



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 May 1 of each year pursuant to N.J.A.C. 3:1-7.6 and N.J.A.C. 3:23-4.1. 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 an MVIS, was required to file the 2019 annual report by August 1, 2020 and failed to do so.

The Notice of Violation ordered that:

1. Key & Drive Auto Sales Corp shall immediately file its 2019 annual report and pay a civil monetary penalty
2. Before February 1, 2021, the licensee must either:
  - a. File a 2019 annual report with the Department, and pay the administrative penalty...

OR

- b. Request an administrative hearing to contest the violations alleged ...
3. Pursuant to N.J.A.C. 3:1-7.6(c) and -7.6(d), if Key & Drive Auto Sales Corp does not file the 2019 annual report before close of business February 1, 2021 or otherwise request a hearing...before February 1, 2021, Key & Drive Auto Sales Corp shall pay a civil monetary penalty of \$15,000. In addition to the \$15,000 civil monetary penalty, the license of Key & Drive Auto Sales Corp shall be immediately **REVOKED**, effective February 1, 2021.

By letter dated October 19, 2020 the Respondent, through its president, Wael Elseikh<sup>1</sup> (“Elseikh”), requested a hearing. The Department transmitted the matter as a contested case to the Office of Administrative Law (“OAL”) on July 13, 2021, pursuant to N.J.S.A. 52:14B-1 to -31 and N.J.S.A. 52:14F-1 to -23. Id. at 1.

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<sup>1</sup> The Initial Decision incorrectly spells Elseikh’s last name as “Elseihk.”

On or about December 9, 2021, the Department moved for Summary Decision against the Respondent. Id. at 2. The Respondent did not file any opposition to the Department's motion for Summary Decision. Ibid. The ALJ closed the record on January 14, 2022. The ALJ issued its Initial Decision on January 19, 2022 granting the Department's motion for Summary Decision and the imposition of civil monetary penalties against the Respondent in the amount of \$15,000.

Neither party filed exceptions to the Initial Decision.

### **THE ALJ'S FINDINGS OF FACT, LEGAL ANALYSIS, AND CONCLUSIONS**

The ALJ found the following facts relevant to the determination. Respondent is a licensed MVIS. Initial Decision at 2. Pursuant to N.J.A.C. 3:1-7.6 and N.J.A.C. 3:23-4.1, entities licensed as an MVIS must file an annual report for the preceding year by April 1. Ibid.

On January 31, 2020, and March 12, 2020, the Department e-mailed notices to the Respondent reminding them to file its 2019 Annual Report by May 1, 2020.<sup>2</sup> Ibid.

Due to the public health emergency caused by the Coronavirus ("COVID-19") pandemic, the Department temporarily modified N.J.A.C. 3:23-4.1 to extend the deadline to June 1, 2020. Ibid.<sup>3</sup> The Department extended the deadline again to August 1, 2020. Ibid.<sup>4</sup>

On June 26, 2020, the Department e-mailed the Respondent to notify it that the deadline to file its 2019 Annual Report was extended to August 1, 2020. Ibid.

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<sup>2</sup> N.J.A.C. 3:1-7.6 provides for an April 1<sup>st</sup> due date. However, as a matter of administrative accommodation, the Department requires annual reports to be filed by May 1<sup>st</sup> of each year. The Department's reminder notices to the Respondent provided that the due date was May 1<sup>st</sup>. See Ex. B and Ex. C to the Certification of Adrian Ellison. The Notice of Violation also provided that the due date was May 1<sup>st</sup>. See Ex. E to the Certification of Adrian Ellison.

<sup>3</sup> See Department of Banking and Insurance Bulletin 20-23, issued May 12, 2020.

<sup>4</sup> See Department of Banking and Insurance Bulletin 20-23 FAQs.

The ALJ noted that summary decision may be granted if “the papers and discovery which have been filed, together with affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law.” Initial Decision at 3 (citing N.J.A.C. 1:1-12.5(b)). The ALJ stated that all “inferences of doubt are drawn against the movant and in favor” of the nonmoving party. Ibid. (citing Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 75 (1954)). The ALJ noted that the standard for summary decision is

a determination whether there exists a “genuine issue” of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials present, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged dispute issue in favor of the non-moving party. The “judge’s function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.”

Ibid. (quoting Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995) (additional citations omitted)).

