

of Greer is a licensed motor vehicle dealer in the State of South Carolina. The SCDMV sent Respondent an Official Order of License Suspension dated June 27, 2017. It stated the grounds for the revocation were violations of *S.C. Code Ann.* §§ 56-3-30, -40, -350, -19-210, -360 and -370, and Procedure DE-002 due to an accumulation of twelve sanction points each alleging “engaging in any action which causes damage to any party or the public (Failure to deliver title within 45 days of the date of sale).

The Respondent filed a timely request for a hearing, and pursuant to written notice to the parties, a hearing was held before me on October 02, 2017 at the Greer Municipal Court, Greer, South Carolina. After reviewing the entire record and considering all the evidence, I conclude that the Respondent’s Dealer License Suspension is sustained.

FINDINGS OF FACT

Having observed the witnesses and reviewed the exhibits presented at the hearing and closely passed upon their credibility, and having taken into consideration the burden of persuasion by the parties, I make the following Findings of Fact by a preponderance of the evidence.

1. Complaint 16/746 involves the Complaint of Scott Bocook, manager of Quality Auto of Anderson. His complaint was filed on or about July 11, 2016, and received by the Department on July 14, 2016. He alleged that he purchased a vehicle, a 2000 Chrysler 300 VIN 2C3HE66G4YA198153 for his dealership on February 26, 2016, but had not received the title as of the date of the complaint, a time a period of 135 days. While the Respondent produced evidence that the vehicle was sold through an auction, a Bill of Sale was prepared and signed by a representative of the Respondent and Mr. Bocook containing the following declaration:

I, Toyota of Greer (Seller), 13770 E. Wade Hampton BL Greer SC 29651 state that on the 26 day of February, Yr. 2016 The following vehicle Make Chrysler Model 300M Body Type 4 Dr Year 2000 Vehicle Identification 2C3HE66G4YH198153 License Plate No. 37456 was sold to Quality Auto of Anderson L Buyer 911 Whitehall Rd Anderson SC 29625 And the above vehicle is free of all liens and encumbrances in the buyer’s name except:

(List here any mortgages, liens or encumbrances)

The line for the listing of liens or encumbrances was left blank. There was a lien on the vehicle to a title loan establishment from the customer who had sold the vehicle to Respondent. Thus, the above statement concerning the absence of a lien was false. Respondent produced testimony of Wholesale Title Clerk Toni Powell and a copy of a check prepared for the title lender the day before the sale. Ms. Powell asserted in testimony that the signature on the bill of sale on behalf of seller was not authorized. In any case it was not withdrawn or corrected and was allowed to become part of the Department's official records of the sale through the agency of the auction or otherwise. Ms. Powell stated that she was aware that secondary lenders, such as title lenders, often took up to twenty-one days to give a lien satisfaction. Nevertheless, she testified that the known location of the particular title lender had closed, that she was referred to another location and had difficulty reaching it, and was ultimately referred to the Spartanburg location.

Upon Agent Benjamin's investigation of the complaint, he recorded remarks from Ms. Powell that Toyota of Greer and associated dealerships owned by MCE had had a lot of turnover and movement within their finance departments due to employee terminations, which were the result of bad deals. Respondent's argument at hearing differed somewhat from Ms. Powell's statement, asserting that the dealership had done everything possible to deliver title, that the vehicle itself that Respondent had sold was a piece of junk and had nominal value, and that if there was any fault at all it was Mr. Bocook's by failing return the vehicle through the rules of the auction rather than insisting on receiving the title. Ms. Powell also submitted a written statement in which she added that once she located a title lender branch that could supply a lien release, she still had to wait for the manager to return from vacation. She also stated that once the branch was located and the manager was available, the title was delivered to the auction. She also testified the check to the title lender cleared on March 8, 2016, ten days after the sale. Agent Benjamin confirmed that title was provided on July 18, 2016, 143 days after purchase. This was after receipt of the complaint from the Department.

2. Complaint No. 17/445 involves Tonya McAllister. On or about April 26, 2017 she filed a complaint with the Department stating she had purchased a 2006 Mazda VIN JM1FE173560201810 from Toyota of Greer on February 10, 2017 and had not yet received title. It turned out that the vehicle had a lien of record by prior owner, Matthew Gorman. Department

records showed that Respondent had Mr. Gorman sign a power of attorney to authorize Respondent's representative to take steps to sell that vehicle on January 3, 2017.

