STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES,

Petitioner,

Case No. 20-1769

vs.

MOVING SYSTEMS OF SOUTH FLORIDA, INC.,

Respondent.
_____/

RECOMMENDED ORDER

This case came before Administrative Law Judge John G. Van Laningham, Division of Administrative Hearings ("DOAH"), for final hearing by video teleconference on July 28, 2020, at sites in Tallahassee and West Palm Beach, Florida.

APPEARANCES

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For Respondent: Donald Goldrich, Esquire
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STATEMENT OF THE ISSUE

The issue in this case is whether Petitioner has grounds for refusing to renew Respondent's registration as an intrastate mover, where Respondent is currently a defendant in a civil enforcement action brought by Petitioner, which action Respondent's president allegedly failed to disclose in the subject application for renewal registration.

PRELIMINARY STATEMENT

By letter dated March 11, 2020, Petitioner Department of Agriculture and Consumer Services ("Department") notified Respondent Moving Systems of South Florida, Inc. ("Moving Systems"), that it intended to deny Moving Systems' application for renewal of registration (licensure) as an intrastate mover. The Department gave two reasons for its preliminary decision, namely that (i) Moving Systems is a defendant in a pending enforcement proceeding, which is based upon allegations of fraud and dishonest dealing, and (ii) Moving Systems failed to disclose the existence of the pending proceeding in its application.

Moving Systems timely requested a formal hearing, and the Department referred the matter to DOAH on April 9, 2020. The undersigned scheduled the final hearing for June 29, 2020. The matter was later continued to July 28, 2020, which is when the hearing took place.

At hearing, the Department called one witness, an employee named Ryan Hartle. Petitioner's Exhibits A through D were received in evidence. Moving Systems' president, James Fischer, testified for Respondent, whose Exhibits B and C were admitted. In addition, official recognition was taken of the Recommended Order in *Department of Agriculture and Consumer Services v. Florida Licensed Moving Corporation*, Case No. 19-5838 (Fla. DOAH May 5, 2020), as well as of chapters 120 and 507, Florida Statutes.

The final hearing transcript was filed on September 3, 2020. Each party timely filed a proposed recommended order on September 14, 2020.

Unless otherwise indicated, citations to the official statute law of the State of Florida refer to Florida Statutes 2019.

FINDINGS OF FACT

1. The Department is the state agency responsible for, among other things, licensing and regulating household moving services in the State of Florida.

2. Moving Systems is a Florida corporation registered with the Department as a licensed mover authorized to engage in the intrastate transportation and shipment of household goods.

3. Moving Systems' registration (IM1939) was scheduled to expire on February 11, 2020. Accordingly, it timely submitted an application for renewal registration (the "Renewal Application"), which was signed by James Fischer ("Fischer"), the corporation's president, on February 9, 2020.

4. Question number 9 of the Renewal Application asks:

> Has the mover or any director, officer, owner, or general partner of the business:
>
> a. been convicted of a crime involving fraud, dishonest dealing, or any act of moral turpitude? YES ____ NO ____
>
> * * *
>
> b. not satisfied a civil fine or penalty arising out of any administrative or enforcement action brought by any governmental agency or private person based upon conduct involving fraud, dishonest dealing, or any violation of Chapter 507, Florida Statutes? YES ____ NO ____

> c. a pending criminal, administrative, of [*sic*] enforcement proceeding in any jurisdiction, based upon conduct involving fraud, dishonest dealing, or any act of moral turpitude? YES ____ NO ____
>
> d. had a judgment entered in any action brought by the department or the Department of Legal Affairs pursuant to Chapter 507 or ss. 501.201-501.213, Florida Statutes? YES ____ NO ____

Fischer checked the answer "NO" to each of these items.

