

STATE OF NEW JERSEY  
DEPARTMENT OF BANKING AND INSURANCE

MARLENE CARIDE, COMMISSIONER	)	
NEW JERSEY DEPARTMENT OF BANKING	)	
AND INSURANCE,	)	FINAL DECISION AND ORDER
Petitioner,	)	
	)	OAL DKT. NO.: 07969-21
v.	)	
	)	AGENCY DKT. NO.: 19-020061
23 <sup>RD</sup> AUTO GROUP, LLC.,	)	
Respondent.	)	

This matter comes before the Commissioner of Banking and Insurance (“Commissioner”) pursuant to the authority of N.J.S.A. 52:14B-1 to -31, N.J.S.A. 17:1-15, N.J.S.A. 17:11C-1 to -49, the New Jersey Consumer Finance Licensing Act (“CFLA”) and all powers expressed or implied therein, for the purpose of reviewing the Initial Decision on Remand of Administrative Law Judge John P. Scollo (“ALJ”) rendered on January 4, 2022 (“Initial Decision on Remand”) and the Initial Decision of the ALJ rendered on October 14, 2020 (“Initial Decision”). In the Initial Decision on Remand, the ALJ found that 23<sup>rd</sup> Auto Group, LLC. (“23<sup>rd</sup> Auto” or “Respondent”), a licensed motor vehicle installment seller, filed its 2018 annual report 44 days late and that the Department of Banking and Insurance (“Department” or “Petitioner”) correctly calculated the fine at \$100 per day for 44 days late, for a total fine of \$4,400. The ALJ recommended that the total fine shall be in the amount of \$4,400.

PROCEDURAL HISTORY

On June 7, 2019, the Department issued a Notice of Violation, Conditional Order Suspending License and Imposing Fines, and Contingent Final Order (“Notice of Violation”), pursuant to N.J.S.A. 17:1-15 and N.J.A.C. 3:1-7.6, against 23<sup>rd</sup> Auto. The Notice of Violation

provides that individuals or entities licensed as motor vehicle installment sellers are required to file an annual report for the preceding year on or before April 1 of each year pursuant to N.J.A.C. 3:1-7.6(a). N.J.A.C. 3:1-7.6 authorizes the Commissioner to take action on the license of a licensee who fails to file an annual report, including license revocation or suspension and imposition of fines of not more than \$100 per day for each day the annual report is not filed. The Notice of Violation alleged that the Respondent, licensed as a motor vehicle installment seller, was required to file the 2018 annual report by May 1, 2019 and failed to do so.<sup>1</sup> 23<sup>rd</sup> Auto did not file its annual report until June 14, 2019, which was 44 days late.

The Notice of Violation ordered that:

1. Pursuant to N.J.A.C. 3:1-7.6(c) and (d), the license issued to 23RD AUTO GROUP LLC shall be suspended, effective 30 days from [June 7, 2019], until such time as the 2018 annual report is filed and the \$2,000 administrative fine has been paid, or, if the report is not filed and the fine is not paid, until such time as the term of the licensee's license as a motor vehicle installment seller expires; and
2. Upon suspension, any pending license renewal application shall be stayed and not granted by the Department until such time as the annual report filing violation is cured, the full penalty had been paid, and the license has been reinstated by the Department;
3. To avoid license suspension and the assessment of an administrative fine, the licensee must within 30 days from [June 7, 2019], either:
  - a. File a 2018 annual report with the Department, and pay a fine in the amount of \$2,000 ...

or

  - b. Request an administrative hearing to contest the violations alleged ...

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<sup>1</sup> N.J.A.C. 3:1-7.6 provides for an April 1<sup>st</sup> due date. However, Department notices and the Department's website provided that the due date was May 1<sup>st</sup>. See Exhibits to the Initial Decision P-2, P-3, and P-4 and Initial Decision at 3.

4. If, within 30 days from [June 7, 2019], the missing annual report is not filed and the fine is not satisfied, or a hearing request is not received, this Order shall become effective and shall constitute a final agency decision. ...