The ALJ found that there is no genuine issue of material fact that the Respondent did not file its 2019 Annual Report. Ibid.

The ALJ noted that pursuant to N.J.A.C. 3:1-7.6(c),<sup>5</sup> the Respondent could be fined up to \$100 per day for not filing its 2019 Annual Report. Ibid. The ALJ stated that the maximum penalty was \$48,700. Id. at 2. However, the Department was requesting a penalty of \$15,000. Id. at 3.

Turning to the appropriate monetary penalty in this matter, the ALJ noted that the factors for determining monetary penalties are set forth in Kimmelman v. Henkles & McCoy, Inc., 108

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<sup>5</sup> The ALJ cited this regulation at N.J.A.C. 1:7-7. This appears to be a typographical error.

N.J. 123, 137-39 (1987). Id. at 4. These factors include: (1) the good or bad faith of the violator; (2) the violator's ability to pay; (3) the amount of profit obtained from the illegal activity; (4) injury to the public; (5) duration of the illegal activity; (6) existence of criminal actions and whether a large civil penalty may be unduly punitive if other sanctions have been imposed; and (7) past violations. Ibid.

The ALJ found that the Respondent demonstrated bad faith when it did not respond to the Department's reminder notices dated January 31, 2020; March 12, 2020; and June 26, 2020. Ibid. Regarding the fifth factor in Kimmelman, the duration of illegal activity, the ALJ found that even after one year and four months, the Respondent still has not filed its 2019 Annual Report. Ibid. The ALJ did not address the second, third, fourth, sixth, or seventh Kimmelman factors. Based upon this analysis, the ALJ recommended that a civil monetary penalty be imposed against the Respondent in the amount of \$15,000.

### **EXCEPTIONS**

By letter dated January 20, 2022, the Department indicated that it did not have any exceptions to the Initial Decision. The Respondent did not file any exceptions.

### **LEGAL DISCUSSION**

The Department bears the burden of proving the allegations 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 (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, 678 N.J. 47 (1975).

As noted by the ALJ, N.J.A.C. 1:1-12.5(b) provides the standard to determine whether summary decision should be granted in a contested case. Specifically, the provision states that a summary decision may be rendered “if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law.” Ibid. The rule also provides that “when a motion for summary decision is made and supported, an adverse party, in order to prevail must, by responding affidavit, set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding.” Ibid.

The ALJ found that the Respondent failed to adduce evidence that would create a genuine issue as to any material fact and that summary decision is appropriate. I concur with the ALJ that summary decision is appropriate.

The Notice of Violation charges the Respondent with failing to timely file its 2019 Annual Report pursuant to N.J.A.C. 3:1-7.6(a), which provides that motor vehicle installment sellers, among others, must file an annual report, as set forth in N.J.A.C. 3:23-4.1. Licensees who fail to timely file the annual report are subject to a penalty of not more than \$100 per day. N.J.A.C. 3:1-7.6(c)(1).

The ALJ found that there is no dispute that Respondent failed to file its 2019 Annual Report. I concur that Respondent failed to file the 2019 Annual Report as required by N.J.A.C. 3:23-4.1.

The Department submitted undisputed evidence that Respondent did not file its 2019 Annual Report as required by N.J.A.C. 3:23-4.1. The Respondent was licensed by the Department as a motor vehicle installment seller on March 23, 2018. Certification of Adrian Ellison (“Ellison Cert.”) at ¶3, Ex. A. As a licensee, Respondent has an affirmative obligation to ensure that it is

compliant with the requirements of licensure. Moreover, the Department e-mailed the Respondent on January 31, 2020 to remind it to file its 2019 Annual Report. Id. at ¶6, Ex. B. On March 12, 2020, the Department sent another e-mail to the Respondent notifying it that its 2019 Annual Report had not been filed. Id. at ¶7, Ex. C. On June 26, 2020, the Department e-mailed the Respondent again to inform it that the grace period to extend the 2019 Annual Report had been extended to August 1, 2020. Id. at ¶8, Ex. D. Nevertheless, the Respondent failed to submit its 2019 Annual Report. Id. at ¶10.

Based upon the above undisputed facts, I concur with the ALJ and ADOPT her findings that the Department proved that the Respondent failed to file its 2019 Annual Report as required by N.J.A.C. 3:23-4.1.

