

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2007 CA 0116

**FOREIGN CAR SALES, L.L.C, JANET LEE AND KIMUEL
LEE**

VERSUS

**LOUISIANA RECREATIONAL AND USED MOTOR
VEHICLE COMMISSION**

Judgment Rendered: November 2, 2007

On Appeal from the 19th Judicial District Court
In and For the Parish of East Baton Rouge
Trial Court No.537,518, Section 24, Division I

Honorable R. Michael Caldwell, Judge Presiding

Kimuel Lee
Baton Rouge, LA

Counsel for Plaintiffs/Appellants
Foreign Car Sales, Janet Lee, &
Kimuel Lee

Robert W. Hallack
Baton Rouge, LA

Counsel for Defendants/Appellees
Louisiana Recreational and
Used Motor Vehicle Commission

BEFORE: WHIPPLE, GUIDRY, AND HUGHES, JJ.

Guidry, Jr. CONCUR.

WJW

HUGHES, J.

This is an appeal from a judgment of the 19th Judicial District Court. That judgment granted a motion to annul filed by the Louisiana Recreational and Used Motor Vehicle Commission (the Commission), affirmed a prior ruling of the Commission, and assessed penalties against appellants in the amount of \$1,000.00, plus costs. For the following reasons, we affirm the judgment of the district court.

FACTS AND PROCEDURAL HISTORY

On January 6, 2005 Dewanna Wells, an employee of Insurance Auto Action (IAA), received a phone call from a man who identified himself as Kimuel Lee. (Ex. C) The caller asked why his account was inactive. Ms. Wells informed the caller that the faxed bid card she had received for the account was in the name of Janet Lee and that because the bid card was not in his (Kimuel's) name, he would not be able to purchase cars from the IAA site. (Ex. C) The caller then stated that he had never held a bid card in his own name and that he had always used Janet Lee's bid card. (Ex. C) On Sunday, January 23, 2005 a bid card in the name of Kimuel Lee was faxed to IAA. (Ex. C-3) Because of its suspicious appearance, on Monday, January 24, 2005 IAA employees sent the bid card to the Commission for verification. (Ex. C-2) The bid card number was determined to belong to Janet Lee. (Ex. C-4) As a result, the Commission conducted an investigation. Ultimately, Kimuel Lee was charged with falsifying a bid card and acting as a used motor vehicle dealer or salesman without a license. Ms. Janet Lee d/b/a Foreign Car Sales, L.L.C. was charged with employing an unlicensed used motor vehicle salesman.¹

¹ Ms. Lee was originally charged with multiple violations; however, at the administrative hearing the Commission voluntarily dismissed the other original violations and only charged her with employing an unlicensed salesman.

On April 12, 2005 a violation ticket was mailed to Kimuel Lee at the address of Foreign Car Sales, L.L.C., via certified mail. (Ex. E) On May 25, 2005 a “Notice of Administrative Hearing” was hand-delivered to Janet Lee at the address of Foreign Car Sales, L.L.C. (R., pg. 9) The notice advised that charges were being brought against Kimuel Lee and Janet Lee d/b/a Foreign Car Sales, L.L.C. Further, the notice included a list of facts upon which the Commission relied and advised the parties of the potential outcome.

The administrative hearing was eventually held on August 16, 2005.² The Commission found Kimuel Lee in violation of LSA-R.S. 32:775(A)(6)(d) in that he committed a fraudulent act by placing his name on the bid card of Janet Lee. The Commission also found Kimuel Lee to be in violation of LSA-R.S. 32:775(A)(1) for acting as a used motor salesman without a license. Regarding Ms. Lee d/b/a Foreign Car Sales, L.L.C., the Commission found her to be in violation of LSA-R.S. 32:775(A)(7)(b) by employing Kimuel Lee as an unlicensed salesman. Mr. Lee was assessed penalties in the amount of \$750.00 and Ms. Lee d/b/a Foreign Car Sales, L.L.C. was assessed penalties in the amount of \$250.00. The parties were ordered to split the costs of the hearing.