On or about June 25, 2019, Anthony Burney (“Burney”), the owner of 23<sup>rd</sup> Auto, sent a letter to the Department requesting an administrative hearing to contest the violation. The matter was transmitted to the Office of Administrative Law where it was filed on February 13, 2020 as a contested case. The hearing was conducted on October 8, 2020 via Zoom, a video teleconferencing service.<sup>2</sup>

On October 14, 2020, the ALJ issued the Initial Decision. In the Initial Decision, the ALJ concluded that 23<sup>rd</sup> Auto violated the law by filing its 2018 annual report 44 days late and that the Department correctly calculated the fine at \$100 per day for 44 days, for a total fine of \$4,400. However, the ALJ found that considering the devastating effects that the pandemic has had upon the economy of New Jersey, and considering that the Respondent knew that a fine of \$100 per day could be imposed, a fine of \$67 per day would be more equitable than a fine of \$100 per day. The ALJ concluded that a fine of \$67 per day for 44 days without suspension or revocation of the license is more equitable than the penalty sought by the Department. The ALJ thus recommended that 23<sup>rd</sup> Auto be subject to an administrative fine in the amount of \$2,948.

On October 23, 2020, the Department timely filed Exceptions to the Initial Decision to clarify an error in the Appendix of the Initial Decision, which incorrectly listed that no witnesses were present at the October 8, 2020 hearing in this matter. 23<sup>rd</sup> Auto did not file Exceptions to the Initial Decision, nor did it reply to the Department’s Exceptions.

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<sup>2</sup> The Initial Decision does not include the date of the hearing or that the hearing was conducted via Zoom. These details were gathered from documents in the record.

On July 15, 2021, the Department issued an Order of Remand (“Order of Remand”) pursuant to N.J.A.C. 1:1-18.7. This matter was remanded to the Office of Administrative Law (“OAL”) to develop the record relating to the factors for determining a civil monetary penalty set forth in Kimmelman v. Henkels & McCoy, Inc., 108 N.J. 123 (1987) and to provide for the full procedural history relating to the ALJ’s recommended reduction of the penalty.

The parties opted to submit papers rather than to have another hearing. The ALJ allowed 23<sup>rd</sup> Auto time to submit evidence of its inability to pay a \$4,400 penalty, but no such information was provided. On December 29, 2021, 23<sup>rd</sup> Auto corresponded with the OAL stating that it could not locate its tax returns but did not request more time to submit same. Instead, 23<sup>rd</sup> Auto asked the OAL to make its decision without the tax returns before it.

On January 4, 2022, the ALJ issued the Initial Decision on Remand. In the Initial Decision on Remand, the ALJ included an analysis of the matter using the factors set forth in Kimmelman. The ALJ concluded that there is no reason to reverse or alter the penalty of \$4,400 (\$100 per day for 44 days). The ALJ thus recommended that the total fine shall be in the amount of \$4,400.

#### ALJ’S FINDINGS OF FACT, LEGAL ANALYSIS, AND CONCLUSIONS

The ALJ found the following facts relevant to the determination. 23<sup>rd</sup> Auto is a car dealership located in Linden, New Jersey<sup>3</sup> and licensed as a motor vehicle installment seller under the CFLA. Initial Decision on Remand at 4. The owner of 23<sup>rd</sup> Auto is Anthony Burney. Ibid. The due date for the business’s 2018 annual report was April 1, 2019. Ibid. In previous years, 23<sup>rd</sup> Auto filed its annual reports, which indicates that it was aware that an annual report was due on April 1st of each year and was aware of the thirty-day grace period without penalty, thus making

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<sup>3</sup> The Initial Decision provides that the Respondent is located in Hackettstown, New Jersey. The Initial Decision on Remand provides that the Respondent is located in Linden, New Jersey.

the effective due date for the filing of the annual report May 1st of the year. Ibid. Even without any notices from the Department, 23rd Auto should have been aware of its duty to file the 2018 annual report in a timely manner. Id. at 5. The Department sent a notice by letter to 23rd Auto dated January 31, 2019 informing it of the need for it to file its 2018 annual report. Ibid. The Department sent reminder emails to 23rd Auto.<sup>4</sup> Ibid. The notices and reminder emails made the owner of 23rd Auto aware that the annual report was due no later than May 1, 2019. Ibid. The 2018 annual report for 23rd Auto was filed on June 14, 2019, which was 44 days late. Ibid.

The ALJ stated that in the case of Kimmelman v. Henkels & McCloy, Inc., the New Jersey Supreme Court established the standard for determining the appropriateness of monetary penalties imposed by a State agency, and noted that no one factor is dispositive. Id. at 5. The seven factors set forth in Kimmelman are:

- (1) the good or bad faith of the subject entity;
- (2) the subject entity's ability to pay the penalty;
- (3) the amount of profit obtained from illegal activity;
- (4) injury to the public;
- (5) the duration of the entity's misconduct;
- (6) the existence of criminal or treble damage actions; and
- (7) the existence of past violations.

