

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.: 06051-21
v.)	
)	AGENCY DKT. NO.: 19-020060
GARDEN STATE AUTO MALL, 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 December 13, 2021 (“Initial Decision on Remand”) and the Initial Decision of the ALJ rendered on October 8, 2020 (“Initial Decision”). In the Initial Decision on Remand, the ALJ found that Garden State Auto Mall, LLC. (“Garden State” or “Respondent”), a licensed motor vehicle installment seller, filed its 2018 annual report 43 days late and recommended a fine in the amount of \$4,300.

PROCEDURAL HISTORY

On June 7, 2019, the Department of Banking and Insurance (“Department” or “Petitioner”) 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 Garden State. 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 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.¹ Garden State did not file its annual report until June 13, 2019, which was 43 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 GARDEN STATE AUTO MALL 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 ...

¹ N.J.A.C. 3:1-7.6 provides for an April 1st due date. However, Department notices and the Department's website provided that the due date was May 1st. 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. ...

Salama Shaddy, the owner of Garden State, sent a letter to the Department requesting an administrative hearing to contest the violation. The Department received the request on June 24, 2019. The Department transmitted this matter to the Office of Administrative Law (“OAL”), where it was filed on February 13, 2020 as a contested case under Docket Number BKI 02308-20 pursuant to N.J.S.A. 52:14B-1 to –15; N.J.S.A. 52:14F-1 to –13. The hearing was conducted on October 1, 2020 via Zoom, a video conferencing service.²

On October 8, 2020, the ALJ issued the Initial Decision. In the Initial Decision, the ALJ concluded that Garden State violated the law by filing its 2018 annual report 43 days late and that the Department correctly calculated the fine at \$100 per day for 43 days, for a total fine of \$4,300. 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. In the Initial Decision, the ALJ concluded that a fine of \$67 per day for 43 days without suspension or revocation of the license is more equitable than the penalty sought by the Department. The ALJ recommended that Garden State submit a \$2,881 administrative fine.

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

² The Initial Decision did not include the date of the hearing or that the hearing was conducted via Zoom. These details were gathered from documents included in the record.

were present at the October 1, 2020 hearing in this matter. Garden State did not file Exceptions to the Initial Decision.

On July 15, 2021, the Commissioner issued an Order of Remand (“Order of Remand”) pursuant to N.J.A.C. 1:1-18.7. This matter was remanded to the 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 reduction of the penalty.

In a letter brief to the ALJ dated September 20, 2021, the Department provided the ALJ with its analysis of the seven factors set forth in Kimmelman and argued that the \$2,881 penalty recommended in the Initial Decision be affirmed.³ The ALJ allowed Garden State time to submit evidence of its inability to pay a \$4,300 penalty, but no such information was provided by Garden State.

On December 13, 2021, the ALJ issued the Initial Decision on Remand, which included an analysis of the matter using the factors set forth in Kimmelman and recommended the imposition of a fine in the amount of \$4,300.

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

The ALJ found the following facts relevant to the determination. Garden State is a car dealership located in Jersey City, New Jersey and licensed as a motor vehicle installment seller under the CFLA. Initial Decision on Remand at 3. The owner of Garden State is Shaddy. Id. at 4. The due date for Garden State’s 2018 annual report was April 1, 2019. Ibid. The ALJ found that Garden State filed its annual reports in previous years, indicating that it was aware that an

³ In the Department’s September 20, 2021 letter brief, the Department argued that the \$2,881 penalty be affirmed. However, in its Exceptions to the Initial Decision on Remand, the Department agreed with the ALJ’s recommended penalty of \$4,300.

annual report was due on April 1 of each year and was aware of the thirty-day grace period without penalty, thus making the effective due date for the filing of the annual report May 1st of the year.

Ibid.

The ALJ determined that even without any notices from the Department, the owner of Garden State should have been aware of the need to file the 2018 annual report for his business.

Ibid. The Department sent a notice by letter to Garden State dated January 31, 2019 informing it of the need for it to file its 2018 annual report. Ibid. The Department sent reminder emails to Garden State dated March 13, 2019; March 27, 2019; April 10, 2019; April 24, 2019 and May 2, 2019. Ibid. The notices and reminder emails made the owner of Garden State aware that the annual report was due no later than May 1, 2019. Ibid. The 2018 annual report for Garden State was filed on June 13, 2019, which was 43 days late. Ibid. The Department correctly calculated the fine at \$100 per day times 43 days late, for a total fine of \$4,300. Ibid.

In the Initial Decision, the ALJ took judicial notice that the Covid-19 pandemic has been an unexpected, severe outbreak of disease, which has had a deleterious and prolonged effect upon the people of New Jersey and the economic conditions prevailing in New Jersey, the United States and, indeed, the entire World. Initial Decision at 4. The ALJ found that Shaddy's testimony about the severe impact that the pandemic has had upon his business is credible but does not excuse his non-compliance with the requirements of the law. Ibid.

