

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HIGHWAY SAFETY)
AND MOTOR VEHICLES, DIVISION OF)
MOTORIST SERVICES,)
)
Petitioner,) Case No. 12-4123
)
vs.)
)
COHIBA MOTORSPORT, INC.,)
)
Respondent.)
_____)

RECOMMENDED ORDER

On April 26, 2013, Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings, conducted the final hearing by videoconference in Tallahassee and Miami, Florida.

APPEARANCES

For Petitioner: Dennis S. Valente, Esquire
Assistant General Counsel
Department of Highway Safety
and Motor Vehicles
2900 Apalachee Parkway
Tallahassee, Florida 32399

For Respondent: Herminio Frometa
Qualified Representative
Cohiba Motorsport, Inc.
5800 Northwest 27th Avenue
Miami, Florida 33142

STATEMENT OF THE ISSUE

The issue is whether Respondent engaged in business activities requiring a motor vehicle dealer license while its license was suspended.

PRELIMINARY STATEMENT

By Administrative Complaint dated September 18, 2012, Petitioner alleged that Respondent is a licensed motor vehicle dealer, holding license number VI-1005997. The Administrative Complaint alleges that, in a separate proceeding, Petitioner had suspended Respondent's license for 90 days, effective July 1, 2012.

The Administrative Complaint alleges that, on or about July 5, 2012, Respondent sold a 2001 Subaru, VIN 4SBH806917627525, to Ramon Gomez, and, on or about August 12, 2012, Respondent sold a 2007 Suzuki, VIN KL5JD66Z97K644005, to 4A Body Shop, Inc. The Administrative Complaint alleges that these transactions violated the suspension order, and Respondent thus violated section 320.27(9)(b)8., Florida Statutes.

Respondent timely requested a hearing. At the hearing, the Administrative Law Judge examined Herminio Frometa, who is the president and owner of Respondent, and determined that he was a Qualified Representative.

At the hearing, Petitioner called three witnesses and offered into evidence seven exhibits: Petitioner Exhibits 1-7.

Respondent called one witness and offered into evidence two exhibits: Respondent Exhibits 1-2. All exhibits were admitted except Petitioner Exhibits 3-5, which were admitted, but not for the truth, and Respondent Exhibits 1-2, which were not admitted for any purpose. Both parties proffered their exhibits for all purposes.

The parties did not order a transcript. On May 3, 2013, Petitioner filed a proposed recommended order, which, due to evidentiary problems that arose when the alleged purchaser of the 2001 Subaru failed to appear at the hearing, addressed only the alleged sale of the 2007 Suzuki. For this reason, the Administrative Law Judge deems Petitioner to have abandoned the allegations concerning the 2001 Subaru, and this recommended order will address only the 2007 Suzuki.

FINDINGS OF FACT

1. Respondent is a motor vehicle dealer that, at all material times, has been located at 5800 Northwest 27th Avenue, Miami. Except for the period of suspension discussed below, at all material times, Respondent has been licensed to operate as a motor vehicle dealer, holding license number VI-1005997.

2. In the course of business, Respondent acquired possession of a 2007 Suzuki motor vehicle, bearing VIN KL5JD66Z97K644005. Respondent acquired title to the Suzuki by a state of Maryland Certificate of Salvage issued by Nationwide

Insurance on August 13, 2010. The certificate shows "damage greater than 75% and repairable" and Respondent as the buyer.

3. Following an informal hearing on May 2, 2012, Petitioner issued a final order on June 18, 2012, that, among other penalties, suspended Respondent's motor vehicle dealer license for 90 days, effective July 1, 2012, for issuing more than two temporary tags to the same person for the same vehicle, in violation of section 320.27(9)(b)17, Florida Statutes, and for issuing fraudulent temporary tags, in violation of section 320.131, Florida Statutes.

4. On August 12, 2012, Respondent sold the Suzuki to 4A Body Shop, Inc. On August 2, 2012, Respondent executed the documentation necessary to complete this transaction.

CONCLUSIONS OF LAW

5. The Division of Administrative Hearings has jurisdiction over the subject matter. §§ 120.569, 120.75(1), and 320.27(12), Fla. Stat.

6. No person may engage in the business of a motor vehicle dealer without a license. § 320.27(2), Fla. Stat. Any person who buys, sells, or deals in at least three motor vehicles in a 12-month period is presumably a motor vehicle dealer.

§ 320.27(1)(c), Fla. Stat. Notwithstanding the suspension that took effect on July 1, 2012, Respondent could not qualify the August 12, 2012, transaction as a casual or isolated sale due to

the fact that it presumably had bought or sold at least two other vehicles in the preceding 12 months.

7. Section 320.27(9)(b)8. provides for the discipline of a motor vehicle license as follows:

(b) The department may deny, suspend, or revoke any license issued hereunder or under the provisions of s. 320.77 or s. 320.771 upon proof that a licensee has committed, with sufficient frequency so as to establish a pattern of wrongdoing on the part of a licensee, violations of one or more of the following activities:

* * *

8. Failure to continually meet the requirements of the licensure law.

8. Petitioner must prove the material allegations by clear and convincing evidence. Dep't of Bank. & Fin. v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996).

9. The statutory precondition for suspension or revocation of a motor vehicle license, under section 320.27(9)(b)8., is the commission of violations that establish a pattern of wrongdoing on the part of the licensee. In this case, the alleged violations are the failure to continually meet the requirements of the licensure law.

10. There are two problems with Petitioner's case. First, Petitioner proved only a single violation. The statute requires "violations" with "sufficient frequency so as to establish a

pattern of wrongdoing." It is impossible to find a pattern of wrongdoing based on the commission of a single wrongful act.

11. Second, the alleged violation is the failure to continually meet the requirements of the licensing law. It is unclear how a violation of a suspension order constitutes a failure to continually meet the requirements of the licensing law. Cf. Trevisani v. Dep't of Health, 90 So. 2d 1108 (Fla. 1st DCA 2005).

12. Florida Administrative Code Rule 15C-7.003(6)(d)8.d. would have supplied the missing link as to this second problem. This rule provides that, upon suspension of its license, a licensed dealer shall "[c]ease operation of the business." But Petitioner failed to allege this ground in the Administrative Complaint. Even if Petitioner had pleaded this rule, though, its prosecution would have failed due to the lack of a pattern of violations of the rule.

RECOMMENDATION

It is

RECOMMENDED that the Petitioner enter a final order dismissing the Administrative Complaint.

DONE AND ENTERED this 31st day of May, 2013, in
Tallahassee, Leon County, Florida.



ROBERT E. MEALE
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 31st day of May, 2013.

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.