Ibid.

As to the first factor, the ALJ found that entities such as the Respondent are required to know and comply with filing deadlines. The ALJ stated that the Department's evidence demonstrates that it did notify 23rd Auto of the filing deadline, and even sent subsequent reminder emails. Initial Decision on Remand at 5. The ALJ found that the Department acted in good faith

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<sup>4</sup> The Department sent reminder emails to 23<sup>rd</sup> Auto on March 13, 2019; March 27, 2019; April 10, 2019; April 24, 2019, and May 2, 2019. Initial Decision at 3.

and 23rd Auto was merely dilatory and slack in its business practices and thus failed to fulfill its duty to file its annual report within the applicable time limit. Ibid.

As to the second Kimmelman factor, the ALJ found that it is the subject entity's burden to prove that it is unable to pay the penalty imposed for the violation. Ibid. Although afforded the opportunity to present its evidence, such as its income tax returns, to demonstrate that it is unable to pay the penalty, 23rd Auto did not present such documents. Id. at 5 and 8.

As to the third through seventh Kimmelman factors, the ALJ found that there was no indication that 23rd Auto realized any profit flowing from its violation (third factor). Id. at 6. The ALJ found that there was no evidence that the Respondent harmed the public (fourth factor), and that there was no disagreement that 23rd Auto filed its annual report 44 days late (fifth factor). Ibid. The ALJ also found that there was no evidence of any criminal or treble damage actions against 23rd Auto (sixth factor), and no evidence produced of any prior violations (seventh factor). Ibid. Based upon the above factors, the ALJ recommended that a penalty of \$4,400 be imposed. Id. at 8.

### EXCEPTIONS

The Department timely filed exceptions to the Initial Decision on Remand on January 18, 2022. In its filing, the Department agreed with the ALJ's findings of fact, conclusions of law, and the recommended penalty of \$4,400. Additionally, the Department filed exceptions to correct errors in the Initial Decision on Remand. First, the Department clarified that the Petitioner in this matter is the Department, and not the Commissioner. Second, the Department clarified that it did not "impose" a penalty of \$4,400 on the Respondent. Instead, on June 7, 2019, the Department issued a Notice of Violation in which it advised the Respondent that it could either pay a penalty of \$2,000 or request a hearing. The Respondent chose to contest the penalty and requested a

hearing. Thereafter, in the proceeding before the ALJ, the Department requested entry against the Respondent of a penalty of \$4,400, which ultimately was up to the discretion of the ALJ. Finally, the List of Exhibits section of the Initial Decision on Remand (referred to in the Department's Exceptions as "the Supplemental Decision") references only one Exhibit produced by the Department at the hearing in this matter. However, the Department noted that it produced seven documents at the hearing, marked P-1 to P-7, all of which were admitted into evidence at the hearing. The Department noted that all seven Exhibits are correctly referenced in the ALJ's Initial Decision dated October 14, 2020.

The Respondent did not file exceptions and did not reply to the exceptions filed by the Department.

#### LEGAL DISCUSSION

The Department bears the burden of proving the allegations in the Notice of Violation by a preponderance of the competent, relevant and credible evidence. Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550 (1982). The evidence must be such as would lead a reasonably cautious mind to a given conclusion. Bornstein v. Metro. Bottling Co., 26 N.J. 263, 275 (1958). Preponderance may be described as: "the greater weight of credible evidence in the case not necessarily dependent on the number of witnesses, but having the greater convincing power." State v. Lewis, 67 N.J. 47 (1975).

#### Notice of Violation – Allegation Against 23<sup>rd</sup> Auto

The Notice of Violation charges 23<sup>rd</sup> Auto with failing to timely file its 2018 annual report pursuant to N.J.A.C. 3:1-7.6, which provides that motor vehicle installment sellers, among others, must file an annual report by April 1. The Department extended the due date to May 1<sup>st</sup>. See Exhibits to the Initial Decision P-2, P-3, and P-4 and Initial Decision at 3.

The ALJ found that Respondent failed to file its 2018 annual report until June 14, 2019, 44 days after the May 1, 2019 deadline. Initial Decision at 5. I concur that Respondent failed to timely file the 2018 annual report as required by N.J.A.C. 3:1-7.6. As a licensed motor vehicle installment seller, 23<sup>rd</sup> Auto has an affirmative obligation to ensure it is compliant with the requirements of licensure.

