

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

P\*, Petitioners,

vs.

Case No. 13-0801

OFFICE OF FINANCIAL REGULATION,

Respondent.  
\_\_\_\_\_ /

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on May 14, 2013, via video teleconference in Tampa and Tallahassee, Florida, before Lynne A. Quimby-Pennock, Administrative Law Judge of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Scott Robert Toner, Esquire  
Toner and Ramirez, P.A.  
5323 Spring Hill Drive  
Spring Hill, Florida 34606

For Respondent: William Michael Oglo, Esquire  
Office of Financial Regulation  
Fletcher Building, Suite 550  
200 East Gaines Street  
Tallahassee, Florida 32399-0376

STATEMENT OF THE ISSUE

The issue is whether the Petitioners' application for licensure as a motor vehicle retail installment seller should be approved.

PRELIMINARY STATEMENT

On December 12, 2012, the Office of Financial Regulation (Respondent or OFR), issued a Denial Letter to P\*, managing member of P\* advising him that P\*'s application for licensure as a motor vehicle retail installment seller was denied based on violations of section 520.995, Florida Statutes, (2012).<sup>1/</sup> Specifically, OFR denied the application based on the failure to disclose six criminal cases<sup>2/</sup> involving P\*.

P\*, Petitioners, disputed OFR's denial and timely filed a Petition for Administrative Hearing. OFR referred the matter to DOAH for purposes of hearing.

At hearing, Petitioners called P\*, T. J. Tessner, Andrew Bishay, and Larry King to testify. Petitioners' Exhibits 1 through 12 were admitted into evidence. Respondent called Jason Booth to testify. Respondent's Exhibits A, B and D were received into evidence without objection. Respondent's Exhibit C was admitted into evidence except for pages 3 through 14, which were taken under advisement. For the reasons set forth below, Exhibit C is now admitted in total.

The one-volume Transcript was filed with DOAH on May 21, 2013. Both parties timely submitted their proposed recommended orders, and each has been considered in the preparation of this Recommended Order.

## FINDINGS OF FACT

1. OFR is the state agency responsible for the administration and enforcement of chapter 520, Florida Statutes, and the rules promulgated thereunder.

2. P\* is a Florida Limited Liability Company, with P\* as its owner and managing member.

3. On September 10, 2012, Petitioners filed an initial application for a motor vehicle retail installment seller license. OFR issued a deficiency letter to Petitioners on September 14, 2012, seeking additional information. Petitioners submitted additional information on September 18 and 19, 2012; however, neither disclosed the 2000 or 2001 criminal cases.

4. P\* responded affirmatively to the following question on the application:

Has the applicant ever been convicted of or found guilty of, or pleaded guilty or nolo contendere to, any crime under the law of any state or of the United States, without regard to whether a judgment of conviction has been entered by the court?

5. Based on the affirmative response, P\* completed an additional disclosure reporting page. Therein P\* listed one incident, which occurred in 2002, alleging odometer fraud and false statement in a car title transfer. After additional investigation, these allegations were dropped.<sup>3/</sup> P\* was not convicted of, found guilty of nor

did he plead guilty or nolo contendere to these allegations; thus, this disclosure was not necessary.

6. P\* was the subject of other criminal cases but those cases were not disclosed on the disclosure reporting page.

7. OFR's application review process found the following 2000 and 2001 criminal cases against P\* in the Thirteenth Judicial Circuit, in and for Hillsborough County, Florida:

Dealing in Stolen Property; Criminal Mischief; Arson Second Degree; Grand Theft Third Degree; and three counts of Grand Theft Motor Vehicle. Adjudication was withheld on each.

8. On February 7, 2002, following his pleading guilty to these allegations, the criminal court withheld the adjudication of guilt and sentenced P\* to 60 months probation. These allegations involved fraud, dishonest dealings or acts involving moral turpitude. At some point in time, P\* became a confidential informant. It is unclear whether he did this as a result of a plea agreement or at the request of law enforcement. P\* believed that these six criminal charges would "go away" if he assisted law enforcement. Although no one other than P\* testified to his involvement as a confidential informant, on October 25, 2004, the circuit court entered a "COURT ORDER TERMINATING [P\*'s] PROBATION." P\* believed these criminal cases had gone away.

However, there was no court document or other evidence declaring that the charges had been dropped, dismissed or expunged.

P\*'s understanding regarding the legal effect of the termination of probation was erroneous.

9. In March 2012, Petitioner was issued a license by the Department of Highway Safety and Motor Vehicles, Division of Motorist Services (HSMV) "TO CONDUCT AND CARRY ON BUSINESS AS AN INDEPENDENT DEALER IN MOTOR VEHICLES." In order to obtain that license, P\* had to complete a HSMV license application (Respondent's Exhibit C, pages 3 through 14).

10. On the HSMV application, P\* responded negatively and appropriately to the following inquiry:

Has this applicant, partner, corporate officer or director:  
Been convicted of a felony or equivalent charge anywhere?

(emphasis added).

11. In follow-up to a HSMV request, P\* was asked to provide court documents on the facts and disposition of some 1998 criminal charges. P\* contacted the clerk of the court of Hillsborough County and received a letter that stated:

Please be advised that on this date [November 15, 2011] a search of Felony & Misdemeanor records covering the year(s) 01/01/1998 thru 12/31/1998 was conducted on the following subject:

P\* DOB:02/28/1981

This search revealed NO RECORD of any Felony or Misdemeanor offense on this subject during this time period. It does not include

criminal Traffic or Juvenile offenses. This search is valid for Hillsborough County, Florida[,] only.

(emphasis added).

