



**Before The
State of Wisconsin
DIVISION OF HEARINGS AND APPEALS**

In the Matter of the Appeal of the Cancellation of
the Wisconsin Buyer's License of Destiny Motors
Corp.

Case No: DOT-21-0015

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

In accordance with Wis. Stat. §§ 227.47 and 227.53(1)(c), the PARTIES to this proceeding are identified as follows:

Destiny Motors, Corp., by

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PRELIMINARY RECITALS

On March 22, 2021, the Wisconsin Department of Transportation (Department), Division of Motor Vehicles, sent a letter to Destiny Motors, Corporation (Appellant), canceling the Wisconsin buyer's licenses of Appellant's employees. By letter to the Division of Hearings and Appeals (DHA) dated April 7, 2021, Appellant requested a hearing. Administrative Law Judge (ALJ) Angela Chaput Foy was assigned to preside over a Class 2 hearing. The ALJ conducted a telephone prehearing conference with the parties on April 29, 2021, and a scheduling order was issued. Both parties filed motions for summary judgment on May 14, 2021, and the Department also filed a motion to dismiss for lack of jurisdiction. After briefing pursuant to the scheduling order, the motions for summary judgment and motion to dismiss were denied by order dated June 18, 2021.

Pursuant to due notice, a hearing was scheduled and held on September 22, 2021, at the Hill Farms State Office Building, in Room S148, 4822 Madison Yards Way, Madison, Wisconsin. The Department appeared by Attorney Daniel Graff and the Appellant appeared by Attorney M. Samir Siddique. The hearing was digitally recorded, and the record includes the

digital recording, Department's exhibits 1 through 10, and Appellant's exhibit 100. The parties also stipulated that all filings, including the parties' briefs on the motions, constitute the overall record in the case.

APPLICABLE LAW

Wis. Stat. § 218.0101 Definitions. In ss. 218.0101 to 218.0163, unless the context requires otherwise:

...

(22m) 'Motor vehicle buyer' means an individual who is employed by or who has contracted with one or more motor vehicle dealers to bid on or purchase a motor vehicle being held and offered for sale by a motor vehicle dealer or motor vehicle auction.

(23) (a) 'Motor vehicle dealer' means any person, firm or corporation... who:

1. For commission, money or other thing of value, sells, leases, exchanges, buys, offers or attempts to negotiate a sale, consumer lease or exchange of an interest in motor vehicles; or
2. Is engaged wholly or in part in the business of selling or leasing motor vehicles, including motorcycles, whether or not the motor vehicles are owned by that person, firm or corporation.

...

(38)(a) 'Wholesaler' or 'wholesale dealer' means a person, other than a licensed motor vehicle dealer or licensed motor vehicle auction dealer, who does any of the following:

1. Sells more than 5 used motor vehicles in any 12-month period to one or more motor vehicle dealers, motor vehicle auction dealers, or salvage dealers.
2. Except as provided in par. (b), purchases used motor vehicles from a motor vehicle dealer or at a motor vehicle auction for the purpose of selling the vehicles to a motor vehicle dealer, motor vehicle auction, or wholesaler.
3. Except as provided in par. (b), purchases used motor vehicles on behalf of a motor vehicle dealer.

(b) A person is not a wholesaler or a wholesale dealer if the person is employed by and receives compensation from only one motor vehicle dealer for services relating to the sale or purchase of motor vehicles and the person conducts all financial transactions involving the sale or purchase of motor vehicles in the name of the motor vehicle dealer that employs him or her, under the supervision of the motor vehicle dealer that employs him or her, and using the motor vehicle dealer's funds or financial accounts."

Wis. Stat. § 218.34 Purchases from a motor vehicle auction.

(1) No person may purchase or submit a bid for the purchase of a motor vehicle from a motor vehicle auction unless the following conditions are satisfied:

- (a) The person holds a valid motor vehicle dealer, motor vehicle wholesaler, or motor vehicle buyer license.

