

**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS**

DEPARTMENT OF AGRICULTURE AND
CONSUMER SERVICES,

Petitioner,

Case No. 20-4380

vs.

ROBERT J. ARTHUR, D/B/A MUSTANG
SPEED AND RESTORATION,

Respondent.

_____ /

RECOMMENDED ORDER

Pursuant to notice, Administrative Law Judge Lynne A. Quimby-Pennock of the Division of Administrative Hearings (DOAH) conducted a disputed-fact evidentiary hearing by Zoom conference from Tallahassee, Florida, on January 20, 2021.

APPEARANCES

For Petitioner: Genevieve Hall, Esquire
Department of Agriculture
and Consumer Services
407 Calhoun Street
Tallahassee, Florida 32399

For Respondent: Robert J. Arthur, pro se
Robert J. Arthur, d/b/a Mustang
Speed & Restoration
12545 44th Street North, Suite D
Clearwater, Florida 33762

STATEMENT OF THE ISSUES

Whether Respondent committed the acts alleged in the Administrative Complaint; and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

The Department of Agriculture and Consumer Services, Division of Consumer Services (Department or Petitioner), alleged in an Administrative Complaint (AC) dated August 18, 2020,¹ that Respondent Robert J. Arthur d/b/a Mustang Speed and Restoration (Respondent) violated various provisions of chapter 559, Florida Statutes (2019). On September 17, 2020, Respondent's Election of Rights form requesting a "Formal Hearing" was received by the Department.

On October 2, 2020, the Department referred the matter to DOAH for the assignment of an administrative law judge to conduct the hearing. The final hearing was initially scheduled for December 3, 2020, but was continued once at Petitioner's request.² The hearing was rescheduled for January 20, 2021, and completed on that date.

Prior to taking testimony, Petitioner's counsel moved ore tenus for Petitioner's request for admissions to be deemed admitted.³ After hearing arguments from both parties, the undersigned declined to deem the admissions admitted, and testimony was heard.

¹ The Certificate of Service attached to the AC provides that it had "been furnished by UPS on this 18th day of March, 2020, to" Respondent. The discrepancy in the date of service and the date the AC was signed was not explained.

² Petitioner's Proposed Recommended Order incorrectly provides that the hearing was continued by an "agreement of the parties." Petitioner's counsel filed a "Motion to Continue" on November 13, 2020, citing a conflict created when a circuit court judge scheduled a summary judgment motion hearing for December 3, 2020. That motion provided Respondent did "not have an objection to the continuance."

³ Apparently, Petitioner's "FIRST REQUESTS FOR ADMISSIONS TO RESPONDENT" was served on Respondent on October 2, 2020. Petitioner did not file a notice of serving the discovery at that time, nor was there a timely pleading filed seeking to deem the requests admitted prior to the hearing.

At the hearing, the Department presented the testimony of Victor James Oddo and Alan Parkinson. Petitioner's Exhibits 1 through 9,⁴ and 11 were received into evidence without objection. Respondent testified on his own behalf and did not offer any exhibits into evidence.

At the conclusion of the hearing, the parties were informed of the ten-day deadline provided by rule for filing proposed recommended orders (PROs) after the final hearing transcript is filed with DOAH. The parties acknowledged their understanding as to when to submit their PROs.

The transcript of the proceeding was filed with DOAH on February 8, 2021. The Department filed its PRO on February 12, 2021. To date, Respondent has not filed a PRO. To the extent that the Department's PRO contained hearsay evidence not supported by direct testimony or evidence, that information has not been relied on for any finding of fact.

All references to Florida Statutes or administrative rules are to the versions in effect at the time of the action, except as otherwise indicated.

FINDINGS OF FACT

Based on the testimony and documentary evidence presented at the final hearing, the demeanor and credibility of the witnesses, and the entire record of this proceeding, the following Findings of Fact are made:

1. Mr. Arthur is the owner of Mustang Speed and Restoration (MS&R), a motor vehicle repair shop. MS&R's physical address is 12545 44th Street North, Suite D, Clearwater, Florida.

