

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Abington Auto World, LP d/b/a
Abington Chrysler Dodge Jeep Ram,
Petitioner

v.

Bureau of Professional and
Occupational Affairs, State Board of
Vehicle Manufacturers, Dealers and
Salespersons,
Respondent

Chrysler Group LLC,
Petitioner

v.

Bureau of Professional and
Occupational Affairs, State Board of
Vehicle Manufacturers, Dealers and
Salespersons,
Respondent

No. 374 C.D. 2012

No. 377 C.D. 2012

Argued: September 10, 2012

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE ANNE E. COVEY, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
JUDGE LEADBETTER

FILED: January 22, 2013

Petitioners, Abington Auto World (Abington), and Chrysler Group LLC (Chrysler), petition for review of the order of the State Board of Vehicle Manufacturers, Dealers and Salespersons (Board) that sustained the protest of Boulevard Auto Group d/b/a Barbera's Autoland (Barbera) to the establishment of Abington's new Chrysler dealership in Jenkintown, Pennsylvania. The Board concluded that Abington was not exempt from protest under Section 27(b)(2) of the Board of Vehicles Act (Act),¹ because it was not established within two years of the termination of a prior same-line dealer located within two miles of a former Jenkintown Chrysler dealership. The Board also concluded that Barbera had shown good cause for barring the addition of a new Chrysler dealer at the proposed location in Jenkintown. We reverse.

In 2009, there were four authorized Chrysler, Jeep or Dodge dealers in Jenkintown. Three of the dealers were involuntarily terminated in connection with Chrysler's bankruptcy. The fourth dealer, Faulkner, voluntarily terminated its sales and service franchise agreements with Chrysler on April 5, 2009. In early 2011, a real estate trust affiliated with Abington purchased property located at 140 Old York Road, Jenkintown, Pennsylvania. On April 1, 2011, Chrysler entered into sales and service agreements authorizing Abington to sell Chrysler, Jeep and Dodge vehicle lines at 140 Old York Road. On the same date, Chrysler notified the Board of its appointment of Abington as dealer. Abington's proposed location is approximately 1.3 miles from the defunct Faulkner dealership. On May 17,

¹ Act of December 22, 1983, P.L. 306, *as amended*, 63 P.S. § 818.27(b)(2). Section 27(b)(2) exempts a manufacturer seeking to establish an additional vehicle dealer from protests by same line-make dealers if the proposed vehicle dealer is to be established within two miles of a location at which a former licensed new vehicle dealer for the same line-make of new vehicle had ceased operating within the previous two years.

2011, Abington filed an initial dealership license application and the Board issued a dealer license to Abington on June 8, 2011. At this time, Abington was not engaged in selling or servicing vehicles at 140 Old York Road because it intended to spend between \$3.3 million and \$3.5 million in renovations at the location.

The Barbera dealership, which is located at 7810 Roosevelt Boulevard, Philadelphia, Pennsylvania, is approximately five miles from 140 Old York Road. The Barbera dealership was purchased on February 11, 2011, by Thomas J. Hessert for \$3.2 million and maintains a floor plan line of \$8 million. Prior to Hessert's purchase, the Barbera dealership had not been in operation for 18 months due to the legal problems of one of its former principals. When Hessert purchased the Barbera dealership, he was not aware of Chrysler's intention to establish a dealership in Jenkintown. On April 29, 2011, Barbera filed a protest to Chrysler's appointment of Abington as a dealer in Jenkintown, asserting that the new dealership had not been established within two years of the termination of Faulkner.

The parties engaged in mediation, which was unsuccessful. Thereafter, Petitioners filed a motion to dismiss Barbera's protest pursuant to Section 27(b)(2) of the Act asserting that Barbera could not protest because Abington had been established as a dealer within two years of the termination of the Faulkner dealership at a location that was within two miles of the defunct dealership. The Board denied Petitioner's motion without prejudice.

Before the Board, Petitioners presented the testimony of Steven Hoffman, Chrysler's dealer placement manager for the Mid-Atlantic Business Center, Bill O'Flanagan, general manager and president of Abington, and Sharif Farhat, an expert witness. Barbera presented the testimony of Thomas Hessert, its

owner, and Thomas P. Matthews, an expert witness. Petitioners also renewed their motion to dismiss Barbera's protest.