5. Moving Systems and Fischer are among the defendants in *State of Florida, Department of Agriculture and Consumer Services v. Florida Licensed Moving Corporation, et al.*, Case No. 2018-CA-002516, which is pending in the Circuit Court for Seminole County, Florida (the "Action"). The Action is a civil proceeding brought by the Department under section 507.10, seeking to enforce compliance with chapter 507. The Department alleges in the Action that the defendants, including Moving Systems and Fischer, engaged in actions involving fraud or dishonest dealing.

6. Moving Systems and Fischer have each vigorously denied the allegations made against them in the Action, which remained pending as of the final hearing in this case. The Department's intended agency action in this case does not depend upon proof of the allegations upon which the Action is based. No findings of fact concerning the merits of such allegations will be made herein.

7. By letter dated March 11, 2020, the Department notified Moving Systems that it intended to deny the Renewal Application for two reasons. *First*, the Department asserted, then as here, that both Moving Systems and one of its officers (Fischer) have pending against them an enforcement proceeding, i.e., the Action, "based upon conduct involving fraud, dishonest dealing, or any other act of moral turpitude," which the Department contends provides grounds for nonrenewal pursuant to section 507.03(8)(d). *Second*, the Department alleged, and has here sought to prove, that Fischer

knowingly made a false statement in the Renewal Application when he denied that the mover "has … a pending … enforcement proceeding in any jurisdiction, based upon conduct involving fraud, dishonest dealing, or any act of moral turpitude."

8. Fischer disputes that his answer to question number 9(c) was knowingly false. He maintains that this question is confusing because it (i) is syntactically awkward and (ii) employs legal terminology, which is unfamiliar to ordinary laypersons. There is some merit to these criticisms of the question.

9. Question number 9(c) attempts—not entirely successfully—to paraphrase section 507.03(8)(d), which authorizes the Department to deny, refuse to renew, or revoke a registration if a mover or one of its principals "[h]as *pending against him or her* any criminal, administrative, or enforcement proceedings in any jurisdiction, based upon conduct involving fraud, dishonest dealing, or any other act of moral turpitude." (Emphasis added.) The prepositional phrase ("pending against him or her") makes clear that the verb ("has"), as used in the statute, is operating semantically as a standalone, transitive verb, which denotes that the mover stands in a certain relationship to the pending proceeding, i.e., he or she is a party to such proceeding.

10. Question number 9(c) omits the prepositional phrase, without which the verb "has" is not clearly a transitive verb, but instead can be misread as an auxiliary verb. Confusion then arises because there is no verb phrase of which "has" is a part. Instead, the question asks, "[h]as the mover … a pending" proceeding? This may cause applicants to wonder, "Has the mover *what* with respect to a pending proceeding?" Testified in? Heard about? Been named as a party to? The undersigned believes that an applicant could reasonably read this somewhat affected language and decide that the

question does not apply to him or her, based upon a simple misunderstanding of, or uncertainty about, what is being asked.[1]

11. In addition, the terms "enforcement proceeding," and "fraud, dishonest dealing, or any act of moral turpitude," are legalistic in nature, as Fischer argues. An applicant who is a party to a legal proceeding could reasonably conclude, even so, that the proceeding is not based upon historical conduct involving fraud, dishonest dealing, or an act of moral turpitude as he understands those terms.

12. Increasing the likelihood of an applicant's reaching such a conclusion is that the question does not distinguish between *alleged* conduct and *actual* conduct. As a result, an applicant who is certain of his innocence might answer "no" to question number 9(c) rather than appearing to admit that his conduct was fraudulent or dishonest. Indeed, a falsely accused applicant would probably view any pending enforcement proceeding as based upon, not his conduct, but upon unfounded allegations. Why should such an applicant *not* answer "no" to question number 9(c), when answering "yes" might give the impression that he did something which he knows that he did not do?

13. Consequently, the undersigned credits Fischer's testimony that he did not knowingly make a false statement on the Renewal Application. Reinforcing this finding is that Fischer had no reason to knowingly attempt to conceal the Action because the Department is the plaintiff therein. Obviously, the Department was aware of the Action, and thus falsely denying its existence would have been both foolish and futile. Fischer had no motive to lie, and while this is not dispositive, it is corroborative circumstantial evidence.