In connection with the sale, an Affidavit & Notification of Sale of Motor Vehicle was executed. As the name implies, it is in the form of a sworn affidavit. In pertinent part it contained this statement:

Personally appeared before me, MCE Automotive, Inc, d/b/a Toyota of Greer 13770 E. Wade Hampton BL Greer SC 29651 who being duly sworn, deposes and says that on the 10th day of February 2017 he sold the following motor vehicle: Make MASDA Model R&B Year 2006 Identification (Serial) No. JM1FE173560201810 License No. _____ was sold to TONYA GREEN MCCALLISTER 112 TIMBERBROOK RD GAFFNEY CHEROKEE SC 29340-5948 Deponent further states that there are no liens or encumbrances on the said vehicle except as listed below:

Lienholder WELLS FARGO DEALER SERVICES Amount 6020.00

Address PO BOX 997517 SACRAMENTO CA 95899-7517 Date 02/10/2017

Wells Fargo Dealer Services is the lender that financed the sale of the vehicle to Ms. McAllister. There was no mention of any other lienholder. The document was signed by Ms. McAllister and by a representative of the Respondent, a different representative than either the one that signed the affidavit for Ms. Gilliam's transaction (FOF #3) or the person that signed the bill of sale in Mr. Bocook's transaction.

In investigating the complaint, Mr. Benjamin asked for a statement from Ms. Michelle Taylor, Title Clerk, and she gave him a written one in which she stated that the customer who traded the vehicle in was not the actual owner, and she did not know the status of the title until she enlisted the aid of a dealership in North Carolina. She was not able to get in touch with the actual owner until mid-April. She was unable to say whether the sales personnel had requested a driver's license from the customer initially because she was not in sales. Thus, when the sale was made and the affidavit signed, the Respondent had no idea whether or not there was a lien.

3. Complaint No. 16/664 involved Sheila Gilliam. On or about June 28, 2016 she filed a complaint with the Department stating that she had purchased a 2007 Ford Explorer VIN1FMEU65E07UB13396 from Toyota of Greer on March 29, 2016 and had not yet received title. It turned out that the vehicle had a lien of record to Ford Motor Credit by prior owner, James

and Catherine Derrick. Department records showed that Respondent had James Derrick and Catherine Derrick sign powers of attorney to authorize Respondent's representative to take steps to sell that vehicle on January 21, 2016. Respondent submitted a contract whereby the Derricks contracted to trade in the Explorer to Respondent on January 26, 2016. Respondent also submitted a title inquiry report that it pulled on February 4, 2016 revealing the lien to Ford Motor Credit. Respondent nevertheless sold Ms. Gilliam the Explorer on March 29, 2016.

In connection with the sale, an Affidavit & Notification of Sale of Motor Vehicle was executed. As the name implies, it is in the form of a sworn affidavit. In pertinent part it contained this statement:

Personally appeared before me, MCE Automotive, Inc, d/b/a Toyota of Greer 13770 E. Wade Hampton BL Greer SC 29651 who being duly sworn, deposes and says that on the 29th day of March 2016 he sold the following motor vehicle: Make FORD Model Explorer Year 2007 Identification (Serial) No. 1FMEU65E07UB13396 License No. _____ was sold to Sheila Gilliam 337 Belcher Road Boiling Springs Spartanburg SC 29316 Deponent further states that there are no liens or encumbrances on the said vehicle except as listed below:

Lienholder _____ Amount N/A

Address _____ Date 3/29/2016

As indicated above neither the identity of any lienholder or an address was written into the blanks. The document was signed by Ms. Gilliam and by a representative of the Respondent who was a different representative than the person who signed the bill of sale to Mr. Bocook of Quality Auto. The dealership had knowledge of the lien of Ford Motor Credit not later than February 4, 2016. It had fifty-four days to clear the lien before it sold the Explorer to Ms. Gilliam, but it did not. Respondent did sell the vehicle to Ms. Gilliam and the title was not provided within forty-five days. Ms. Gilliam filed her complaint. Agent Jason Benjamin, in investigating the complaint, established its basic accuracy. He requested a statement regarding the circumstances of the failure to provide title and received a statement from Ms. Michelle Taylor, the Title Clerk. She stated that the vehicle was traded into the dealership on January 25, 2016, *without a title*, and there was an issue getting the title from Ford Motor Credit. Ford Motor Credit faxed a lien release on July 5, and Ms. Gilliam's title was delivered to the Department on July 6, 2016, ninety-nine days after the