The Board determined that Barbera was entitled to a protest because Abington had not been established as a new dealership within two years of Faulkner's termination. The Board acknowledged that Chrysler had appointed Abington as a dealer on April 1, 2011. However, the Board then stated that Abington had not established a place of business as of April 1, 2011, and did not intend to sell vehicles until October 2011. The Board quoted the definition of "established place of business" contained in Section 2 of the Act, 63 P.S. § 818.2.² The Board also noted that Abington had not filed an initial dealer license application until May 17, 2011. The Board cryptically concluded that a new dealer is "established" when the dealer files its initial dealer application. The Board reasoned:

Such a step is needed in order for the Board to conclusively determine that the new location is, in fact, where [Chrysler] and [Abington] intend to establish the new dealership. To find otherwise would permit any manufacturer to simply sign a franchise agreement with a buyer within two years and two miles of closing a prior dealership of their same line-make and then, under their interpretation of section 27(b)(2), wait an indefinite period of time before ever opening the new dealership to the public.

² "Established place of business" is defined as "a permanent, enclosed building as more specifically defined by regulation which is accessible and open at reasonable times and at which the business may be lawfully conducted in accordance with terms of applicable building codes, zoning and other land-use regulation." 63 P.S. § 818.2.

Board's Opinion at 13. The Board further concluded that Barbera had established good cause³ to bar the establishment of Abington as a Chrysler dealer at 140 Old York Road. These appeals followed.

Petitioners assert two primary arguments in these appeals. First, Petitioners argue that the Board erred in concluding that Chrysler's appointment of Abington was not exempt from protest under Section 27(b)(2) because the proposed dealership was established within two years of the termination of a prior dealership located within two miles of the proposed location. Second, Petitioners contend that the Board erred in determining that Barbera had demonstrated good cause to prevent Chrysler from establishing Abington as a dealer in Jenkintown.

Petitioners challenge the Board's conclusion that a dealer is "established" when a new dealer application is filed, and therefore that the Section 27 protest exemption did not apply to Abington. Petitioners argue that the Board's interpretation of Section 27 protest exemption is contrary to the rules of statutory construction, improperly focuses on actions performed by the dealer rather than the manufacturer, and is inconsistent with other subsections of the Act. Petitioners assert that a new dealer is established when the sales and services franchise agreement is executed.

³ Section 27(c) provides that in determining whether good cause has been established for not entering into an additional new dealer for the same line-make, the board shall take into consideration the existing circumstances in the relevant market area including: the permanency of the investment by all dealers, growth or decline in population and new vehicle purchases, possible effects on the public, whether it is injurious or beneficial to the public welfare for an additional new dealer to be established, whether there is adequate competition and convenient customer care for vehicles, whether an additional dealer would increase competition and whether such increased competition would be in the public interest. 63 P.S. § 818.27(c).

Section 27 of the Act, 63 P.S. § 818.27, governs the establishment of vehicle dealers and the right to protest thereto. Section 27(a)(1) provides in relevant part:

*In the event that a manufacturer seeks to enter into a franchise establishing an additional new vehicle dealer ... within or into a relevant market area where the same line-make is then represented, the manufacturer shall in writing first notify the board and each new vehicle dealer in such line-make in the relevant market area of the intention to establish an additional dealer ... within or into that market area. ... [A]ny such new vehicle dealer may file with the board a protest to the establishing or relocating of the new vehicle dealer. When such a protest is filed, the board shall inform the manufacturer that a timely protest has been filed, and that *the manufacturer shall not establish the proposed new vehicle dealer ... until the board has held a hearing, nor thereafter, if the board has determined that there is good cause for not permitting the addition ... of such new vehicle dealer.**

63 P.S. § 818.27(a)(1) (emphasis added). Thus, a manufacturer seeking to establish an additional vehicle dealer in a relevant market area (RMA)⁴ must notify both the Board and any same-line dealers within the RMA of its intent. If a protest is filed, the Board must inform the manufacturer. The filing of the protest acts as a temporary stay pending the outcome of the protest hearing. *Trailmobile, Inc. v. State Bd. of Mfr., Dealers & Salespersons*, 612 A.2d 574 (Pa. Cmwlth. 1992).

⁴ Section 2 of the Act defines “relevant market area” as the area within a ten mile radius of the proposed additional vehicle dealer.

The right to protest is limited by Section 27(b)(2) which exempts a manufacturer from dealer protests if certain requirements are met. Section 27(b)(2) provides that a dealer may not protest:

[i]f the proposed new vehicle dealer is to be established at or within two miles of a location at which a former licensed new vehicle dealer for the same line-make of new vehicle had ceased operating within the previous two years. For purposes of this section, a former vehicle dealer shall have ceased operations on the date on which the franchise or agreement shall have been finally terminated.