Wis. Stat. § 227.10 Statements of policy and interpretations of law; discrimination prohibited.

(1) Each agency shall promulgate as a rule each statement of general policy and each interpretation of a statute which it specifically adopts to govern its enforcement or administration of that statute. A statement of policy or an interpretation of a statute made in the decision of a contested case, in a private letter ruling under s. 73.035 or in an agency decision upon or disposition of a particular matter as applied to a specific set of facts does not render it a rule or constitute specific adoption of a rule and is not required to be promulgated as a rule.

...

(2m) No agency may implement or enforce any standard, requirement, or threshold, including as a term or condition of any license issued by the agency, unless that standard, requirement, or threshold is explicitly required or explicitly permitted by statute or by a rule that has been promulgated in accordance with this subchapter, except as provided in s. 186.118 (2) (c) and (3) (b) 3. The governor, by executive order, may prescribe guidelines to ensure that rules are promulgated in compliance with this subchapter.

Wis. Admin. Code § Trans 138.025 Motor vehicle dealer license required; exceptions.

(1) Dealers. Except as provided in sub. (2), any person engaging wholly or partly in the business of selling motor vehicles or exchanging, buying, leasing, providing services aiding the sale of motor vehicles, offering or attempting to negotiate a sale or exchange of an interest in motor vehicles, whether or not such vehicles are owned by such person, without first obtaining and maintaining a valid license under ss. 218.0101 to 218.0163, Stats., violates s. 218.0114, Stats.

(2) Exemptions. The following persons are not required to hold a motor vehicle dealer license and, except as provided in this subsection, are exempt from the provisions of this chapter and ss. 218.0101 to 218.0163, Stats.

...

- (g) Licensed wholesalers. A wholesaler in compliance with s. Trans 138.027.

ISSUES

The issue in this case is whether the Department may cancel the buyer's license of the Appellant's employee because they were erroneously granted. The parties agreed on many of the underlying facts, including that the Department had no basis upon which to suspend or revoke

the Appellant's buyer's licenses, as set forth in Wis. Stat. § 218.0116(1). However, the parties dispute how the law should be applied to the facts in this case. The issues for hearing were: (1) how, why, and when did the Department decide to interpret the law to cancel the Appellant's buyer's licenses, and (2) the applicability of the exemptions for wholesalers under Wis. Admin. Code § Trans 138.025.

FINDINGS OF FACT

1. Appellant is a licensed motor vehicle wholesaler (license number WHL7415). Appellant is not a licensed motor vehicle dealer.
2. In approximately 2004, the Wisconsin Legislature created a license for motor vehicle buyers and gave the Department a relatively short time for implementation. It is not known exactly when or why, but the Department began issuing buyer's licenses to employees of both motor vehicle dealers and wholesalers, perhaps as a temporary implementation tool following the legislation. (Domke hearing testimony)
3. The Field Investigation Unit (Unit), within the Dealer and Agent Section of the Division of Motor Vehicles in the Department is responsible for ensuring that motor vehicle wholesale auctions are compliant in only selling vehicles to licensed buyers or wholesale or retail dealers. The Unit saw a pattern of continued noncompliance from auctions not ensuring that buyers at auctions were credentialed. The Unit also saw a correlation of increased noncompliance as the number of wholesale licensees in Wisconsin increased. (Domke hearing testimony)
4. In 2017 and 2019, respectively, Appellant applied for motor vehicle buyer's licenses for its employees. Appellant was listed as the dealer in each such buyer's license application. These buyer's license applications (Department form MV2941) provided in relevant part: "Employees of a [sic] motor vehicle dealers or wholesalers are eligible for Buyer's Licenses." (Exs. 2 and 3) The Department issued the buyer's licenses.
5. In February or March 2021, Mr. Michael Domke, the Chief¹ of the Wisconsin Department of Transportation Dealer and Agent Section within the Division of Motor Vehicles, reviewed Chapter 218 of the Wisconsin Statutes, specifically the issue of who qualified a motor vehicle buyer's license. He determined that these definitions excluded wholesalers from sponsoring a motor vehicle buyer's license, and therefore, the Department's practice of issuing motor vehicle buyer's licenses to employees of wholesalers was improper. (Domke hearing testimony)
6. By letter dated March 22, 2021, the Department canceled the Appellant's buyer's licenses, explaining that the law only allowed for motor vehicle dealers, not wholesalers, to have buyer's licenses. (Exs. 1 and 100)

