

STATE OF NEW JERSEY
DEPARTMENT OF BANKING AND INSURANCE

MARLENE CARIDE, COMMISSIONER)
NEW JERSEY DEPARTMENT OF BANKING)
AND INSURANCE,) ORDER OF REMAND
Petitioner,)
v.) OAL DKT. NO.: 02310-20
23RD AUTO GROUP, LLC.,) AGENCY DKT. NO.: 19-020061
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 of Administrative Law Judge John P. Scollo (“ALJ”) rendered on October 14, 2020 (“Initial Decision”). In that decision, the ALJ found that 23rd Auto Group, LLC. (“23rd Auto” or “Respondent”), a licensed motor vehicle installment seller, filed its 2018 annual report forty-four days late and that the Department of Banking and Insurance (“Department”) correctly calculated the fine at \$100 per day for forty-four days late, for a total fine of \$4,400. The ALJ also found that under the severe economic conditions created by the pandemic, a fine of \$100 per day for forty-four days and revocation of the license to operate the business, as recommended by the Department is unreasonable. The ALJ also found that a fine of \$67 per day for forty-four days without suspension or revocation of the license is more equitable than that sought by the Department and recommended that 23rd Auto submit a \$2,948 administrative fine.

PROCEDURAL HISTORY

On June 7, 2019, Petitioner, 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 23rd 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 Respondent, licensed as a motor vehicle installment seller, was required to file the 2018 annual report by May 1, 2019¹ and failed to do so. 23rd Auto did not file its annual report until June 14, 2019, which was forty-four 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:

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 P-2, P-3, and P-4 and Initial Decision at 3.

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 ...

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. ...

Anthony Burney (“Burney”), the owner of 23rd Auto, sent a letter to the Department requesting an administrative hearing to contest the violation. The Department received the request on or about June 25, 2019.

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 conferencing service.²

ALJ’S FINDINGS OF FACT, LEGAL ANALYSIS AND CONCLUSIONS

The ALJ found the following facts relevant in his determination. 23rd Auto is a car dealership located in Hackettstown, New Jersey and licensed as a motor vehicle installment seller under the New Jersey Consumer Finance Licensing Act, N.J.S.A.17:11C-1 to 50. Initial Decision at 3. The owner of 23rd Auto is Burney. Ibid. The due date for 23rd Auto’s 2018 annual report was April 1, 2019. Ibid. In previous years, 23rd Auto filed its annual reports; therefore, it was aware of the deadline for filing Annual Reports. Ibid.

² 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.

The ALJ determined that even without any notices from the Department, the owner of 23rd Auto 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 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 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 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 forty-four days late. Id. at 4. The Department correctly calculated the fine at \$100 per day times forty-four days late, for a total fine of \$4,400. Ibid.

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. Ibid. The ALJ found that Burney'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.

The ALJ concluded that 23rd Auto violated the law pertaining to the filing of its Annual Report for the year 2018. Id. at 5. However, the ALJ concluded 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. Ibid.

The ALJ found that the decision of the Department to impose a fine upon 23rd Auto for filing its 2018 Annual Report forty-four days late should be affirmed and that said fine should be in the amount of \$67 per day, not \$100 per day. Ibid. The ALJ recommended that the total fine

payable shall be in the amount of \$2,948 and further ordered that the Department take no action to suspend or revoke the license to operate of 23rd Auto. Ibid.

EXCEPTIONS

The Department timely filed Exceptions to the Initial Decision by email dated October 23, 2020. The Department requested that the Commissioner clarify an error in the Appendix of the Initial Decision, which lists no witnesses present at the October 8, 2020 hearing in this matter. In fact, the Department presented the witness testimony of Sharon Davis, Administrative Analyst 1, at the hearing.

23rd Auto did not file Exceptions.

LEGAL DISCUSSION

As to the appropriate monetary penalty in this matter, the factors for determining monetary penalties are set forth in Kimmelman v. Henkels & McCoy, Inc., 108 N.J. 123, 137-39 (1987). In Kimmelman, our Supreme Court established seven factors for courts to consider when imposing civil penalties: (1) the good faith or bad faith of the Respondent, (2) the Respondent's ability to pay; (3) the amount of profits obtained from the illegal activity; (4) injury to the public; (5) duration of the illegal activity or conspiracy; (6) existence of criminal actions; and (7) past violations. Id. See Dep't of Banking & Ins. v. Fagbemi, OAL Dkt. No. BKI 15592-12, Initial Decision, (December, 11, 2014) https://njlaw.rutgers.edu/collections/oal/html/initial/bki15592-12_1.html, Final Decision and Order (May 22, 2015). See also In re Boas, 2019 N.J. AGEN LEXIS 417 (January 30, 2019).

No one Kimmelman factor is dispositive for or against fines and penalties. See Kimmelman, 108 N.J. at 139)"[t]he weight to be given to each of these factors by a trial court in determining...the amount of any penalty, will depend on the facts of each case").

In the Initial Decision, the ALJ took judicial notice of the Covid-19 pandemic's impact on Burney's business as described by Burney. These were the sole justification for the penalty amount in this case. While this reasoning may be applied to the Respondent's ability to pay, the second Kimmelman factor, it does not appear that the Respondent provided any documentary evidence regarding the Respondent's inability to pay penalties (e.g., tax returns) and it is not clear from the record whether Burney testified, as Burney is not listed as a witness who testified nor is there a summary of his testimony. 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). In this case, the record does not provide a sufficient description of the duly admitted testimony nor does it appear that sufficient evidence was entered into the record to apply the Kimmelman factors.

Pursuant to N.J.A.C. 1:1-18.7, "an agency head may enter an order remanding a contested case to the Office of Administrative Law for further action on issues or arguments not previously raised or incompletely considered." Here, the Initial Decision is silent as to how the Kimmelman factors apply in this matter. Moreover, there is insufficient evidence in the record to determine the reasonableness of the penalties considering the factors under Kimmelman.

In order to properly develop the record relating to the Kimmelman factors, and to provide for the full procedural history relating to this matter, this matter is remanded to the OAL for further proceedings to include the development of the record related to the Kimmelman factors.

CONCLUSION

Good cause having been shown, it is now, therefore ORDERED that, pursuant to N.J.A.C. 1:1-18.7, this matter is REMANDED to the OAL for further proceedings as discussed herein.

It is so ORDERED this 15 day of July, 2021.



Marlene Caride
Commissioner

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