63 P.S. § 818.27(b)(2) (emphasis added). Section 8 of the Act, 63 P.S. § 818.8, sets deadlines and procedures for protest hearings, rights of appeal and the consequences of reversal of the Board on appeal. The Board is required to render a decision on a protest with 120 days of the filing of the protest. 63 P.S. § 881.8(a). Additionally, Section 8(a) provides that if a manufacturer enters into a franchise establishing a new vehicle dealer after the Board has determined good cause does not exist for refusing to permit the proposed additional or relocated new vehicle dealer, then the manufacturer is not liable for damages based upon such establishment even if a court reverses the determination of the Board.⁵

⁵ Section 8(a) provides in relevant part:

If the board determined that good cause does not exist for refusing to permit the proposed additional or relocated new vehicle dealer and *the manufacturer ... thereafter enters into a franchise establishing that new vehicle dealer*, the manufacturer ... shall not be liable for damages based upon such establishment even if a court reverses the determination of the board.

63 P.S. § 818.8(a) (emphasis added).

Dealers of new and used vehicles are required to be licensed. Section 5(a)(1) of the Act, 63 P.S. § 818.5(a)(1). Section 2 of the Act defines “new vehicle dealer” as a person engaged in the business of buying, selling or exchanging new and used vehicles for consideration who holds a franchise with a manufacturer. The Act defines “engaging in the business” as “any activity which requires licensure under this act.”

This Court finds the Board’s decision internally inconsistent as it held that Abington was not established because it did not have an “established place of business,” but then held that a dealer is established upon filing of an initial dealer application. The Board improperly equated the verb “establish” with the defined term “established place of business” to conclude that a dealer is established when an initial new dealer application is filed. The term “established place of business” is not used in Section 27. The term is used in other sections of the Act, but only with regard to dealers, specifically dealer licensing [Section 5(e)(1), 63 P.S. § 818.5(e)(1)], grounds for disciplinary proceedings [Section 19(14), 63 P.S. § 818.19(14)], vehicle shows and off-premise sales and exhibitions [Section 32(a), 63 P.S. § 818.32(a)]. Additionally, the filing of an initial dealer application does not result in an established place of business being open for business selling and servicing of vehicles.

The plain language of the Act demonstrates that “established” is used in relation to execution of the franchise agreement. It is the manufacturer who seeks to “establish” a dealership. Throughout Section 27, the use of the word “establish” is tied to activities of the manufacturer in entering a franchise⁶

⁶ Franchise is defined as “the written agreement between any new vehicle manufacturer or distributor and any new vehicle dealer which purports to fix the legal rights and liabilities of the **(Footnote continued on next page...)**

agreement, rather than the requirements a dealer is required to satisfy. For example, Section 27(a) states that “[i]n the event that a *manufacturer seeks to enter into a franchise establishing* an additional vehicle dealer” and the “*manufacturer shall not establish* the proposed new vehicle dealer” Emphasis added. Further, Section 8(a) provides that “[i]f ... the *manufacturer ... enters into a franchise establishing* that new vehicle dealer” Emphasis added. Thus, the plain language of the Act demonstrates that the establishment of a dealer for purposes of the Section 27 protest exemption is unrelated to the regulatory requirements imposed upon dealers following execution of franchise agreement as posited by the Board.

The Act does not require that a dealer be “established” for the Section 27 protest exemption to be triggered. The sections of the Act concerning the establishment of new dealers and the protest rights of existing dealers are written in the present and future tenses. The Act does not assume that a manufacturer has already executed a franchise agreement prior to notification to the Board and the filing of a protest, as in the case at hand, let alone that the new dealership be built out and open for business. Rather, the Act speaks of the manufacturer’s intent to enter a franchise agreement. Section 27(a)(1) states that “[i]n the event a *manufacturer seeks to enter into a franchise establishing* an additional new vehicle dealer ... the manufacturer shall in writing first notify the board and each new vehicle dealer in such line-make in the relevant market area of the *intention to establish an additional dealer.*” (Emphasis added). Likewise, Section 27(b)(2)

(continued...)

parties to such agreement, and pursuant to which the dealer purchases, resells, services, separately services and performs warranty repairs on the franchise product or leases or rent the dealership premises.” 63 P.S. § 818.2.

provides that “[i]f a proposed new vehicle dealer is to be established.” Section 8(a) speaks of the “protest of a proposed establishment” of a dealer and provides protection from damages if a manufacturer “enters into a franchise establishing that new vehicle dealer” after the Board determines that just cause does not exist to bar the establishment of the proposed dealer and thereafter the Board is reversed upon appeal.