14. It is found as a matter of ultimate fact that the evidence fails to show Fischer knowingly made a misrepresentation in the Renewal Application in violation of chapter 507. *See* § 507.07(2), Fla. Stat.

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[1] Question 9(c) is not wrong, grammatically, nor is it necessarily ambiguous in a legal sense. But, the question *is* stilted and likely confuses applicants who are not wordsmiths.

15. The other ground, however, is the true crux of the Department's case. The pendency of the Action is an undisputed fact, and Moving Systems and Fischer are defendants in that case. There can be no genuine dispute, moreover, that the Action is an "enforcement proceeding" based upon allegations of "dishonest dealing" as those terms are used in section 507.03(8)(d). Viewed in isolation, paragraph (d)'s plain and literal language makes for a seemingly open-and-shut case against Moving Systems, which has pending against it an enforcement proceeding based upon dishonest dealing.

16. Yet, paragraph (d) does not stand alone but is just one part of subsection (8), all of whose provisions must be read as a whole and construed together. When paragraph (d) is considered in conjunction with the other paragraphs of subsection (8), it becomes far less clear that a *license* may be revoked or nonrenewed on the basis of *mere allegations* of wrongdoing by the licensee, where such allegations have yet to be proved.

17. The undersigned concludes as a matter of law, for reasons explained below, that subsection (8) is clear and unambiguous with respect to the Department's authority to *deny an initial application* based upon the pendency of a proceeding described in paragraph (d), but is ambiguous as to whether paragraph (d) provides grounds for taking away a valuable and legally protected property interest via revocation or nonrenewal of an existing license simply because unproved allegations of misconduct have been made against the licensee. Because subsection (8) is penal in nature, this ambiguity must be resolved in Moving Systems' favor.

CONCLUSIONS OF LAW

18. DOAH has personal and subject matter jurisdiction in this proceeding pursuant to sections 120.569 and 120.57(1).

19. A proceeding, such as this one, which arises from an agency's preliminary decision not to renew a license based upon the licensee's alleged commission of a disciplinable offense, is penal in nature because nonrenewal

of licensure is tantamount to imposing a penalty upon the licensee. *See Ag. for Pers. with Disab. v. Daniel Madistin LLC #1*, Case No. 15-2422FL, at 13 (Fla. DOAH Nov. 25, 2015; Fla. APD Jan. 26, 2016). Accordingly, the Department must prove the charges against Moving Systems by clear and convincing evidence. *Dep't of Banking & Fin., Div. of Sec. & Investor Prot. v. Osborne Stern & Co.*, 670 So. 2d 932, 933-34 (Fla. 1996) (citing *Ferris v. Turlington*, 510 So. 2d 292, 294-95 (Fla. 1987)); *Nair v. Dep't of Bus. & Prof'l Reg., Bd. of Med.*, 654 So. 2d 205, 207 (Fla. 1st DCA 1995).

20. Regarding the standard of proof, in *Slomowitz v. Walker*, 429 So. 2d 797, 800 (Fla. 4th DCA 1983), the court developed a "workable definition of clear and convincing evidence" and found that of necessity such a definition would need to contain "both qualitative and quantitative standards." The court held that:

> [C]lear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

Id. The Florida Supreme Court later adopted the *Slomowitz* court's description of clear and convincing evidence. *See In re Davey*, 645 So. 2d 398, 404 (Fla. 1994). The First District Court of Appeal also has followed the *Slomowitz* test, adding the interpretive comment that "[a]lthough this standard of proof may be met where the evidence is in conflict, … it seems to preclude evidence that is ambiguous." *Westinghouse Elec. Corp. v. Shuler Bros., Inc.*, 590 So. 2d 986, 988 (Fla. 1st DCA 1991), *rev. denied*, 599 So. 2d 1279 (Fla. 1992) (citation omitted).