¹ Mr. Domke served in this role at all relevant times in this case; he was the Section Chief for six years, concluding in September 2021, two weeks before the hearing, when he transitioned to the role of Director of the Bureau of Consumer Protection for the Department of Agriculture, Trade and Consumer Protection. (Domke hearing testimony)

7. Appellant did not engage in misconduct, and the Department had no legal grounds upon which to suspend or revoke the Appellant's buyer's licenses, as set forth in Wis. Stat. § 218.0116(1).
8. As of May 2, 2021, the buyer's license application form (MV2941) was revised to state, "A Buyer's License is required to submit bids and purchase motor vehicles held and offered for sale by a motor vehicle wholesale [sic] auctions. Employees of motor vehicle dealers are eligible for Buyer's Licenses." (Ex. 10)
9. By letter dated April 7, 2021, Appellant requested a hearing to contest the Department's cancellation of the buyer's licenses.

DISCUSSION

Issuance and supervision of motor vehicle buyer's licenses is the responsibility of the Department. Wis. Stat. § 218.0111(1). For many years, the Department issued motor vehicle buyer's licenses to employees of wholesalers, including Appellant's employees. In 2021, it then canceled these buyer's licenses, determining, based on the statutory definitions of motor vehicle buyers, motor vehicle dealers, and wholesalers, that only motor vehicle dealers can sponsor employees for motor vehicle buyer's licenses. Appellant requested a hearing pursuant to Wis. Stat. § 227.42(1).

The Department asserts that the cancellations were necessary to correct course and comply with the law. Appellant counters that the Department does not have the authority to cancel licenses, only to revoke, suspend, or deny them for specific statutory reasons, and that the Department cannot change its policy without promulgating an administrative rule. This case turns on whether the Department's change in practice was a mere correction or a new interpretation of an arguably ambiguous law. In the former instance, the Department was permitted to cancel the licenses. In the latter, however, it would have had to undergo the administrative rule making process before changing its practice. The record does not support a finding that the Department made a new interpretation of the law. This is because the statutes already clearly set forth what categories of employees could and could not be licensed buyers.

The statutory definitions of a motor vehicle dealer and wholesaler are mutually – and plainly – exclusive of one another. An applicant for a motor vehicle buyer's license must be "employed by or... contracted with one or more motor vehicle dealers..." Wis Stat § 218.0101 (22m). A wholesaler is someone "other than a licensed motor vehicle dealer." Wis Stat § 218.0101(38)(a). Therefore, the plain language of the statute dictates that a wholesaler cannot sponsor its employees for motor vehicle buyer's licenses. When the Department realized this, it was duty-bound to come into compliance with the law. This meant it had to cease and remedy its prior practice of allowing both motor vehicle dealers and wholesalers to sponsor employees for motor vehicle buyer's licenses. *See Schoolway Transp. Co. Inc. v. Division of Motor Vehicles*, 72 Wis. 2d 223, 229, 240 N.W.2d 403, 406 (1976).

Coming into compliance with the law, in this instance, did not require the Department to promulgate new administrative rules. An agency must "promulgate as a rule each statement of general policy and each interpretation of a statute which it specifically adopts to govern its enforcement or administration of that statute." Wis. Stat. § 227.10(1). That is only required if an

agency changes its interpretation of a law that lends itself to another reasonable construction. This is because the agency would then be engaging in rulemaking, and those affected are entitled to be informed, which is accomplished by the agency promulgating a new rule. *Lamar Central Outdoor, LLC v. Division of Hearing & Appeals*, 2019 WI 109, ¶24, 389 Wis. 2d 486, 936 N.W.2d 573.