#### Penalty Against 23<sup>rd</sup> Auto

With respect to the appropriate penalty to be imposed against 23<sup>rd</sup> Auto, I concur with the ALJ's recommendation and find that the record is sufficient to support the imposition of a \$4,400 fine with no suspension or revocation of 23<sup>rd</sup> Auto's license. N.J.S.A. 17:16C-19 and N.J.A.C. 3:1-7.6(c) provide that licensees who fail to timely file the annual report may be subject to a penalty of not more than \$100 per day for each day's delay in filing the required report, and their license is subject to revocation. The failure to file an annual report interferes with the Department's regulatory purpose of reviewing the financial health of licensees' business dealings, and the Department's statutory oversight over licensees operating within New Jersey. As such, the Commissioner is authorized to suspend or revoke the license of a licensee who fails to file an annual report, and to impose monetary penalties.

I agree with the ALJ's finding that revocation or suspension of Respondent's license is not warranted in this case. After receiving the Notice of Violation, Respondent filed its annual report and sent a letter to the Department requesting an administrative hearing to contest the violation. Because the Respondent ultimately filed its annual report, although it was late, and timely responded to the Department's Notice of Violation, I concur with and adopt the ALJ's recommendation that no suspension or revocation in this case is appropriate.



As noted above, under Kimmelman, certain factors are to be examined when assessing administrative monetary penalties, such as those that may imposed pursuant to N.J.S.A. 17:16C-19 and N.J.A.C. 3:1-7.6, upon motor vehicle installment seller licensees. I adopt the ALJ's findings and analysis of those factors, except as modified herein.

As to the first Kimmelman factor (the good or bad faith of the Respondent), the ALJ found that 23<sup>rd</sup> Auto merely failed to fulfill its duty to file its annual report within the applicable time and no allegations of bad faith were put forward. Initial Decision on Remand at 5. As to the second Kimmelman factor (the violator's ability to pay), Respondents who claim an inability to pay civil penalties bear the burden of proving their incapacity. See Commissioner v. Shah, OAL Dkt. No. BKI 11903-05, Initial Decision, (April 15, 2008) <https://njlaw.rutgers.edu/collections/oal/final/bki11903-05.html>, Final Decision and Order (September 2, 2008).<sup>5</sup> Here, the Respondent did not present evidence that addressed its inability to pay a civil penalty, even though it was afforded the opportunity to present such evidence. Ibid. As to the third Kimmelman factor (the amount of profits obtained or likely to be obtained from the illegal activity), the ALJ found that no evidence of profit obtained was put forward. Id. at 6.

As to the fourth Kimmelman factor (injury to the public), the ALJ found that there was no evidence of any such injury. Ibid. However, I find that the failure to file an annual report has the potential to cause public harm. Such a failure interferes with the Department's regulatory purpose of reviewing the financial health and business dealings of licensees operating within New Jersey.

As to the fifth Kimmelman factor (duration of the illegal activity), the Respondent filed the report 44 days late. Ibid. As to the sixth Kimmelman factor (the existence of criminal actions and

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<sup>5</sup> Even though the Shah case relates to insurance, it is still applicable to this matter as it speaks to a respondent's burden of proving their incapacity.

other sanctions), the ALJ found that there is no evidence in the record to suggest that there are any criminal actions or actions concerning treble penalties related to this matter. Initial Decision on Remand at 6. Therefore, the only penalty contemplated derives from the present action. The New Jersey Supreme Court in Kimmelman, 108 N.J. at 128, stated that a lack of criminal punishment weighs in favor of a larger civil penalty. Finally, as to the seventh Kimmelman factor (past violations), there is no evidence of any past violations. Ibid.

In light of the above Kimmelman analysis and based on the Respondent's failure to timely file the 2018 annual report, I concur that the \$4,400 fine recommended by the ALJ is fully warranted, not excessive or unduly punitive, and succeeds to the required level of opprobrium. The \$4,400 fine shall be paid within 30 days of the date of this Final Decision and Order.

#### CONCLUSION

Having carefully reviewed the Initial Decision, the Exceptions and the entire record herein, I hereby ADOPT the Findings and Conclusions as set forth in the Initial Decision and the Initial Decision on Remand, except as modified herein, and find that 23<sup>rd</sup> Auto failed to timely file its 2018 annual report as required by N.J.A.C. 3:1-7.6. I also ADOPT the ALJ's recommendation that 23<sup>rd</sup> Auto be ORDERED to pay a fine of \$4,400. Accordingly, the Initial Decision and Initial Decision on Remand are hereby ADOPTED as modified herein.

It is so ORDERED this 18 day of February 2022.



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Marlene Caride  
Commissioner