STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

TED VERNON SPECIALTY AUTOMOBILES, INC.,

Petitioner,

vs. Case No. 21-2096

DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES,

Respondent.
_____/

RECOMMENDED ORDER

Pursuant to notice, a final hearing in this case was conducted before Administrative Law Judge Mary Li Creasy by Zoom conference on November 19, 2021.

APPEARANCES

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STATEMENT OF THE ISSUE

Whether Petitioner, Ted Vernon Specialty Automobiles, Inc. ("TVSA"), should be denied a renewal of its motor vehicle dealer license based upon the allegations contained in the agency action letter dated May 10, 2021.

PRELIMINARY STATEMENT

Ted Vernon, the sole owner, officer, and license holder for TVSA, was convicted of a felony in April 2018. In its 2019 Renewal Application, TVSA answered "No" to the question of whether any officer or director had been convicted of a felony since the last renewal application.[1] The application was completed by Ted Vernon under penalty of perjury, on behalf of TVSA. In March 2021, Respondent, Department of Highway Safety and Motor Vehicles ("the Department"), first became aware of Mr. Vernon's conviction by a complaint filed by his ex-wife.

TVSA submitted its 2021 Renewal Application, and it was received by the Department on March 24, 2021. On May 10, 2021, the Department sent TVSA a Notice of Intent to Deny Letter ("NOID") based on Mr. Vernon's 2018 felony conviction and failure to disclose the same on TVSA's 2019 renewal application. No defect was cited for the 2021 Renewal Application.

TVSA timely challenged the NOID. The matter was referred to the Division of Administrative Hearings ("DOAH") on July 1, 2021. TVSA filed a Motion for Continuance of Final Hearing from September 14, 2021, which was granted. The final hearing was held on November 19, 2021.

Because this matter is in the nature of a revocation proceeding, the Department presented its case first. The Department presented one witness, Jaime Williams, Dealer License Administrator. The Department's Exhibits A

[1] Other than a hearsay statement in the denial letter, the Department did not provide any evidence as to when TVSA's license was renewed prior to the 2019 Renewal Application. Because the application asks whether TVSA or an officer or director of TVSA was convicted of a felony "since your last renewal" and because the record provides no evidence as to when the "last renewal" of TVSA's license occurred prior to the 2019 Renewal Application, there is insufficient evidence to determine whether TVSA's answer to the question on the 2019 Renewal Application was incorrect. However, for purposes of this Recommended Order, it is assumed that the 2019 Renewal Application was incorrect.

through E were admitted. TVSA presented no witnesses. TVSA's Exhibits 1 through 4 were admitted.

The Transcript was filed on December 13, 2021. Both parties timely filed proposed recommended orders, which were considered in the preparation of this Recommended Order. Unless otherwise indicated, citations to the Florida Statutes refer to the version in effect at the time of the issuance of the NOID.

FINDINGS OF FACT

1. TVSA is an independent motor vehicle dealer in Miami, Florida, that is licensed by the Department.

2. In March 2021, TVSA submitted the renewal application at issue in this case ("2021 Renewal Application").

3. The 2021 Renewal Application was timely filed and received by the Department on March 24, 2021.

4. The 2021 Renewal Application was regular in form and complied with the provisions of section 320.27, Florida Statutes, and the Department's rules promulgated thereunder.

5. Despite the 2021 Renewal Application meeting the requirements of the statutes and the Department's rules for renewal of its license, on May 10, 2021, the Department sent the NOID informing TVSA of the Department's intent to deny the 2021 Renewal Application.

6. In the NOID, the Department asserts: (1) Mr. Vernon was convicted of a felony in 2018 and that such conviction supports a denial of the 2021 Renewal Application pursuant to section 320.27(9)(a)2.; and (2) on its 2019 Renewal Application, TVSA incorrectly checked the box next to "No" for the question, "Have you or any officer/owner been convicted of a felony or equivalent in any jurisdiction since your last renewal?" (the "Felony Question") and that this incorrect answer on the 2019 Renewal Application

supports a denial of the 2021 Renewal Application pursuant to section 320.27(9)(a)1.

7. The Department admits that TVSA, the corporate entity, and not Mr. Vernon, the individual, is the "applicant" and the "licensee" for the 2019 and 2021 Renewal Applications for purposes of section 320.27(9)(a).

8. TVSA has not been convicted of a felony.

9. Thus, with respect to the 2019 and 2021 Renewal Applications (and TVSA's license generally), neither the applicant nor the licensee has been convicted of a felony.

10. Mr. Vernon, the individual, was convicted of a felony on April 3, 2018. The Department was notified of this conviction by Mr. Vernon's ex-wife at or near the time of the submission of the 2021 Renewal Application.