The record showed that the Department was not making a new interpretation, but merely correcting itself upon learning of an error in effectuating the law. The Department established that in February or March of 2021, Mr. Michael Domke, the Chief of the Unit responsible for ensuring that only licensed buyers purchased vehicles at auction, reviewed the issue of who qualified a motor vehicle buyer's license in Chapter 218 of the Wisconsin Statutes. In that review, he realized that the Department's prior practice was erroneous and outside of the authority conferred upon it. *See Froebel v. Wisconsin Dep't of Nat. Res.*, 217 Wis. 2d 652, 663, 579 N.W.2d 774, 779 (Ct. App. 1998) (administrative agencies do not have equitable power, only the authority conferred by statute). The Department then notified these license holders that their licenses would be canceled.

The other issue at hearing was how, if at all, the exemptions for wholesalers in chapter Trans 138 of the Administrative Code apply here. The law provides that wholesalers are exempt from needing a buyer's license to purchase vehicles. Wis. Admin. Code § Trans 138.025(2). This means that the licensed wholesaler can purchase vehicles, but the exemption does not extend to the wholesaler's employees. The exemption does not provide a pathway for wholesalers to sponsor their employees for motor vehicle buyer's licenses. Thus, the effect of the Department's cancellation of the Appellant's employee's buyers license does not change by virtue of the exemption.

Because the Department changed its practice in order to come into compliance with unambiguous law, the Appellant, and others similarly situated, may now be limited in their representation at auctions, since only the wholesale licensee may bid at auction, instead of the licensee and its employees with buyer's licenses. However, this does not change the Department's responsibility to administer the statute according to its terms and correct its error. *See Schoolway Transp. Co. Inc.*, 72 Wis. 2d at 236.

CONCLUSIONS OF LAW

1. The Department is responsible for the issuance and supervision of motor vehicle buyer's licenses. Wis. Stat. § 218.0111(1).
2. Sections 218.0101(23) and 218.0101(38) of the Wisconsin Statutes distinguish a motor vehicle dealer from a wholesale dealer. A wholesaler is specifically defined as "a person, other than a licensed motor vehicle dealer." Wis. Stat. § 218.0101(38)(a).
3. Section 218.0101(22m) of the Wisconsin Statutes requires that a licensed motor vehicle buyer be employed by or contract with a motor vehicle dealer. It does not allow for a licensed motor vehicle buyer to be employed by only a wholesaler.

4. The Division of Hearings and Appeals has the authority to hear contested cases and issue decisions on behalf of the Department of Transportation pursuant to Wis. Stat. § 227.43(b)(g).

ORDER

WHEREFORE, IT IS HEREBY ORDERED that the Department's March 22, 2021, license cancellations are affirmed.

Dated at Madison, Wisconsin on October 22, 2021.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
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By: _____
Brian Hayes, Administrator

NOTICE

Set out below is a list of alternative methods available to persons who may wish to obtain review of the attached decision of the Division. This notice is provided to ensure compliance with Wis. Stat. § 227.48 and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Division of Hearings and Appeals a written petition for rehearing pursuant to Wis. Stat. § 227.49. Rehearing may only be granted for those reasons set out in Wis. Stat. § 227.49(3). A petition under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.
2. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefore in accordance with the provisions of Wis. Stat. §§ 227.52 and 227.53. Said petition must be served and filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (1) above, any party seeking judicial review shall serve and file a petition for review within thirty (30)

days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Any petition for judicial review shall name the Division of Hearings and Appeals as the respondent. The Division of Hearings and Appeals shall be served with a copy of the petition either personally or by certified mail. The address for service is:

DIVISION OF HEARINGS AND APPEALS
4822 Madison Yards Way, 5th Floor
Madison, Wisconsin 53705

Persons desiring to file for judicial review are advised to closely examine all provisions of Wis. Stat. §§ 227.52 and 227.53 to insure strict compliance with all its requirements.