⁴ Exhibit 9 is a composite exhibit of seven black and white photocopied photographs. Three of the photographs were identified as sand in the back seat of the Jeep; two photographs were of the Jeep parked; one photograph identified a pair of "pink" panties; and one photograph contained two "ZAFUL FOREVER YOUNG" tags. Only the photographs of the parked Jeep and the tags were clear.

2. Mr. Arthur filed a motor vehicle repair registration application to renew MS&R's license in March 2019. The application contained MS&R's registration number as MV87835. Additionally, the application contained the following "Application Certification:"

I certify that this applicant is aware of and complies with all of the requirements of ss. 559.901-559.9221, F.S., including the repair estimate and disclosure statement required to be given to customers, and I am empowered to execute this application on behalf of the above named [sic] entity or individual.

Mr. Arthur's name was printed below this statement along with his signature (which Mr. Arthur acknowledged during his testimony), his title as "owner," his phone number, and the date: March 10, 2019. At all times relevant to this case, MS&R held a valid motor vehicle repair shop license.

3. Sometime in 2019, Victor Oddo bought a 2002 Jeep Liberty (Jeep) from M and K Auto. Mr. Oddo secured his vehicle license plate, numbered FL-NBMD06, on the Jeep.

4. Shortly after the purchase, the Jeep was not running smoothly. Mr. Oddo contacted M and K Auto, explained the problem, and he was directed to Respondent. Testimony at hearing did not adequately address the extent of the problem, other than the check engine light was coming on.

5. During another appointment, Mr. Oddo paid Respondent \$100 for a valve gasket repair. When shown a copy of the MS&R invoice for the valve gasket repair, Mr. Arthur confirmed it was an MS&R invoice but, testified he had "never seen that invoice, no. I don't know anything about a valve gasket repair."

6. In January 2020, the Jeep's check engine light kept coming on. Mr. Oddo brought the Jeep to Respondent. Mr. Arthur sent Mr. Oddo to a different repair shop, Carl and Sons Repair Shop (C&S).

Based on information provided, Mr. Oddo believed the repair would cost \$1,000 if done by C&S.

7. On Wednesday, January 15, 2020, Mr. Oddo returned his Jeep to MS&R after Mr. Arthur stated he could do the repair for \$380. The Jeep remained in Respondent's possession until February 6, 2020, a period of 22 days.

8. Mr. Oddo communicated with Mr. Arthur via telephone and text messages. Over the course of the 22 days the Jeep was at MS&R, Mr. Oddo sought information about the status of the Jeep's repairs and when it would be returned to him.

9. Respondent did not provide Mr. Oddo a written estimate for any work to be completed on the Jeep. At no time did Mr. Oddo waive the preparation of a written estimate. Mr. Arthur repeatedly claimed that the repair would be paid for by M and K Auto, as "the repairs were not done for the - - Mr. Oddo, they were done for the lot."

10. Mr. Oddo did not authorize Respondent or any of its employees to use his Jeep for personal use. Between January 15, 2020, and February 6, 2020, Mr. Oddo never took physical possession of his Jeep.

11. On Thursday, January 23, 2020, at approximately 1:10 p.m., Mr. Oddo took two photographs of his Jeep parked in front of a Speedway store. The Jeep's license plate confirmed it was Mr. Oddo's vehicle. (Pet. Ex.9, pp 31 & 32.) This Speedway store is a block or more away from MS&R.