The Board’s prior decisions are consistent with this analysis. In *Teo’s Chrysler-Plymouth, Inc. v. Chrysler*, File No. 91-60-01077 (filed June 17, 1991) (slip opinion), World Class Motors, a Chrysler dealer in Lower Burrell, intended to sell its assets to Rea Motors. Chrysler notified that Board of its intent to approve the sale of World Class Motors’ assets to Rea Motors and its approval of a new dealership located in New Kensington. Chrysler intended to terminate World Class Motors’ franchise located in Lower Burrell, and enter into a franchise agreement with Rea for the sale of new vehicles in New Kensington, .767 miles from the Lower Burrell location. Teo’s filed a protest to the proposed transaction. The Board held that the transaction was exempt from protest under Section 27(b)(2)’s predecessor, Section 18(b)(2),⁷ 63 P.S. § 818.18(b)(2), reasoning:

Rea will be issued a franchise (will be established) for the sale and service of Dodge, Chrysler and Plymouth vehicles at 651 Industrial Boulevard, New Kensington, Westmoreland County, a distance within two miles (.767) of the location of World Class, a same line-make dealer whose franchise had been terminated and who had ceased operations (at the time of the establishment of Rea

⁷ Renumbered as Section 27 [63 P.S. § 818.27] and amended by the Act April 19, 1996, P.L. 104, No. 27, Section 13.

in New Kensington), the franchise having been terminated within two years prior to the establishment of the new dealer.

Slip Op. at 9; Reproduced Record (R.R.) at 69a. As *Teo's Chrysler* demonstrates, the Section 27 protest exemption is applicable in a situation where a manufacturer intends to establish an additional dealer, but has not yet even executed the franchise agreement.

Based on a review of the statutory language, the right of protest and any exemptions thereto are triggered simply by a manufacturer's notice to the Board of its intent to establish a new dealer. Section 27(a)(1) does not require that the manufacturer have entered into a franchise agreement or the dealer to have filed an initial dealer license application or the Board to have awarded a dealer license for an existing dealer to file a protest. Likewise Section 27(b)(2) does not require that any of these actions have been taken.

In this instance, Chrysler's notice to the Board of its intent to establish a new dealer within two years of termination of Faulkner is sufficient to satisfy the two year, two mile requirements of the protest exemption. The Board's reasoning that a new dealer can be established for the purposes of Section 27 only upon filing of the new dealer application because to allow otherwise would result in a manufacturer who executes a franchise agreement within two years and two miles and then waits an indefinite time before opening a new dealership is without merit. This Court has noted that the notice requirement of Section 27 serves two purposes: "(1) to make an affected dealer aware of his opportunity to protest, and (2) to supplement the overall statutory scheme for disposing of existing dealer protests expeditiously, in order to protect the interests of proposed dealers, manufacturers, and the public, as well as the interests of existing dealers." *Pritz*

Auto, Inc. v. State Bd. of Vehicle Mfrs., Dealers & Salespersons, 536 A.2d 485, 488 (Pa. Cmwlth. 1988).

These purposes are best served by requiring protests to be filed and adjudicated at the earliest possible time. Moreover, the language of Section 27(b)(2) read in the context of the overall statutory scheme makes clear that the two year exemption must be measured from the time the new dealership is *proposed* and other dealers are notified and have the right to lodge a protest.

For all the foregoing reasons, we reverse.⁸

BONNIE BRIGANCE LEADBETTER,
Judge

Judge Simpson dissents.
Judge Brobson did not participate in the decision in this case.

⁸ As we have concluded that Petitioners' dealership is exempt from protest under Section 27, we need not address whether the Board properly found that good cause existed to prohibit establishment of the dealership.

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	:	
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Occupational Affairs, State Board of	:	
Vehicle Manufacturers, Dealers and	:	
Salespersons,	:	
Respondent	:	

ORDER

AND NOW, this 22nd day of January, 2013, the order of the State Board of Vehicle Manufacturers, Dealers and Salespersons is hereby REVERSED.

BONNIE BRIGANCE LEADBETTER,
Judge