11. The box next to "No" was checked for the Felony Question on the 2019 Renewal Application.

12. In reviewing the 2021 Renewal Application, the Department did not know whether the box was checked "No" to the Felony Question on the 2019 Renewal Application due to a mistake and did not contact TVSA or otherwise conduct any investigation into TVSA's intent in checking the "No" box. The Department has no knowledge or evidence as to TVSA's intent with respect to checking the "No" box for the Felony Question on the 2019 Renewal Application. The Department only knows that the wrong box was checked on the 2019 Renewal Application.

13. The Department's decision to issue the NOID was not based on any written or uniformly applied policies of the Department. The Department does not have any rules or guidelines on which it relies in determining whether it is going to deny, suspend, revoke, or not take any action against a licensee when the Department believes a renewal applicant violated section 320.27(9). Indeed, the Department does not deny, suspend, or revoke a license every time it believes that a violation of section 320.64(9) occurs.

14. As set forth in the NOID, the Department refused to renew TVSA's license, and, as a result, the license expired, and TVSA is not able to conduct business as an independent motor vehicle dealer.

15. The Department's action to deprive TVSA of its ability to continue to operate as a motor vehicle dealer occurred prior to TVSA being provided a hearing to dispute the grounds asserted by the Department and is tantamount to a suspension or revocation by inaction.

CONCLUSIONS OF LAW

16. DOAH has jurisdiction over the parties to, and subject matter of, this proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes (2021).

17. Although the Department has not suspended, revoked, or disciplined TVSA's license, its issuance of the NOID and the subsequent lapse of the license is disciplinary in nature.

18. 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, 497 (Fla. 1973). This includes cases in which an agency seeks to deny a license renewal application. *See Dubin v. Dep't of Bus. Regul.*, 262 So. 2d 273, 274-75 (Fla. 1st DCA 1972) (Refusal to renew a license to a person who has once demonstrated he possesses the statutory prerequisites to licensure cannot be used as a substitute for a license revocation proceeding.); *Coke v. Dep't of Child. & Fam. Servs.*, 704 So. 2d 726, 726 (Fla. 5th DCA 1998) (applying clear and convincing standard to license renewal denial case).

19. The Department must therefore prove the charges against TVSA by clear and convincing evidence. *Fox v. Dep't of Health*, 994 So. 2d 416, 418 (Fla. 1st DCA 2008) (citing *Dep't of Banking & Fin. v. Osborne, Stern, & Co.*, 670 So. 2d 932 (Fla. 1996)); *Ferris v. Turlington*, 510 So. 2d 292 (Fla. 1987).

20. As stated by the Florida Supreme Court:

> 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 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.

In re Henson, 913 So. 2d 579, 590 (Fla. 2005) (quoting *Slomowitz v. Walker*, 492 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).

21. Penal statutes must be construed in terms of their literal meaning and words used by the Legislature may not be expanded to broaden the application of such statutes. *Elmariah v. Dep't of Pro. Regul., Bd. of Med.*, 574 So. 2d 164, 165 (Fla. 1st DCA 1990); *Griffis v. Fish & Wildlife Conser. Comm'n*, 57 So. 3d 929, 931 (Fla. 1st DCA 2011); *Beckett v. Dep't of Fin. Servs.*, 982 So. 2d 94, 100 (Fla. 1st DCA 2008). "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." *McClung v. Crim. Just. Stds. & Training Comm'n*, 458 So. 2d 887, 888 (Fla. 5th DCA 1984); *Munch v. Dep't. of Pro. Regul., Div. of Real Estate*, 592 So. 2d 1136, 1143 (Fla. 1st DCA 1992).

22. The allegations of fact set forth in the NOID are the grounds upon which this proceeding is predicated. *Trevisani v. Dep't of Health*, 908 So. 2d 1108 (Fla. 1st DCA 2005) (administrative complaint charged physician with a failure to create medical records; proof of a failure to retain medical records cannot support a finding of guilt); *see also Cottrill v. Dep't of Ins.*, 685 So. 2d

1371, 1372 (Fla. 1st DCA 1996). Furthermore, due process prohibits the Department from taking disciplinary action against a licensee based on matters not specifically alleged in the charging instrument, unless those matters have been tried by consent. *See Delk v. Dep't of Pro. Regul.*, 595 So. 2d 966, 967 (Fla. 5th DCA 1992).

23. Pursuant to section 320.27(4)(a), "[a] license certificate shall be issued by the department in accordance with such application when the application is regular in form and in compliance with the provisions of this section."

24. Pursuant to the plain terms of the statute, a license application must be processed, and the license issued, if the application is "regular in form and in compliance" with section 320.27.