#### PENALTY AGAINST THE RESPONDENT

##### Monetary Penalty Against Respondent

With respect to the appropriate penalty to be imposed against the Respondent, I find that the record is sufficient to support the imposition of a \$15,000 fine.

The Respondent's 2019 Annual Report was due August 1, 2020. Respondent never filed this report. Pursuant to N.J.S.A. 17:16C-19 and N.J.A.C. 3:1-7.6(c), it could be fined up to \$100 a day.<sup>6</sup> The Department seeks a fine in the amount of \$15,000.

As discussed by the ALJ, under Kimmelman, certain factors are to be examined when assessing administrative monetary penalties. 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

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<sup>6</sup> Pursuant to N.J.A.C. 3:1-7.6(d) and N.J.S.A. 17:16C-19, the Respondent's license is subject to revocation or suspension. The ALJ did not recommend any action be taken against the Respondent's license and the Department did not take exception. In his letter requesting a hearing, Elseikh stated that his licenses were surrendered on September 30, 2019 when he went out of business.

these factors by a trial court in determining . . . the amount of any penalty, will depend on the facts of each case”).

I MODIFY the findings of the ALJ to address all seven of the Kimmelman factors as follows:

The first Kimmelman factor addresses the good faith or bad faith of the violator. Here, I agree with the ALJ that the Respondent demonstrated bad faith when it failed to file its 2019 Annual Report, despite multiple reminders from the Department.

The second Kimmelman factor is the Respondent’s ability to pay the penalties imposed. The Respondent has presented no evidence of its ability or inability to pay the civil monetary penalties that could be assessed in this matter. Neither party submitted evidence as to the Respondent’s ability to pay a fine. This factor is neutral.

The third Kimmelman factor addresses the amount of profits obtained or likely to be obtained from the illegal activity. The greater the profits an individual is likely to obtain from illegal conduct, the greater the penalty must be if penalties are to be an effective deterrent. Kimmelman, 108 N.J. at 138. No evidence was presented regarding the profit the Respondent made from failing to file its 2019 Annual Report. Accordingly, this factor is neutral with regard to analysis of the penalty to be imposed.

The fourth Kimmelman factor addresses the injury to the public. The failure to file an annual report has the potential to cause public harm. 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. This factor weighs in favor of the imposition of a higher monetary penalty.



The fifth Kimmelman factor to be examined is the duration of the illegal activity. Here, I concur with the ALJ that after one year and four months, the Respondent did not file its 2019 Annual Report. This factor weighs in favor of a higher monetary penalty.

The sixth factor is the existence of criminal or treble damage actions and whether a civil penalty may be unduly punitive if other sanctions have been imposed. The Court held in Kimmelman that a lack of criminal punishment weighs in favor of a more significant civil penalty because the defendant cannot argue that he or she has already paid a price for his or her unlawful conduct. Kimmelman, 108 N.J. at 139. Here, there is no evidence of criminal actions taken against the Respondent nor any treble damage actions related its not filing the 2019 Annual Report. Accordingly, this factor weighs in favor of a higher monetary penalty.

The last Kimmelman factor addresses whether there have been past violations, and if past penalties have been insufficient to deter future violations. Here, there is no evidence that the Respondent previously filed any of its annual reports late. This factor weighs in favor of a reduction of the monetary penalty.

Weighing the Kimmelman factors and based upon the Respondent's failure to file its 2019 Annual Report, I ADOPT the recommendations of the ALJ that the Respondent shall pay civil monetary penalties in the amount of \$15,000. I MODIFY the findings and reasoning of the ALJ to address all seven of the Kimmelman factors.

#### CONCLUSION

Having carefully reviewed the Initial Decision and the entire record herein, I hereby ADOPT the Findings and Conclusions as set forth in the Initial Decision. Specifically, I ADOPT the conclusion that the Respondent failed to timely file its 2019 Annual Report as required by N.J.A.C. 3:1-7.6. Further, I ADOPT the conclusion that the Department's Motion for Summary

Decision should be granted on the Notice of Violation to Respondent for failure to file its 2019 Annual Report required of motor vehicle installment sellers. I also ADOPT the ALJ's recommendation that the Respondent be ORDERED to pay a fine of \$15,000, though I MODIFY the reasoning to address all seven of the factors in Kimmelman.

It is so ORDERED on this 28 day of February 2022.



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Marlene Caride  
Commissioner

JD Key Drive FO/Final Orders-Banking