12. On February 6, 2020, Mr. Oddo picked up the Jeep from MS&R.

13. Respondent did not provide Mr. Oddo an invoice or billing statement for any work that was completed on the Jeep.

14. After picking up the Jeep on February 6, 2020, Mr. Oddo received a parking ticket (Ticket One) in the mail. Ticket One was issued by the City of Tampa for a parking infraction at Ben T. Davis beach.⁵ The parking

⁵ A round-trip trek from MS&R's location to Ben T. Davis beach could not be more than 40 miles.

infraction occurred on Saturday, January 18, 2020, at approximately 1:00 a.m., while the Jeep was in Respondent's possession. The Jeep's license number on Ticket One confirmed it was Mr. Oddo's vehicle. Mr. Oddo communicated with Mr. Arthur about Ticket One, and believed Mr. Arthur would pay the \$46.00 fine.

15. Later, Mr. Oddo received another parking ticket (Ticket Two) in the mail. Ticket Two was issued by the City of Clearwater for an expired parking meter at a Clearwater beach.⁶ The parking ticket was issued on January 18, 2020, at 5:11 p.m., while the Jeep was in Respondent's possession. The Jeep's license number on Ticket Two confirmed it was Mr. Oddo's vehicle. Mr. Oddo did not communicate with Mr. Arthur about Ticket Two as by that time, Mr. Oddo had filed a complaint with Petitioner.

16. Petitioner's Exhibit 9, pages 27 through 29, purports to show sand on the back seat of Mr. Oddo's Jeep. While it is logical to assume that a vehicle may have sand in it after a trip (or two) to the beach, or for that matter while in Florida as a whole, the black and white photographs are not clear or concise, but are unnecessary. That the Jeep was at each beach is established by the two tickets.

17. After receiving the second ticket, Mr. Oddo checked his Florida Sunpass transponder⁷ account and discovered two charges while the Jeep was at MS&R for repair. On Thursday, January 23, 2020, at approximately 11 a.m., Mr. Oddo's transponder account was charged \$1.07 for his Jeep traveling southbound on the Bob Graham Sunshine Skyway bridge (Skyway). Later, at 12:25 p.m., Mr. Oddo's transponder account was again charged \$1.07 for the Jeep returning northbound on the Skyway.

18. Mr. Arthur testified that Mr. Oddo's Jeep was taken for a round-trip test drive to Sarasota, Florida, on January 23, 2020. The round-trip test drive

⁶ A round-trip trek from MS&R's location to a Clearwater beach could not be more than 40 miles.

⁷ Mr. Oddo referred to this as his "Sunshine Skyway pass."

was approximately 82 miles in distance. Mr. Arthur attached a scanner to the Jeep to determine “what the repair needed to be done.” The test drive was also to pick up “a check for a different repair for a car dealer.” Respondent described this test drive using the phrase it “killed two birds with one stone.”

19. Approximately 45 minutes after the Jeep returned from the Sarasota test drive, the Jeep was photographed at the Speedway store front. Mr. Arthur claimed the Jeep was on empty and had to be filled with gas. As provided in paragraph 11 above, Petitioner’s Exhibit 9, pages 31 and 32, are pictures of the Jeep parked in front of the Speedway store, not at a gas pump.

20. Prior to reclaiming his car, Mr. Oddo was led to believe from Mr. Arthur that the Jeep’s timing chain and the check engine light had been repaired. However, that was not the case. Although the timing chain may have been repaired or replaced, the check engine light stayed on.

21. When Mr. Oddo reclaimed his Jeep on February 6, 2020, he claimed there were “approximately a thousand miles added to my odometer.” He failed to substantiate this claim with evidence of the odometer reading on the Jeep when he dropped it at MS&R, compared to the odometer reading when he reclaimed the Jeep. Further, Mr. Oddo confused the issue when he testified:

My trip odometer only had 16 miles on it, and I always reset my trip odometer when I fill up my gas tank. My gas tank was empty with 16 miles, so I - - I don’t understand why the trip odometer has to be reset for a test drive at all.

22. Mr. Arthur admitted he never filled out or provided an estimate or invoice for the repair work to Mr. Oddo’s Jeep. Mr. Arthur testified instead that he was under the impression the repair work would be paid for by the car dealer from whom Mr. Oddo bought the Jeep. Mr. Arthur testified:

We have an open contract, we are - - no shop under any of the motor vehicle repair under

Mr. Williamson,^[8] or anybody else, requires the car dealer to come out here and sign the invoice on every job.

