STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

GENUINE SCOOTERS, LLC,

Petitioner,

vs. Case No. 15-3982

ACTION MOPEDS, INC., d/b/a
ACTION WHEELSPORT AND TROPICAL
SCOOTERS, LLC,

Respondents.
_____/

RECOMMENDED ORDER

On January 13, 2016, an administrative hearing was held in Largo, Florida, before Lynne A. Quimby-Pennock, Administrative Law Judge, Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Trey Duren, pro se
Genuine Scooters, LLC
2700 West Grand Avenue
Chicago, Illinois 60612

For Respondent: William A. Lynch, pro se
Action Mopeds, Inc.
5310 66th Street North
St. Petersburg, Florida 33709

Michelle Stanley, pro se
Tropical Scooters, LLC
11610 Seminole Boulevard
Largo, Florida 33778

STATEMENT OF THE ISSUE

The issue in this case is the "propriety of the protest regarding issues specifically within the purview of sections 320.642 and 320.699, Florida Statutes."

PRELIMINARY STATEMENT

On July 14, 2015, Action Mopeds Inc., d/b/a Action Wheelsport (Wheelsport), filed a protest with the Department of Highway Safety and Motor Vehicles (the Department).[1/] The protest was in opposition to the establishment of Tropical Scooters, LLC (Tropical), as a dealership for the MOTI and LMLL lines of motor scooters distributed by Genuine Scooters, LLC (Genuine).

By letter dated July 16, 2015, the Department referred the matter to DOAH 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 [(2015)]." All statutory references are to Florida Statutes (2015) unless otherwise noted.

At the hearing, Genuine and Tropical appeared and testified through their corporate officers. Wheelsport appeared and testified through its corporate officer. Genuine's Exhibits one through four were admitted over objection. Tropical did not offer any exhibits. Wheelsport's Exhibits one and two were admitted over objection.

At the conclusion of the final hearing, Petitioner advised the undersigned that the transcript would be ordered. By rule the parties have ten days from the date the transcript is filed at DOAH to file proposed recommended orders (PROs). On February 12, 2016 the undersigned was advised that no transcript was being provided. Later that same day, a Notice of Filing the Proposed Recommended Orders was issued advising the parties that "any post-hearing submissions shall be filed on or before 5:00 p.m. (EST), on Monday,
February 22, 2016.

Genuine timely filed a PRO. To date, none of the other parties has filed a post-hearing document. To the extent that Genuine's PRO contained new testimony or evidence, not subject to cross-examination, that information has not been considered.

FINDINGS OF FACT

1. On July 29, 2015, DOAH mailed a Notice of Hearing to each of the parties, scheduling the final hearing for January 13, 2016. No party objected to a final hearing on January 13, 2016.

2. The dealership agreement between Wheelsport and Genuine is not in evidence; however, the weight of the evidence established that Wheelsport is an existing franchised dealer for Genuine, and has been since Genuine's incorporation in 2003.

3. Standing to protest the establishment of an additional new motor vehicle dealer depends on the population of the county in which the proposed location sits. If the population is greater than 300,000 persons, then a dealer of the same line-make must either: i) be located within a radius of 12.5 miles from the proposed location; or ii) "establish that during any 12-month period of the 36-month period preceding the filing of the [manufacturer's] application for the proposed dealership, the dealer or its predecessor made 25 percent of its retail sales of new motor vehicles to persons whose registered household addresses were located within a radius of 12.5 miles of the location of the proposed additional or relocated motor vehicle dealer." § 320.642(3)(b), Fla. Stat.

4. The Department published the Notice, which indicated Genuine's intent "to establish the new point location in a county of more than 300,000 population, according to the latest population estimates of the University of Florida, Bureau of Economic and Business Research."

5. There was no testimony of the census, an actual count of the population, or any population estimates in Pinellas County in 2015. No evidence was presented showing that Pinellas County, the county in which this dealership was proposed, had a population of greater (or less) than 300,000.[2/]

CONCLUSIONS OF LAW

6. The Division of Administrative Hearings has jurisdiction over this proceeding pursuant to sections 120.569, 120.57(1), 320.642 and 320.699, Florida Statutes.