21. It is unlawful in this state to "conduct business as a mover or moving broker, or advertise to engage in the business of moving or offering to move, without being registered with the department." § 507.07(1), Fla. Stat. Consequently, before engaging in such activities, "[e]ach mover and moving broker must [initially] register with the department" and thereafter renew this "registration … biennially on or before its expiration date." § 507.03(1), (4), Fla. Stat.

22. Section 507.09(1)(d) provides that "if the department finds that a mover … or a person employed or contracted by a mover has violated or is operating in violation of this chapter," then it may refuse "to register or revok[e] or suspend[ ] a registration."

23. Section 507.07(2) states that it is a violation of chapter 507 to "knowingly make any false statement, representation, or certification in any application, document, or record required to be submitted or retained under this chapter."

24. Section 507.03(8) provides as follows:

> The department may deny, refuse to renew, or revoke the registration of any mover or moving broker based upon a determination that the mover or moving broker, or any of the mover's or moving broker's directors, officers, owners, or general partners:
>
> (a) Has failed to meet the requirements for registration as provided in this chapter;
>
> (b) Has been convicted of a crime involving fraud, dishonest dealing, or any other act of moral turpitude;
>
> (c) Has not satisfied a civil fine or penalty arising out of any administrative or enforcement action brought by any governmental agency or private person based upon conduct involving fraud, dishonest dealing, or any violation of this chapter;

> (d) *Has pending against him or her any criminal, administrative, or enforcement proceedings in any jurisdiction, based upon conduct involving fraud, dishonest dealing, or any other act of moral turpitude*; or
>
> (e) Has had a judgment entered against him or her in any action brought by the department or the Department of Legal Affairs under this chapter or ss. 501.201-501.213, the Florida Deceptive and Unfair Trade Practices Act.

(Emphasis added.)

25. The foregoing statutory and rule provisions "must be construed strictly, in favor of the one against whom the penalty would be imposed." *Munch v. Dep't of Prof'l Reg., Div. of Real Estate*, 592 So. 2d 1136, 1143 (Fla. 1st DCA 1992); *see Camejo v. Dep't of Bus. & Prof'l Reg.*, 812 So. 2d 583, 583-84 (Fla. 3d DCA 2002); *McClung v. Crim. Just. Stds. & Training Comm'n*, 458 So. 2d 887, 888 (Fla. 5th DCA 1984) ("[W]here a statute provides for revocation of a license the grounds must be strictly construed because the statute is penal in nature. No conduct is to be regarded as included within a penal statute that is not reasonably proscribed by it; if there are any ambiguities included, they must be construed in favor of the licensee."); *see also, e.g., Griffis v. Fish & Wildlife Conserv. Comm'n*, 57 So. 3d 929, 931 (Fla. 1st DCA 2011) (statutes imposing a penalty must never be extended by construction).

26. As reflected in the findings above, the Department failed to carry its burden of proving, by clear and convincing evidence, that Fischer knowingly made a false statement in the Renewal Application.

27. As for the other ground, section 507.03(8) identifies five offenses for which the Department may deny, revoke, or nonrenew a registration. The Department charges Moving Systems with the offense defined in paragraph (d), which makes it a violation merely to be accused in a pending proceeding of conduct involving fraud, dishonest dealing, or an act of moral

turpitude. For ease of reference, this category of wrongdoing will hereafter be called "Deceitful Conduct" for short. The intended denial of Moving Systems' Renewal Application on this basis raises the question of whether section 507.03(8)(d) authorizes the Department to revoke or nonrenew a registration—and thereby effectively put an established mover out of business—solely because someone has alleged that the licensee engaged in Deceitful Conduct, which might be untrue or at least unprovable. For the reasons that follow, the undersigned answers this question of law in the negative.