In the Initial Decision on Remand, the ALJ noted that in the case of Kimmelman, the New Jersey Supreme Court established the standard for determining the appropriateness of monetary penalties imposed by a State agency. Initial Decision on Remand at 6. No one Kimmelman factor is dispositive. Ibid. The Supreme Court set forth seven factors that must be considered. Ibid. 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 Kimmelman factor, the ALJ found that entities such as the Respondent are required to know and comply with filing deadlines. Id. at 4. Garden State's claim of not being notified of the deadline therefore fails. Ibid. Moreover, the Department's evidence demonstrates that it did notify Garden State of the filing deadline and even sent subsequent reminders. Ibid. The ALJ found that the Department acted in good faith and found that Garden State merely failed to fulfill its duty to file its annual report within the applicable time limit, which appears to have been to nothing more than ordinary tardiness and there is no evidence to demonstrate that the late filing was due to any malicious intent on the part of Garden State. Id. at 6. The ALJ concluded that there is insufficient proof of "bad faith" on the part of Garden State. Id. at 7.

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. Id. at 5. Although afforded the opportunity to present its evidence, such as its income tax returns, to demonstrate that it is unable to pay the penalty, the ALJ found that Garden State had not done so. Ibid.

As to the third through seventh Kimmelman factors, the ALJ found that Garden State did not realize any profit from any illegal activities, did not injure the public, and filed its annual report 43 days late. Ibid. The ALJ found that there have been no criminal or treble damage actions filed against Garden State, and there has been no evidence produced of any prior violations. Ibid.

The ALJ concluded that the Kimmelman factors at play in this matter are numbers one, two, and three and that there is no disagreement about factor number three. Ibid. The ALJ noted

that there is no evidence of bad faith, the duration of the violation was 43 days, and that Garden State did not produce any evidence to demonstrate that it is unable to pay the penalty that was imposed. Ibid. Finally, the ALJ concluded that there is no reason to reverse or alter the penalty of \$4,300 (\$100 per day for 43 days). Ibid.

EXCEPTIONS

The Department timely filed exceptions to the Initial Decision on Remand on December 23, 2021. In its filing, the Department agreed with the ALJ's findings of fact, conclusions of law, and the recommended penalty of \$4,300. Additionally, the Department filed exceptions to correct minor 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 \$4,300 on Respondent. Instead, on June 7, 2019, the Department issued a Notice of Violation in which it advised Respondent that it could either pay a penalty of \$2,000 or request a hearing. Respondent chose to contest the penalty and requested a hearing. Thereafter, in the proceeding before the ALJ, the Department requested entry against Respondent of a penalty of \$4,300. Third, the Department clarified that the ALJ's Initial Decision, which was remanded by the Commissioner, recommended a penalty of \$2,881 (or \$67 for each of the 43 days that Respondent's annual report remained late), and not \$4,300.

The Respondent did not file exceptions.

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 Garden State

The Notice of Violation charges Garden State 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. Licensees who fail to timely file the annual report are subject to a penalty of not more than \$100 per day, and their license is subject to revocation. N.J.A.C. 3:1-7.6(c)1 and (d).

The ALJ found that the Department extended the April 1st due date to May 1st. See Exhibits to the Initial Decision P-2, P-3, and P-4 and Initial Decision at 3. Further, the ALJ found that the Department sent a notice by letter to Garden State dated January 31, 2019 and multiple reminder emails informing Garden State that it needed to file its 2018 annual report and that these notices made the owner of Garden State aware that the annual report was due no later than May 1, 2019. Ibid. Shaddy did not dispute and the ALJ found that Garden State filed its 2018 annual report on June 13, 2019, 43 days late. Initial Decision at 2 and 4.

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, Garden State has an affirmative obligation to ensure it is compliant with the requirements of licensure.

Penalty against Garden State

With respect to the appropriate penalty to be imposed against Garden State, I concur with the ALJ's recommendation and find that the record is sufficient to support the imposition of a \$4,300 fine with no suspension or revocation of Garden State'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 are subject to a penalty of not more than \$100 per day, 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.

Here, there is no need to revoke or suspend the Respondent's license. After receiving the Notice of Violation, the 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 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 below.

As to the first Kimmelman factor (the good or bad faith of the Respondent), the ALJ found that Garden State 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 4. 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).⁴ Here, the Respondent did not present evidence that addressed its incapacity to pay a civil penalty, even though it was afforded the opportunity to present evidence. Id. at 5. The Respondent has not met that burden; thus, this factor does not mitigate against a penalty. 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 from illegal activity was put forward. Ibid.

As to the fourth Kimmelman factor (injury to the public), the ALJ found that there is no evidence of any injury to the public. Ibid. However, I find that 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 annual report 43 days late. Ibid. As to the sixth Kimmelman factor (the existence of criminal actions and whether a civil penalty may be unduly punitive if other sanctions have been imposed), the Supreme Court has explained that a lack of criminal punishment weighs in favor of a more significant civil penalty because the defendant cannot argue that he has already paid a price for his unlawful conduct. Kimmelman, 108 N.J. at 139. Here, there is no evidence in the record to suggest that the Respondent has been party to criminal proceedings or treble damage actions stemming from the conduct at issue. Ibid. Finally, the seventh Kimmelman factor (past violations), the record does not reflect any prior violations by the Respondent.

⁴ 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.

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 \$4,300 fine recommended by the ALJ is fully warranted, not excessive or unduly punitive, and succeeds to the required level of opprobrium. The \$4,300 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 Initial Decision on Remand, except as modified herein, and hold that Garden State 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 Garden State be ORDERED to pay a fine of \$4,300. 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.



Marlene Caride
Commissioner

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