purchase and at least one hundred fifty three days after Respondent was aware of the existence of the lien. She testified that she contacted Ford Motor Credit a number of times, and the company confirmed the debt had been paid four years ago. She said the company nevertheless had to contact research for old files. When the vehicle was finally titled, however, it was by letter and not by a release of lien on a title. She testified that the dealership previously subscribed to Carfax, but no longer did, and did not subscribe to R.L. Polk, Experian or other service for title data from outside South Carolina.

4. Section III.C.3. of DMV Procedure DE-002 requires that a Sanctions Report be completed if the administrative investigation reveals violations. Petitioner presented two Sanction Reports which list the violation as "Failure to deliver title within 45 days of date of sale." (Petitioner Exs. 6 and 8) Four points are assessed as the sanction on both reports. Petitioner did not present evidence of a Sanction Report related to Tonya McAllister's complaint.

I find that the assessments of 4 point violations were made pursuant to a finding by Petitioner of a "willful failure to deliver title to buyer or department within 45 days of date of sale." Having made these findings, Petitioner is required to show that the failures to deliver title were "willful" as defined in its Procedure DE-002.

Ms. Leaks, the Assistant Manager in the Dealer Licensing & Audit Unit, agreed that DMV policy states:

"The failure to deliver title violation" is not considered "willful" if the dealer can provide a written statement, substantiated by a Dealer Licensing and Audit Unit agent, identifying a prior seller or lien holder who has failed to deliver the title as required by law. (Petitioner Ex. 5, p. 6)

Ms. Leaks testified that she authored the June 27, 2017 Official Notice that included three separate violations. She stated that she had not included the word "willful" in the sanction letter but rather listed the violation as "Engaging in any action which causes damages to any party or to the public." Ms. Leaks admitted that the Notice then stated "(Failure to deliver title within 45 days of date of sale)" and that four points had been assessed against Toyota of Greer for each of the violations listed. Ms. Leaks admitted that the failure to provide title within 45 days had to be "willful" in order for a four point sanction to be assessed against the dealer.

5. Two license renewals of MCE Automotive d/b/a Toyota of Greer were put into evidence. Both were signed by a Russell Antici as owner or corporate officer. Both indicated that Robert Hogan was the sales manager. His testimony indicated he was also a partner. The 2017 renewal lists Mr. Hogan also as Vice President. On the renewal with effective dates of June 15, 2015 to June 15, 2016, the dealership checks "yes" for question 6. which asks if the applicant has a Dealer Manual.

6. The 2007 Dealer Manual was placed in evidence. Page 2-2 of the Manual clearly states the requirement that a dealer must deliver the title or registration to the customer within a 45 day period after the sale. It gives the dealer the option of giving all necessary documentation required to title the vehicle to the customer and maintaining a customer signed receipt by which the customer acknowledges the responsibility for titling and registering. There is no evidence in the record that this option was taken for any of the complaints discussed above.

7. Department Upstate Team Lead Lisa Bird testified that in her experience unless a dealer was arranging the financing of a sale of a known payoff for a trade in or the like, it was not the practice of the franchised dealer industry to make sales without a title. She testified that the Department typically does not sanction dealers if they fail to deliver title by only a few days more than forty-five days.

8. Mr. Robert Hogan, Sales Manager and Vice President of Toyota of Greer, however, testified and he forthrightly stated the dealership's position. When asked why the dealership did not avoid selling vehicles before it had secured titles for the buyers, he said while the dealership did not want trouble with the buyers and did not want trouble with the Department because it was bad for business, the dealership had to buy and sell vehicles before the titles were secured, because if the dealership did not do that the same sales would be made by the competition. Mr. Hogan also testified that the dealership(s) had made 25,182 sales in the last three years.