25. As set forth above, the Department admits that the 2021 Renewal Application was regular in form and complied with the statute. Thus, under the express terms of the statute, the Department was without authority to deny the 2021 Renewal Application.

26. According to Jaime Williams, Dealer License Administrator, "[t]here was no issue with the renewal." The Department admits that the 2021 Renewal Application was proper and free from any issues which would warrant denial. Despite this acknowledgment, the Department denied the 2021 Renewal Application "because we were made aware of the felony" of Mr. Vernon.

27. Because Mr. Vernon was convicted of a felony, the Department asserted that it was entitled to deny the 2021 Renewal Application pursuant to section 320.27(9)(a). However, section 320.27(9)(a) does not apply to the Department's review of license applications; it applies to Respondent's ability to deny, suspend, or revoke a license that has already been "issued hereunder." Instead, the Department's ability to reject a license application is controlled by section 320.27(4)(a).

28. If the Department believes a provision of section 320.27(9)(a) has been implicated, its recourse is to suspend, revoke, or deny a license that has

already been issued—not to deny an application. The Legislature crafted the statute in this manner to prevent the Department from putting a dealer out of business without due process. Florida courts have long recognized that a failure to renew a license is a revocation of the license, and an agency may not, as the Department has done here, refuse to renew a license to avoid the protections afforded a licensee relative to revocation. *See Dubin*, 262 So. 2d at 274-75 ("The courts of this State have held that refusal to renew a license to a person who has once demonstrated that he possesses the statutory prerequisites to licensure cannot be used as a substitute for a license revocation proceeding."). That is exactly what has happened in this case.

29. That the Department's action in this case violated applicable provisions of Florida law is further buttressed by the provision in section 320.27(9)(a), which only permits action against a license *"upon proof"* that one of the violations set forth therein has occurred. Thus, the plain language of the statute makes clear that the Department must prove a violation before taking action against a license. Indeed, the Department's own NOID seems to indicate that the Department believes it should afford TVSA a hearing before putting it out of business, because the NOID refers to the denial as "proposed agency action" and advises that TVSA has a "right to an administrative hearing." Notwithstanding its acknowledgement that TVSA had a right to an administrative hearing, and TVSA's timely exercise of that right, the Department effectively revoked TVSA's license because TVSA can no longer operate as a motor vehicle dealer.

30. This is exactly the denial of due process that section 320.27 and Florida's Administrative Procedure Act is structured to avoid and is why section 320.27(4) requires that an application be approved if regular in form and in compliance with the statute. The Department may not create a backdoor revocation by refusing to renew TVSA's license. *See Dubin*, 262 So. 2d at 274 (Refusal to renew a license to a person who has once demonstrated that he possesses the statutory prerequisites to licensure

cannot be used as a substitute for a license revocation proceeding.); *Vocelle v. Riddell*, 119 So. 2d 809 (Fla. 2d DCA 1960) ("[O]nce a license ha[s] been issued, the annual renewal thereof follows as a ministerial duty; and if a violation occurs the [agency] must resort to revocation rather than denial of renewal.").

31. Section 320.27(4) and the Department's own testimony make clear that the 2021 Renewal Application should have been approved. If the Department believed that TVSA committed an action delineated in section 320.27(9)(a), the remedy was to serve an administrative complaint seeking to take action against TVSA's license such that TVSA would have been able to obtain a hearing before having its license suspended or revoked. What the Department was not permitted to do (and what it did) was to strip TVSA of its license without an opportunity for a hearing.

32. As grounds for its denial of the 2021 Renewal Application, the Department alleged in the NOID that: (1) the April 2018 felony conviction of Mr. Vernon, the individual, constitutes a basis to deny the renewal of TVSA's license under section 320.27(9)(a)2.; and (2) TVSA's incorrect response to the Felony Question on the 2019 Renewal Application constituted a basis to deny the renewal of TVSA's license in 2021 under section 320.27(9)(a)1.

33. Section 320.27(9)(a)2. provides that the "department may deny, suspend, or revoke any license issued hereunder … upon proof ***that an applicant or a licensee*** has [b]een convicted of a felony." (emphasis added).

34. The Department stipulated that, for purposes of this section, TVSA is both the applicant and licensee and that TVSA has not been convicted of a felony.

35. Although the evidence is clear, and the parties agree, that the applicant or licensee has not been convicted of a felony, the Department asserts that section 320.27(9)(a)2. is a proper basis for denial. The Department's argument in this regard is that section 320.27(3) requires officers and directors of corporate applicants to submit fingerprints with their

application for initial licensure "for the purpose of determining any prior criminal record or any outstanding warrants," and, because section 320.27(3) mentions officers and directors, section 320.27(9)(a) must also apply to officers and directors.