On October 26, 2005 Mr. and Mrs. Lee filed a “Notice of Administrative Appeal” in the 19th Judicial District Court. Mr. Lee signed a “Certificate of Service” stating that he had forwarded a copy of the notice to the executive director of the Commission. On December 30, 2005 appellants filed a “Request for Clerk’s Default” (Preliminary Default). The pleading states that “the lawsuit” was filed on October 26, 2005 and served

² The hearing was originally scheduled for June 21, 2005, but was continued pursuant to a Motion for Continuance filed by Kimuel Lee, Janet Lee and Foreign Car Sales, L.L.C. The hearing was rescheduled for July 19, 2005, but was again continued at the request of all defendants.

upon defendants on October 29, 2005 via certified mail. (R., pg. 8). On January 18, 2006, an unidentified judge signed a default judgment. That judgment stated “the findings of fact, conclusions of law and judgement of the Louisiana Recreational and Used Motor Vehicle Commission . . . are set aside and vacated. Costs and attorney fees from the commission hearing are cast to respondent.” On January 19, 2005 the Commission filed an “Exception of Insufficiency of Service of Process” alleging that appellants failed to effect proper service. On January 26, 2006 an order issued wherein appellants were ruled to show cause why the exception should not be granted. (R., pgs. 134, 135) On August 6, 2006 the Commission filed a motion to annul the default judgment. All matters were set for hearing on September 5, 2006. At that hearing, the motion to annul was granted, appellant’s oral motion to continue was denied, appellant’s oral motion to expand the appellate record was denied, and judgment was rendered in favor of the Commission and against appellants. This judgment, signed on October 18, 2006, further assessed the costs of the appeal to appellants. (R., pg. 178) The instant appeal followed.³

ASSIGNMENTS OF ERROR

Kimuel and Janet Lee d/b/a Foreign Car Sales, L.L.C. appeal and allege that the district court made the following errors:

- 1.) granting the motion to annul;
- 2.) affirming the decision of the Commission, specifically, because the hearing was held prior to a compliance hearing;
- 3.) denying appellants’ oral motions to continue and expand the appellate record;

³ This matter is governed by the Administrative Procedure Act, which provides that after a decision of the agency, any aggrieved person may seek review in the district court where the agency is located. As such, appellants properly filed for an appeal in the 19th Judicial District Court. LSA-R.S. 49:964(B). Any party aggrieved by a final judgment or interlocutory order or ruling of the 19th Judicial District Court may appeal or seek review to this court. LSA-R.S. 49:965.

- 4.) affirming the decision of the Commission, specifically because the evidence submitted at the hearing was inadmissible and/or hearsay testimony;
- 5.) affirming the Commission's decision that Ms. Lee was guilty of employing Mr. Lee as an unlicensed salesman because there was no evidence in support of this decision admitted at the hearing;
- 6.) affirming the decision of the Commission that Ms. Lee d/b/a Foreign Car Sales, L.L.C. was guilty of having violated LSA-R.S. 32:775. Specifically, Mr. Lee alleges that the Commission had previously dismissed these charges;
- 7.) affirming the decision of the Commission since the Commission had failed to show the elements of the offenses;
- 8.) affirming the decision of the Commission as to Mr. Lee because the Commission had no jurisdiction over Mr. Lee;
- 9.) affirming the decision of the Commission because the Commission had failed to give appellants sufficient notice, specifically, "[t]he charges were not aligned with the facts in support of each charge."

**ASSIGNMENT OF ERROR NO. 1-
THE MOTION TO ANNUL**

Appellants allege that the district court erred in granting the motion to annul the default judgment, urging that there was no evidence to support such a motion. The record indicates that Mr. Lee filed a "Notice of Administrative Appeal" on October 26, 2005. Additionally, in the notice of appeal, appellants requested injunctive relief and damages under the Civil Rights Act, 42 USCA 1983.

The Commission argued that the default judgment should be annulled pursuant to LSA-C.C.P. art. 2001, et seq. because 1) appellants failed to properly serve the Commission as required by the Louisiana Code of Civil Procedure and the Administrative Procedures Act, 2) the default judgment was taken without the administrative record being lodged for review, and 3) the default judgment was taken pursuant to ill practice.

Louisiana Revised Statute 49:964(B) requires that a judicial review pleading be served upon the agency and all parties of record. Further, it is well settled that the original pleading must be served upon parties by the sheriff pursuant to LSA-C.C.P. art. 1314. A review of the record indicates that the agency was not properly served with the original pleading of the 19th Judicial District Court suit. The pleading includes a “Certificate of Service” which states:

I the undersigned do hereby certify that I have forwarded a copy of the foregoing petition to the executive director of the commission on this 26th day of October, 2005. That I am not a party to the action and am over 18.

Signed Kimuel Lee

Although the pleading does not indicate the method Mr. Lee used to forward the petition, the “Request for Clerk’s Default (Preliminary Default)” states that the pleading was “served” via certified mail. (R., pg. 192) Since appellants did not properly effect service, it was not error for the district court to annul the default judgment. This argument lacks merit.