CONCLUSIONS OF LAW

1. Pursuant to S.C. Code Ann. §1-23-660(A) (Supp. 2016), the Hearing Officers of the OMVH, effective January 1, 2006, preside over contested case hearings involving certain suspensions, cancellations, or revocations of licenses issued by the Department. All hearings

presided over by the Hearing Officers of the OMVH are contested case hearings and must be conducted in accordance with the Administrative Procedures Act (“APA”) and the rules of procedure for the OMVH. § 1-23-660(B) (Supp. 2015). Furthermore, all appeals from final decisions of the Hearing Officers are to the South Carolina Administrative Law Court in accordance with its rules of procedure. § 1-23-660(D) (Supp. 2015).

2. Basic administrative law principles establish that an agency bears the burden of proof in an enforcement action. See Peabody Coal Co. v. Ralston, 578 N.E.2d 751 (Ind. Ct. App. 1991); Randy R. Lowell and Stephen P. Bates, South Carolina Administrative Practice and Procedure, 200-201 (2004). Since Petitioner asserts the affirmative of an issue, i.e. the enforcement of a wholesaler’s license suspension or revocation, and since it will be subject to an adverse ruling if no evidence is introduced, Petitioner bears the burden of proof in this matter. See Alex Sanders & John S. Nichols, Trial Handbook for South Carolina Lawyers § 9.3 at 366 (2nd ed. 2001).

3. The weight and credibility assigned to evidence presented at the hearing of a matter is within the province of the trier of fact. See S.C. Cable Television Ass’n v. S. Bell Tel. & Tel. Co., 308 S.C. 216, 222, 417 S.E.2d 586, 589 (1992); see also Doe v. Doe, 324 S.C. 492, 502, 478 S.E.2d 854, 859 (Ct. App. 1996) (holding that a trial judge, when acting as a finder of fact, “has the authority to determine the weight and credibility of the evidence before him”).

4. S.C. Code Ann. § 56-15-10, related to the regulation of dealers and wholesalers, provides:

As used in this chapter the following words shall, unless the text otherwise requires, have the following meanings:

(a) “Motor vehicle”, any motor driven vehicle required to be registered under Section 56-3-110. This definition does not include motorcycles.

...

(h) “Dealer” or “motor vehicle dealer”, any person who sells or attempts to effect the sale of any motor vehicle. These terms do not include:

- (1) distributors or wholesalers.
- (2) receivers, trustees, administrators, executors, guardians or other persons appointed by or acting under the judgment or order of any court.
- (3) public officers while performing their official duties.
- (4) persons disposing of motor vehicles acquired for their own use and so used in

good faith and not for the purpose of avoiding the provisions of law. Any person who effects or attempts to effect the sale of more than five motor vehicles in any one calendar year is considered a dealer or wholesaler, as appropriate, for purposes of this chapter.

(5) finance companies or other financial institutions who sell repossessed motor vehicles and insurance companies who sell motor vehicles they own as an incident to payments made under policies of insurance.

...

(l) "Sale," shall include the issuance, transfer, agreement for transfer, exchange, pledge, hypothecation, mortgage in any form, whether by transfer in trust or otherwise, of any motor vehicle or interest therein or of any franchise related thereto; and any option, subscription or other contract, or solicitation, looking to a sale, or offer or attempt to sell in any form, whether spoken or written. A gift or delivery of any motor vehicle or franchise with respect thereto with, or as, a bonus on account of the sale of anything shall be deemed a sale of such motor vehicle or franchise.

(m) "Fraud," shall include, in addition to its normal legal connotation, the following: a misrepresentation in any manner, whether intentionally false or due to gross negligence, of a material fact; a promise or representation not made honestly and in good faith; and an intentional failure to disclose a material fact.

...

5. Pursuant to S.C. Code Ann. § 56-15-310(A) (2006), a person who engages in business as a dealer or wholesaler in the State of South Carolina must first make an application to the Department for a license. The license applies to only one place of business of the applicant and is not transferable to another person or place of business with certain exceptions for the exhibition and sale of motor homes by licensed dealers.