36. This argument compels the opposite interpretation from what the Department asserts. "Where the legislature includes wording in one section of a statute and not in another, it is presumed to have been intentionally excluded." *Fla. Carry, Inc. v. Univ. of N. Fla.*, 133 So. 3d 966, 971 (Fla. 1st DCA 2013). The Legislature's mention of officers and directors of the applicant corporation in section 320.27(3), while not mentioning them in section 320.27(9)(a), evidences a clear intent on the part of the Legislature to not include the actions of officers and directors as part of the prohibitions in section 320.27(9)(a).

37. It is clear that section 320.27(9)(a) only applies to the actions of a "licensee or applicant." "When the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning." *Atwater v. Kortum*, 95 So. 3d 85, 90 (Fla. 2012) (quoting *Holly v. Auld*, 450 So. 2d 217, 219 (Fla. 1984)).

38. In this case, TVSA is the licensee and applicant and has not been convicted of a felony. Accordingly, the Department has not established that the licensee or applicant has been convicted of a felony as required by section 320.27(9)(a)2., and the Department's reliance on that statutory provision as a basis for denying the 2021 Renewal Application is in error.

39. Section 320.27(9)(a)1. provides that the "department may deny, suspend, or revoke any license issued hereunder … upon proof that an applicant or a licensee has committed fraud or willful misrepresentation in application for or in obtaining a license." As set forth above, *Munch* dictates

that this statutory provision be strictly construed in favor of TVSA. 592 So. 2d at 1143.

40. The statute's requirement of fraud or intentional misrepresentation indicates that the Department must prove something more than a mistake to take action against TVSA's license. The Department must prove by clear and convincing evidence that TVSA acted to intentionally deceive the Department by way of the 2019 Renewal Application.

41. The First District Court of Appeal addressed this exact issue in *Munch*. There the Department of Professional Regulation sought to suspend a real estate broker's license. The statute at issue in *Munch* provided that action could be taken against a license if the licensee was "guilty of fraud, misrepresentation, concealment, false promises, false pretenses, dishonest dealing … " thereby violating section 475.25(1)(b), Florida Statutes. The agency alleged that the licensee had concealed certain commissions from his broker such that his license should be suspended. *Munch*, 592 So. 2d at 1143. The licensee admitted that he had not told the broker about the commissions, but the statute required more. *Id.* at 1143-44. The First District Court of Appeal held that the statute's use of fraud, misrepresentation, or concealment required "that an intentional act be proved before a violation may be found." *Id.*

42. The language of section 320.27(9)(a)1. similarly compels an interpretation that requires the Department to prove that TVSA acted with intent to defraud or deceive the Department in obtaining or applying for a license. The Department cannot prove by clear and convincing evidence that TVSA intentionally deceived or defrauded the Department with respect to the 2019 Renewal Application.[2]

[2] Additionally, even if Mr. Vernon's felony conviction were applicable to section 320.27(9)(a)2., conviction of a felony alone is insufficient for action against TVSA's license. The Department must establish that the felony is directly related to standards determined to be "necessary and reasonably related to the protection of the public health, safety, and welfare for the specific … profession, or business for which the license … is sought." § 112.011(b), Fla. Stat. The Department has not proven or even alleged that Mr. Vernon's

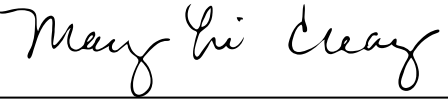
43. In fact, the Department presented no evidence at all as to TVSA's intent. The Department does not know whether the box was checked "No" to the Felony Question on the 2019 Renewal Application as a mistake. All the Department knows is that the wrong box was checked. This is insufficient to establish that TVSA intentionally defrauded or deceived the Department with respect to the 2019 Renewal Application.

44. The Department has not established that TVSA has committed fraud or willful misrepresentation with respect to the 2019 Renewal Application as required by section 320.27(9)(a)2., and the Department's reliance on that statutory provision as a basis for denying the 2021 Renewal Application is not supported by clear and convincing evidence.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that TVSA's March 2021 Renewal Application to renew its independent motor vehicle dealer license be accepted and TVSA's license be renewed.

DONE AND ENTERED this 13th day of January, 2022, in Tallahassee, Leon County, Florida.



MARY LI CREASY
Administrative Law Judge
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conviction was of a felony directly related to a standard determined to be necessary and reasonably related to the protection of the public health, safety, and welfare as relates to the business of an independent motor vehicle dealer.

Filed with the Clerk of the
Division of Administrative Hearings
this 13th day of January, 2022.

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.