* * *

And no shop that does car dealer wholesale work, auto work, auction work, has the customer - - the car dealer come down out of his office and sign a repair order; it's a blanket contract, verbal contract. We repair them, they pay their bills, and everybody's happy.

* * *

Just in rebuttal, there's not one car dealership, one repair shop in the world that gets the car dealer or the auction to sign an invoice on every single job. It's not possible. They're not going to come down out of their car lot to come down here and sign every - - it's a blanket contract, verbal contract valid under the State of Florida.

23. Petitioner did not present any disciplinary history regarding Respondent.

CONCLUSIONS OF LAW

24. DOAH has jurisdiction over the parties to and the subject matter of this proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes. *See also* § 559.921(4)(c), Fla. Stat.

25. The Department is the state agency responsible for registering and regulating motor vehicle repair shops under part IX of chapter 559.

26. The burden of proof is on the party asserting the affirmative of an issue before an administrative tribunal. *See Dep't of Transp. v. J.W.C. Co., Inc.*, 396 So. 2d 778 (Fla. 1st DCA 1981).

⁸ The undersigned is not aware of who "Mr. Williamson" may be; he did not testify during the hearing.

27. In its AC, the Department seeks to impose an administrative fine and other discipline against Respondent's license for violating section 559.920(3), (12), (13), and (17). A proceeding to suspend, revoke, or impose other discipline upon a license is penal in nature. *State ex rel. Vining v. Fla. Real Estate Comm'n*, 281 So. 2d 487, 491 (Fla. 1973).

28. Accordingly, to impose such discipline, Petitioner must prove the allegations in the AC by clear and convincing evidence. *Dep't of Banking & Fin., Div. of Sec. & Investor Prot. v. Osborne Stern and Co.*, 670 So. 2d 932 (Fla. 1996); *Ferris v. Turlington*, 510 So. 2d 292 (Fla. 1987).

29. As stated by the Supreme Court of Florida:

Clear 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 lacking in confusion as to the facts at issue. The evidence must be of such a 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.

In re Henson, 913 So. 2d 579, 590 (Fla. 2005) (quoting *Slomowitz v. Walker*, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)). This burden of proof may be met where the evidence is in conflict; however, "it seems to preclude evidence that is ambiguous." *Westinghouse Elec. Corp. v. Shuler Bros., Inc.*, 590 So. 2d 986, 988 (Fla. 1st DCA 1991).

30. Section 559.921(4) provides:

(a) The department may enter an order imposing one or more of the penalties set forth in paragraph (b) if the department finds that a motor vehicle repair shop:

1. Violated or is operating in violation of any of the provisions of this part or of the rules adopted or orders issued thereunder;

2. Made a material false statement in any application, document, or record required to be submitted or retained under this part;

3. Refused or failed, or any of its principal officers have refused or failed, after notice, to produce any document or record or disclose any information required to be produced or disclosed under this part or the rules of the department;

4. Made a material false statement in response to any request or investigation by the department, the Department of Legal Affairs, or the state attorney; or

5. Has intentionally defrauded the public through dishonest or deceptive means.

(b) Upon a finding as set forth in paragraph (a), the department may enter an order doing one or more of the following:

1. Issuing a notice of noncompliance pursuant to s. 120.695.

2. Imposing an administrative fine in the Class I category pursuant to s. 570.971 for each violation for each act which constitutes a violation of this part or a rule or order.

3. Directing that the MV repair shop cease and desist specified activities.

4. Refusing to register or revoking or suspending a registration.

5. Placing the registrant on probation, subject to such conditions as the department may specify.

(c) The administrative proceedings which could result in the entry of an order imposing any of the penalties specified in paragraph (b) shall be conducted in accordance with chapter 120.