6. With regard to records that dealers and wholesalers are required to keep, § 56-15-340(A)(2006) provides:

Every dealer or wholesaler shall keep complete records of each transaction under which a motor vehicle is transferred for a period of not less than four years from the date of the transaction. The records must show the true name and correct address of the person or persons from whom the motor vehicle was acquired and the date of the transaction; a correct description of the vehicle, when transferred; the true name and correct address of the person to whom the motor vehicle was transferred; and the date of the transaction. The description of the motor vehicle must include the vehicle identification number, make, model, type of body, and the odometer readings at the time the motor vehicle was transferred to and from the

dealer or wholesaler. These records must be open at all reasonable times for inspection and copying by the Department of Motor Vehicles or any of its duly authorized agents.

7. With the exception of dealers selling or offering for sale a new vehicle for which there is a manufacturer's certificate of origin issued to the dealer, it is unlawful for a person to sell or offer for sale or mortgage a vehicle required to be registered and licensed in South Carolina unless a valid certificate of title has been issued for it. §56-19-210.

8. Section 56-19-360, addressing the duties of transferor and transferee with regard to title upon the sale of a motor vehicles provides:

If an owner, manufacturer or dealer transfers his interest in a vehicle other than by the creation of a security interest, he shall, at the time of the delivery of the vehicle, execute an assignment and warranty of title to transferee in the space provided therefore on the certificate or as the Department of Motor Vehicles prescribes and cause the certificate and assignment to be mailed or delivered to the transferee or to the Department.

Except as provided in Section 56-19-370, the transferee shall, promptly after delivery to him of the vehicle, execute the application for a new certificate of title in the space provided therefore on the certificate or as the Department prescribes and cause the certificate and application to be mailed or delivered to the Department.

Except as provided in Section 56-19-370, and as between the parties, a transfer by an owner is not effective until the provisions of this section have been complied with.

9. Section 56-19-370 provides:

If a dealer buys a vehicle and holds it for resale and procures the certificate of title from the owner within forty-five days after delivery to him of the vehicle, he need not send the certificate to the Department of Motor Vehicles, but, upon transferring the vehicle to another person other than by the creation of a security interest, promptly shall execute the assignment and warranty of title by a dealer, showing the names and addresses of the transferee and of any lienholder holding a security interest created or reserved at the time of the resale and the date of his security agreement, in the spaces provided on the certificate or as the department prescribes, and mail or deliver the certificate to the department with the transferee's application for a new

certificate.

10. Pursuant to §56-3-210 (C):

A dealer of new or used vehicles may issue to the purchaser of a vehicle at the time of its sale a temporary license plate....a dealer may not use a temporary license plate for any other purpose, which includes but is not limited to vehicle demonstration, employee use, or transporting vehicles from one location to another.

11. Pursuant to §56-15-40(1):

It shall be deemed a violation of paragraph (a) of Section 56-15-30 for any manufacturer, factory branch, factory representative, distributor, or wholesaler, distributor branch, distributor representative or motor vehicle dealer to engage in any action which is arbitrary, in bad faith, or unconscionable and which causes damage to any of the parties or to the public.

12. Section 56-15-30(a) further provides that “[u]nfair methods of competition and unfair or deceptive acts or practices as defined in §56-15-40 are hereby declared to be unlawful.”

13. Section 56-15-350 (Supp. 2015) provides that any license issued under Chapter 15 of Title 56 may be denied, suspended, or revoked, if the applicant or licensee or an agency of the applicant or licensee acting for the applicant or licensee is determined to have:

- (a) made a material misstatement in the application for the license;
- (b) violated any provision of this chapter;
- (c) been found by a court of competent jurisdiction to have committed any fraud connected with the sale or transfer of a motor vehicle;
- (d) employed fraudulent devices, methods, or practices in connection with meeting the requirements placed on dealers and wholesalers by the laws of this State;
- (e) been convicted of any violation of law involving the acquisition or transfer of a title to a motor vehicle or of any violation of law involving tampering with, altering, or removing motor vehicle identification numbers or markings;
- (f) been found by a court of competent jurisdiction to have violated any federal or state law regarding the disconnecting, resetting, altering, or other unlawful tampering with a motor vehicle odometer, including the provisions of 49 U.S.C. §§32701-32711 (Title 49, Subtitle VI, Part C, Chapter 327);

- (g) refused or failed to comply with the Department's reasonable requests to inspect or copy the records, books, and files of the dealer or wholesaler or failed to maintain records of each motor vehicle transaction as required by this chapter or by state and federal law pertaining to odometer records; or
- (h) given, loaned, or sold a dealer license plate to any person or otherwise to have allowed the use of any dealer license plate in any way not authorized by § 56-3-2320. Any dealer license plate issued to a dealer or wholesaler pursuant to § 56-3-2320 which is determined by the department to be improperly displayed on any vehicle or in the possession of any unauthorized person is prima facie evidence of a violation of Section 56-15-350 by the dealer or wholesaler to whom the license plate was originally issued.