28. On close examination of subsection (8), it will be seen that paragraphs (b), (c), and (d) all have, at bottom, a common cause-in-fact, namely the applicant or licensee's Deceitful Conduct, "but for" which none of these offenses could arise. There is a huge difference, however, between paragraphs (b) and (c), on the one hand, and paragraph (d) on the other, namely that the former offenses require that the applicant or licensee have been adjudicated guilty of Deceitful Conduct, whereas the latter offense requires only that such conduct have been alleged. Notice, as well, the substantial distinction between the offenses defined in paragraphs (b) and (c). Being convicted of a crime involving Deceitful Conduct is an offense, per se, but being found guilty of Deceitful Conduct in a civil or administrative proceeding is *not* disciplinable by itself. The offense defined in paragraph (c) is not the finding of guilt, per se, but instead is the failure to satisfy any penalty that might have been imposed secondary to such a finding.

29. This means that while the Department could deny an applicant's initial application for licensure based upon his prior conviction of a crime involving Deceitful Conduct, it could not deny such an application based upon a civil or administrative adjudication of Deceitful Conduct adverse to the applicant, so long as the applicant had paid the resulting fine. The Department could, however, deny initial registration to an applicant based

upon the pendency of any criminal, civil, or administrative enforcement proceeding against the applicant involving allegations of Deceitful Conduct.

30. With respect to licensees, if paragraph (d) were interpreted literally and strictly likewise to permit the revocation or nonrenewal of an existing registration, then subsection (8) would treat pending *charges* of criminal Deceitful Conduct as being equivalent to a subsequent *conviction* on such charges,[2] and pending civil or administrative *allegations* of Deceitful Conduct as *worse than* an adverse adjudication based upon findings that such conduct occurred in fact.

31. At first blush, it might seem anomalous for the statute to equate charges and allegations with final adjudications of guilt, but the appearance of abnormality largely disappears when taking into account the fact that subsection (8) lumps together, without differentiation, grounds for (i) denying initial registration applications and for (ii) revoking existing registrations. These are two very different situations, however, because denial of registration is not a sanction for violating the law, but rather reflects the application of a regulatory measure designed to safeguard the public. *See, e.g.*, *Osborne Stern*, 670 So. 2d at 934.

32. Thus, at the initial application stage, the focus is on protecting consumers, not on protecting the rights and interests of a licensee facing the loss of livelihood. *See, e.g., Rolle v. Crist*, 2001 WL 1638505, at *6-7 (Fla. DOAH Dec. 14, 2001). Agencies are afforded wide discretion in denying licensure to applicants deemed unfit. *See, e.g., Astral Liquors, Inc. v. Dep't of Bus. Reg.*, 463 So. 2d 1130, 1132 (Fla. 1985). It is, therefore, not peculiar that the legislature would permit the Department to deny registration to an applicant who is presently a defendant in a proceeding based upon allegations that the applicant engaged in Deceitful Conduct. Indeed, it seems

[2] Presumably an existing licensee charged under paragraph (d) would not have a *prior* conviction for criminal Deceitful Conduct because a person having such a criminal record should have been denied initial registration; or, if licensed when the crime was committed, had his registration revoked based upon the prior conviction, pursuant to paragraph (b).

prudent to postpone the registration of such an applicant until after the pending proceeding has run its course. If he is later acquitted or otherwise found not in violation, or if he satisfies any civil fine or penalty thereafter resulting from the then-pending civil or administrative enforcement proceeding, he may reapply. If none of these conditions is subsequently met, however, the applicant should not be registered to do business as an intrastate mover in Florida.

33. In contrast to an initial applicant, a registered mover has significant property rights in the license, which the law respects and protects. *Osborne Stern*, 670 So. 2d at 935. It is unlikely that the legislature intended to authorize the Department to revoke a license, and thus extinguish valuable property rights, based upon mere allegations. Revocation or nonrenewal *is* a sanction, and a harsh one at that. Such punitive action can destroy a company and cost employees their jobs. It is little comfort to the licensee, moreover, that he might reapply for licensure if later found not in violation. By then it is usually too late; the licensee will have long been out of business.

