez v. City of Coral Gables, 819 So. 2d 895, 898 (Fla. 3rd DCA 2002) ("An administrative agency has the burden of providing a reasonable explanation for inconsistent results based upon similar facts."); Gessler v. Department of Business and

Professional Regulation, 627 So. 2d 501, 504 (Fla. 4th DCA 1993) ("[I]nconsistent orders based upon similar facts, without a reasonable explanation, may violate [Subsection 120.68(7)(e)3.] as well as the equal protection guarantees of both the Florida and United States Constitutions.").

41. Administrative stare decisis is particularly applicable in these cases where Petitioner brought the Conley decision to the Department's attention to confirm that equitable tolling would be applicable as a result of the Wilson bankruptcy. The Department considered the application of equitable tolling under its prior Conely decision, notified Petitioner that it agreed that the equitable tolling doctrine applied, and proceeded to issue a license to the successor dealer. Petitioner relied on the agency's determination and would not have proceeded to appoint North Tampa in the absence of the Department's assurances. A licensee, including Petitioner, is entitled to rely on an agency's precedents, particularly when the precedent is brought to the agency's attention and the agency confirms that reliance is warranted. Plante v. Department of Business and Professional Regulation, 716 So. 2d 790, 791 (Fla. 4th DCA 1998). See also Gessler, 627 So. 2d at 503 ("Persons have a right to examine agency precedent and the right to know the factual basis and policy reasons for agency action.").

42. The validity of Rule 15C-7.004(4)(a) was affirmatively determined in 1991 after certain motor vehicle manufacturers, manufacturer associations, dealers, and dealer associations challenged the then proposed rule. General Motors Corp. v. Fla. Dept. of Highway Safety and Motor Vehicles, Case No. 91-2591R (DOAH July 8, 1991) (the Rule Challenge). The then-proposed rule (now adopted rule) provided that the 12-month exemption period began on the date that the dealer license is terminated. The petitioning dealer associations asserted that it would be more fair and consistent with due process if the 12-month exemption period began on the date that the dealership abandoned the dealership under Section 320.641. Id. at 19. GM asserted that fairness and due process would be better served if the 12-month exemption period began on the date that the predecessor dealer's franchise agreement was terminated. Id. at 19.

43. Regardless of the Department's position in the Rule challenge case and its adopted rule, the Department has consistently interpreted its rule in a manner that permits bankruptcy proceedings to toll the 12-month exemption period. The Department took specific action to that effect in this proceeding before Petitioner acted in reliance on the Department's interpretation of its rule.

RECOMMENDATION

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

RECOMMENDED that the Department enter a final order finding that the establishment of North Tampa as a successor motor vehicle dealer is exempt from the notice and protest requirements in Subsection 320.642(3) pursuant to Subsection 320.642(5)(a).

DONE AND ENTERED this 11th day of October, 2010, in Tallahassee, Leon County, Florida.

DANIEL MANRY
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 11th day of October, 2010.

ENDNOTES

[1/] References to subsections, sections, and chapters are to Florida Statutes (2009), unless otherwise stated.

[2/] References to rules are to rules promulgated in the Florida Administrative Code for 2009.

COPIES FURNISHED:

Jennifer Clark
Department of Highway Safety
and Motor Vehicles
Neil Kirkman Building, Room A-308
2900 Apalachee Parkway
Tallahassee, Florida 32399-0500

J. Andrew Bertron, Esquire
Nelson Mullins Riley & Scarborough, LLP
3600 Maclay Boulevard South, Suite 202
Tallahassee, Florida 32312

Robert Craig Spickard, Esquire
Kurkin Forehand Brandes, LLP
800 North Calhoun Street, Suite 1B
Tallahassee, Florida 32303

Robert D. Cultice, Esquire
Wilmer Cutler Pickering Hale
and Door
60 State Street
Boston, Massachusetts 02109

Carl A. Ford, Director
Division of Motor Vehicles
Department of Highway Safety
and Motor Vehicles
Neil Kirkman Building, Room B-439
2900 Apalachee Parkway
Tallahassee, Florida 32399-0500

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

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.