The Department must notify the licensee or applicant in writing at the mailing address provided in the application of its intention to deny, suspend, or revoke his license at least twenty days in advance. A licensee or applicant desiring a hearing must file a request in writing with the OMVH within ten days of receiving notice of the proposed denial, suspension, or revocation of his dealer's or wholesaler's license.

14. I conclude that the evidence showed that the Respondent committed the violation of failing to deliver title within the statutory period. In each complaint reviewed in this case, the failure to deliver was accompanied by a false and misleading bill of sale or affidavit and notification of sale, stating that there were no liens not listed on those statements. In at least two of the complaints, it is clear that someone within the dealership knew of the existence of lien on the vehicles when they were sold to a subsequent buyer, but the dealership sold them anyway and stated (or someone on the dealership's behalf stated) to the buyers that the liens did not exist. On the other complaint, it appears that the dealership was unsure of the status of any lien on the vehicle, and in fact unsure of the identity and whereabouts of the true owner, when the vehicle was sold. In each case, the titles were delayed well beyond the statutory time limit for titling or registering the vehicles.

Respondent insisted that even though the Department's Official Notice did not mention willful violation in it according to DE-002, the Department must be held to a willfulness standard and the Department could not prove willfulness. This is partly because of Respondent claim that

due to the volume of business it handled, occasional problems were inevitable and could happen to anyone. In addition, the Respondent also claimed a proper understanding of DE-002 was that there could be no violation so long as the dealer produced a statement that another prior seller or lienholder had not produced the title as required by law. That is not exactly what happened in these transactions. In the Bocook Complaint, Respondent asserted that it knew of the title loan lien before it put the vehicle on the market, it either had to know or not know where to contact the lender and receive the title. The testimony indicated it did not, but it sold the vehicle anyway. Ms. Powell addressed efforts to find the lender but was not able to do what needed to be done within the forty-five days. In Ms. Gilliam's complaint, the Respondent's evidence indicated that it was aware of the lien for fifty-four days before selling the vehicle to Ms. Gilliam. An "issue" with Ford Motor Credit extended her wait another ninety-nine days after her purchase. In Ms. McAllister's complaint, the vehicle was sold to her before the dealership even knew the identity of the prior owner.

Official Notice of License Suspension listed each complaint as "[e]ngaging in any action which causes damage to any party or to the public" with a parenthetical "(failure to deliver within 45 days of date of purchase)." Each of the warning letters used the same terminology. DE-002 contains no provision that asserts the Department is limited to any particular category. An action which causes damage to any party or to the public is a separate violation on the grid. It provides for sanction points up to 6 for each repetition. The actions of the Respondent in this matter meet the definition of "arbitrary" or "unreasonable, capricious or non-rational; depending on the will alone." Respondent chose, for reasons of competition or convenience, to sell vehicles for which it had not secured a title. It followed this by signing documents with misleadingly false assurances that the vehicles had no liens other than a lien financing the purchase. It violated the law by failing to provide title until well after the statutory deadline, and after the customers had complained to the Department. The customers were damaged by Respondent's acts by being unable to drive legally or sell the vehicles.

Therefore, I conclude that the denial of Dealer License Suspension for Toyota of Greer is sustained.

ORDER

Based upon the above findings of facts and conclusions of law,

IT IS HEREBY ORDERED that the Dealer License Suspension is sustained.

AND IT IS SO ORDERED.



Phillip T. Addington
OMVH Senior Hearing Officer

December 12, 2017
Greer, South Carolina

CERTIFICATE OF SERVICE

I, Frances L. Inabinet, hereby certify that I have this date served this Order upon all parties to this caused by depositing a copy hereof, in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail to the address provided by the party(ies) and/or their attorney(s).

Frances L. Inabinet

Frances L. Inabinet

December 12, 2017

Columbia, South Carolina