12. P\* had no difficulty in answering the HSMV question as it asked specifically about a conviction. OFR's question was different: it asked "regardless of adjudication." P\* did not provide any information about the criminal allegations from 2000 or 2001.

13. P\* attributes his response to the OFR question to his thinking those criminal allegations had been dealt with, yet he provided no evidence, other than his self-serving responses that they were gone.

14. Mr. Tessner became acquainted with P\* approximately six years ago. Mr. Tessner considers P\* a friend and work associate. Mr. Tessner has provided P\* with signed blank checks for P\*'s use at auto auctions. However, Mr. Tessner was unaware of P\*'s past criminal activities.

15. Mr. Bishay first became acquainted with P\* approximately 13 years ago when they met through a mutual friend and discovered they both knew a lot about cars. Mr. Bishay considers P\* a friend and has worked for him in the past. Mr. Bishay was aware that P\* "got arrested for something involving automobiles." The two men lost touch when Mr. Bishay left for college in early 2002. They became

reacquainted in 2004 or 2005. Mr. Bishay believes P\* did not disclose the criminal activities because "he [P\*] did not know that he was supposed to disclose it . . . or there was just some sort of misunderstanding between him and the question."

16. Mr. King has known P\* approximately five years in a business relationship. Mr. King buys used cars, fixes them up, and turns them over to P\* to sell.

17. The testimony by P\*'s colleagues about his character, while enlightening, does not negate the fact that P\* failed to answer OFR's inquiry truthfully. Except for Mr. Bishay, these witnesses were unaware of P\*'s past criminal actions.

18. The evidence clearly and convincingly established that P\* pled guilty to the criminal allegations; that adjudication was withheld as to each allegation; that the allegations were not sealed or expunged; and that Petitioners (P\* and/or P\*) failed to disclose the information on the OFR license application.

#### CONCLUSIONS OF LAW

19. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding pursuant to chapter 120, Florida Statutes.

20. OFR, through its Bureau of Registrations, is the state agency responsible for the administration and regulation of motor vehicle retail installment sellers under section 520.995.

21. OFR has the burden to prove that the application is subject to denial, as alleged in the written notice given Petitioners. See Dep't of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932, 934 (Fla. 1996) ("The general rule is that a party asserting the affirmative of an issue has the burden of presenting evidence as to that issue."); M.H. v. Dep't of Child. & Fam. Servs., 977 So. 2d 755, 761 (Fla. 2d DCA 2008) ("[I]f the licensing agency proposes to deny the requested license based on specific acts of misconduct, then the agency assumes the burden of proving the specific acts of misconduct that it claims demonstrate the applicant's lack of fitness to be licensed."); and Fla. Dep't of HRS v. Career Serv. Comm'n, 289 So. 2d 412, 414 (Fla. 4th DCA 1974) ("[T]he burden of proof is 'on the party asserting the affirmative of an issue before an administrative tribunal.'"). To meet its burden, OFR must establish by a preponderance of the evidence that the applicant's culpability for the specific act(s) of misconduct is as alleged in the denial letter. See M.H., supra, at 762-63

22. Section 520.995, Florida Statutes, provides in pertinent part:

(3) In addition to the acts specified in subsection (1), the following shall be grounds for denial of a license pursuant to



this chapter, or for revocation, suspension, or restriction of a license previously granted:

(a) A material misstatement of fact in an initial or renewal application for a license;

\* \* \*

(c) Pleading nolo contendere to, or having been convicted or found guilty of, a crime involving fraud, dishonest dealing, or any act of moral turpitude, regardless of whether adjudication is withheld; or . . .

23. Section 520.995(3)(a) does not require Petitioners to have knowingly answered the application question incorrectly. The only requirement is that there is a material misstatement of fact. OFR proved the material misstatement.

24. Section 520.995(3)(c) clearly states "regardless of whether adjudication is withheld." P\* entered pleas of guilty, and the court withheld adjudication.

25. Florida Administrative Code Rule 69V-85.111 provides in pertinent part:

(3)(a) In the presence of aggravating or mitigating circumstances supported by clear and convincing evidence the Office of Financial Regulation shall be entitled to deviate from the above guidelines in imposing discipline upon a person.

(b) Aggravating or mitigating circumstances may include, but are not limited to, the following:

1. The severity of the act.
2. The degree of harm to the consumer or public.

3. The number of times the acts previously have been committed by the person.
4. The disciplinary history of the person.
5. The status of the person at the time the act was committed.

26. P\* knew he had pled guilty to the criminal allegations, yet he did not disclose that information.

27. OFR has met its burden of proving by a preponderance of the evidence that Petitioners failed to disclose P\*'s guilty pleas to felony criminal allegations on the application for licensure as a motor vehicle retail installment seller.

#### RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Office of Financial Regulation issue a final order denying Petitioners' application for the motor vehicle retail installment seller on the grounds alleged in the letter dated December 12, 2012.

DONE AND ENTERED this 11th day of July, 2013, in Tallahassee, Leon County, Florida.



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LYNNE A. QUIMBY-PENNOCK  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 11th day of July, 2013.

ENDNOTES

<sup>1/</sup> All references to Florida Statutes are to Florida Statutes (2012), unless otherwise noted.

<sup>2/</sup> On February 7, 2002, P\* pled guilty to: dealing in stolen property; criminal mischief; arson second degree; grand theft third degree; and three counts of grand theft motor vehicle. Adjudication was withheld on each count. It appears there are seven actual charges, however both parties maintained there were only six.

<sup>3/</sup> P\* bought a used car that had previously had the odometer altered. P\* was able to provide proof to the authorities that he did not alter the odometer reading.

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.