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

8. Wheelsport bears the burden of establishing standing by a preponderance of the evidence. Braman Cadillac, Inc. v. Dep't of High. Saf. & Motor Veh., 584 So. 2d 1047, 1050 (Fla. 1st DCA 1991).

9. Section 320.642(1) requires a motor vehicle dealer who proposes to establish an additional motor vehicle dealership within an area already represented by the same line-make vehicle to give written notice to the Department of its intent to establish a new franchise. The statute also provides that any affected dealership may protest the establishment of a new franchise in its territory.

10. Section 320.699 provides in pertinent part:

> (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.

11. Wheelsport timely filed a protest with the Department.

12. Section 320.642(3) provides in pertinent part:

An existing franchised motor vehicle dealer or dealers shall have standing to protest a proposed additional or relocated motor vehicle dealer when the existing motor vehicle dealer or dealers have a franchise agreement for the same line-make vehicle to be sold or serviced by the proposed additional or relocated motor vehicle dealer and are physically located so as to meet or satisfy any of the following requirements or conditions:

* * *

(b) If the proposed additional or relocated motor vehicle dealer is to be located in a county with a population of more than 300,000 according to the most recent data of the United States Census Bureau or the data of the Bureau of Economic and Business Research of the University of Florida:

1. Any existing motor vehicle dealer or dealers of the same line-make have a licensed franchise location within a radius of 12.5 miles of the location of the proposed additional or relocated motor vehicle dealer; or

> 2. Any existing motor vehicle dealer or dealers of the same line-make can establish that during any 12-month period of the 36-month period preceding the filing of the licensee's application for the proposed dealership, such dealer or its predecessor made 25 percent of its retail sales of new motor vehicles to persons whose registered household addresses were located within a radius of 12.5 miles of the location of the proposed additional or relocated motor vehicle dealer; provided such existing dealer is located in the same county or any county contiguous to the county where the additional or relocated dealer is proposed to be located. (Emphasis added).

13. Wheelsport is an existing motor vehicle dealer, which failed to establish the size of the county in which the proposed new dealership is to be established. Wheelsport failed to meet its burden of proof.

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 dismissing Action Mopeds Inc., d/b/a Action Wheelsport's, protest of the proposed establishment of an additional dealership for failure to establish standing pursuant to section 320.642(3).

DONE AND ENTERED this 1st day of March, 2016, in Tallahassee, Leon County, Florida.

LYNNE A. QUIMBY-PENNOCK
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 1st day of March, 2016.

ENDNOTES

[1/] The Department provided a copy of the published Notice of Publication for a New Point Franchise Motor Vehicle Dealer in a County of More than 300,000 Population in the Florida Administrative Register, allowing Tropical Scooters, LLC, to operate as a dealer of its motorcycles. The date on which the Notice was published is unknown.

[2/] The testimony presented used the term "area"; however, there was no definition assigned to that term.

COPIES FURNISHED:

Jennifer Clark, Agency Clerk
Department of Highway Safety
and Motor Vehicles
Neil Kirkman Building, Room A-430
2900 Apalachee Parkway, Mail Stop 61
Tallahassee, Florida 32399
(eServed)

William Edward Van Cott
Department of Highway Safety
and Motor Vehicles
Neil Kirkman Building, Room A-430
2900 Apalachee Parkway, Mail Stop 61
Tallahassee, Florida 32399
(eServed)

William A. Lynch
Action Mopeds, Inc.
5310 66th Street North
St. Petersburg, Florida 33709

Trey Duren
Genuine Scooters, LLC
2700 West Grand Avenue
Chicago, Illinois 60612
(eServed)

Michelle Stanley
Tropical Scooters, LLC
11610 Seminole Boulevard
Largo, Florida 33778

Julie Baker, Chief
Bureau of Issuance Oversight
Division of Motorist Services
Department of Highway Safety
and Motor Vehicles
Neil Kirkman Building, Room A-338
2900 Apalachee Parkway
Tallahassee, Florida 32399-0635
(eServed)

Steve Hurm, General Counsel
Department of Highway Safety
and Motor Vehicles
Neil Kirkman Building, Room A-432
2900 Apalachee Parkway
Tallahassee, Florida 32399-0500
(eServed)

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.