31. Section 559.920 provides in pertinent part:

Unlawful acts and practices. - It shall be a violation of this act for any motor vehicle repair shop or employee thereof to:

* * *

(3) Misrepresent that repairs have been made to a motor vehicle;

* * *

(12) Fail or refuse to give to a customer a copy of any document requiring the customer's signature upon completion or cancellation of the repair work;

(13) Willfully depart from or disregard accepted practices and professional standards;

* * *

(17) Perform any other act that is a violation of this part or that constitutes fraud or misrepresentation.

32. Section 559.905 provides in pertinent part:

(1) When any customer requests a motor vehicle repair shop to perform repair work on a motor vehicle, the cost of which repair work will exceed \$100 to the customer, the shop shall prepare a written repair estimate, which is a form setting forth the estimated cost of repair work, including diagnostic work, before effecting any diagnostic work or repair.

33. The AC alleges four actions on Respondent's part:

- Respondent misrepresented that repairs had been made to the Jeep, a violation of section 559.920(3);

- Respondent failed or refused to give a customer a copy of any document requiring the customer's signature upon completion or cancellation of the repair work, a violation of section 559.920(12);
- Respondent's actions "willfully depart from or disregard accepted practices and professional standards," a violation of section 559.920(13); and/or
- Respondent failed or refused to provide an estimate and/or invoice of the repair work as required by sections 559.905 through 559.911, a violation of section 559.920(17).

34. Based on the Findings of Fact above, Petitioner proved that Respondent violated section 559.920(3), (12), (13), and (17).

35. Mr. Arthur represented to Mr. Oddo that repairs had been made to the Jeep, but the repairs were not made. A violation of section 559.920(3).

36. Mr. Arthur, on behalf of his motor vehicle repair shop, had certified in the most recent renewal application that he was "aware of and complies with all of the requirements of ss. 559.901-559.9221, F.S., including the repair estimate and disclosure statement required to be given to customers." Mr. Arthur candidly admitted that no such estimate, invoice, or disclosure statement was provided to Mr. Oddo, claiming instead, that no documentation was necessary as there was a verbal contract with the car dealer. Mr. Arthur's position flies in the face of the statutory language requiring a customer's signature, whether it was Mr. Oddo or the proprietor of the car lot where he bought the car. A violation of section 559.920(12).

37. While in Respondent's possession, the Jeep was driven and parked at two different locations, Ben T. Davis beach and Clearwater beach, neither of which are at MS&R's physical location. A violation of section 559.920(13) and (17).

38. At the time of the incidents, the disciplinary guidelines, codified in Florida Administrative Code Rule 5J-12.007 provided that the normal penalty range for minor violations was from an administrative fine of \$100 to

\$1,000. For major violations, the normal penalty range was from an administrative fine of \$300 to \$1,000, to denial, suspension, or revocation of the license. Major violations included any violation of section 559.920(1) through (10), (12), and (16) through (18). *See Fla. Admin. Code R. 5J-12.007(8)*, effective January 1, 2020.

39. Rule 5J-12.007(5) provided that a penalty outside the normal range was allowed when warranted by consideration of mitigating and aggravating circumstances.

40. Petitioner's AC seeks an administrative fine up to \$1,000 per violation for a total fine of \$4,000, and a directive for Respondent to cease and desist specified activities.

41. Even though Respondent has no disciplinary history with the Department, the proposed penalty is reasonable and appropriate under the circumstances of this case.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is **RECOMMENDED** that the Department issue a final order that:

1. Finds Respondent guilty of violating section 559.920(3), (12), (13), and (17), as alleged in the AC;
2. Imposes an administrative fine of \$4,000; and
3. Directs Respondent to cease using consumers' vehicles for unauthorized business.

DONE AND ENTERED this 25th day of February, 2021, in Tallahassee, Leon County, Florida.



LYNNE A. QUIMBY-PENNOCK
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 25th day of February, 2021.

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.