34. It is concluded that paragraph (d) clearly authorizes the denial of an initial application based upon a pending proceeding involving allegations of Deceitful Conduct, but that the statute is ambiguous with regard to whether a license may be revoked or nonrenewed on such basis. This ambiguity must be resolved in favor of the licensee. Accordingly, the undersigned interprets paragraph (d) as a regulatory provision, not a sanction, and holds that Moving Systems may not be nonrenewed based upon the pendency of the Action.

35. This holding is strengthened by paragraph (e), which makes it a disciplinable offense to be *adjudicated* in violation of chapter 507 or guilty under the Florida Deceptive and Unfair Trade Practices Act in any action brought by, respectively, the Department or the Department of Legal Affairs. Not all actions brought by the state against an applicant or mover under chapter 507 or chapter 501, Florida Statutes, involve Deceitful Conduct, of

course, but those that *do* fall under the broader, more general category of administrative or enforcement actions mentioned in paragraphs (c) and (d). The pending Action against Moving systems, for example, is described both by the general language in paragraph (d) and by the specific language in paragraph (e).

36. If paragraphs (d) and (e) were construed as cumulative grounds for sanctioning a licensee, then the Department could revoke a registered mover's license by filing a civil enforcement proceeding based upon allegations of Deceitful Conduct, and then initiating an administrative disciplinary proceeding under paragraph (d) based upon the existence of the enforcement proceeding. In this way, the Department could bootstrap unproved allegations of wrongdoing into grounds for the immediate revocation of a license, effectively depriving the licensee of a meaningful opportunity to timely dispute the allegations in defense of his license and livelihood. A judgment would be needed for disciplinary purposes only in those instances where the alleged violation of chapter 507 or chapter 501 did *not* involve Deceitful Conduct.

37. This case demonstrates that such concerns are not academic because, in fact, the Department seeks to revoke (nonrenew) Moving Systems' license based upon allegations that have not yet been proved, and which Moving Systems disputes. If the Department could revoke Moving Systems' registration via this proceeding, rather than doing so only after obtaining a judgment against Moving Systems in the Action (should that occur), then Moving Systems—which is currently a going concern—would suffer the loss of its business before any finding of violation or other wrongdoing has been made.

38. The undersigned rejects the notion that paragraph (d) authorizes such a draconian scheme, which is inconsistent with the many protections afforded licensees against the deprivation of their substantial rights in maintaining the property interests that their licenses create. In relation to registered

movers, subsection (8) is best understood as authorizing revocation or nonrenewal only when the licensee has (i) been convicted of a crime involving Deceitful Conduct; (ii) not satisfied a civil fine or penalty resulting from an administrative or enforcement proceeding based upon Deceitful Conduct; or (iii) had a judgment entered against it in any action brought by the State under chapter 507 or chapter 501.[3]

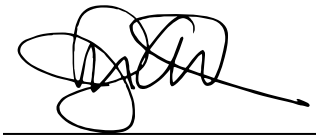
39. This does not leave the Department without recourse if it determines—based upon its own investigation of the facts underlying a pending criminal, civil, or administrative enforcement proceeding against a registered mover arising from the mover's alleged Deceitful Conduct—that the mover poses an immediate and serious danger to consumers and the public. In such an event, the Department is authorized to order the summary suspension of the mover's registration in accordance with, and subject to the requirements of, section 120.60(6).

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Agriculture and Consumer Services enter a final order approving Moving Systems' Renewal Application and renewing registration IM1939.

[3] A license might also be revoked under paragraph (a) if the licensee ceased to meet the requirements for registration under chapter 507, but this provision is not implicated in this case.

DONE AND ENTERED this 5th day of October, 2020, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
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this 5th day of October, 2020.

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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.