ASSIGNMENT OF ERROR NO. 2- DENIAL OF BERTUCCI HEARING

In their second assignment of error, appellants allege that the district court erred in affirming the decision of the Commission because appellants were not afforded a **Bertucci** hearing. In the case of **Louisiana State Board of Medical Examiners v. Bertucci**, 593 So.2d 798 (La. App. 4 Cir. 1/16/92), the Fourth Circuit held that in a proceeding which may lead to suspension, revocation, annulment, or withdrawal of an existing license, the agency must give the licensee an opportunity, prior to the institution of formal proceedings, to show that the actions complained of did not violate the law or agency rules.

Mr. Lee does not hold a license. Since this hearing requirement only applies in instances regarding existing licenses, we will analyze this assignment of error only as to Ms. Lee d/b/a Foreign Car Sales, L.L.C.

The **Bertucci** court held that Subsection C of LSA-R.S. 49:961 requires that the agency perform an additional step before the revocation or suspension of a license. **Louisiana State Board of Medical Examiners v. Bertucci**, 593 So.2d at 801. Specifically, Subsection C provides, in pertinent part:

No revocation, suspension, annulment, or withdrawal of any license is lawful unless, prior to the institution of agency proceedings, the agency gives notice by mail to the licensee of facts or conduct which warrant the intended action, and the licensee is given an opportunity to show compliance with all lawful requirements for the retention of the license.

No license was “revoked, suspended, annulled, or withdrawn” in these proceedings. Furthermore, the notice letter sent to Ms. Lee by the Commission makes clear that she was not in jeopardy of losing her license. The notice stated that the potential outcome of the proceeding was “a civil penalty.” As such, we find that under these circumstances a compliance hearing was not required. This assignment of error lacks merit.

ASSIGNMENT OF ERROR NO. 3- DENIAL OF MR. LEE’S ORAL MOTIONS

Appellants next claim that the district court erred in denying their oral motions to expand the appellate record, and to continue the hearing on the appeal.

Pursuant to La. R.S. 49:964(D), (E), and (F), although a review of an administrative decision is generally confined to the record, upon a showing of good cause and application to the court, the reviewing court may allow expansion of the record. This authority, however, is discretionary and the

lower court's decision will not be overturned absent a clear abuse of that discretion.

In this case, the entire administrative record had been lodged with the lower court. Prior to the date of the hearing, appellants made no request to supplement the record. We cannot say that the lower court abused its discretion in denying appellant's oral motion to expand the appellate record.

Likewise, it is well established that "[t]he trial court has great discretion in granting or denying a continuance under [La. C.C.P.] Article 1601, and its ruling should not be disturbed on appeal in the absence of a clear abuse of discretion." **St. Tammany Parish Hosp. v. Burris**, 2000-2639 (La. App.1 Cir. 12/28/01), 804 So.2d 960, 963. Appellants filed for review of the administrative record on October 26, 2005. (R., pg. 5) The Commission filed its motion to annul the improper default judgment on August 10, 2006. The matters were set for hearing on September 5, 2006. Appellants had notice of the hearing and filed opposition memoranda addressing both the merits of the annulment as well as the appeal. (R., pgs. 158, 165) As such, the lower court determined that all parties had ample opportunity to prepare for argument and denied appellant's request for continuance.

We find that the denials of the motions for continuance and expansion of the appellate record were within the discretion of the lower court. This assignment of error lacks merit.

ASSIGNMENT OF ERROR NOS. 4, 5, & 7- INSUFFICIENCY OF EVIDENCE

In assignments of error numbers 4, 5, and 7, appellants allege that the district court erred in failing to overturn the decision of the Commission due to the alleged lack of admissible evidence in support of the Commission's

findings. In administrative proceedings, the parties are not bound by the strict rules of evidence. **Louisiana Household Goods Carriers v. Louisiana Public Service Commission**, 99-3184 (La. 6/30/00), 762 So.2d 1081, 1089. Further, LSA-R.S. 49:956(2) provides that the agency may offer and make part of the record “[a]ll evidence, including records and documents in the possession of the agency.”

At the administrative hearing, June Powell, an investigator for the Commission, testified that she was the investigator of a complaint filed by IAA against appellants. (R., tr.pg.59) Ms. Powell testified that on January 24, 2005, she was contacted by Ms. Dianna Kelly, an employee of IAA. Ms. Kelly advised Ms. Powell that she had received a suspicious bid card in the name of Kimuel Lee. (R. tr.pg. 61, 65) Ms. Powell testified that the Commission’s records indicated that Mr. Lee was not licensed to hold a bid card. (R. tr.pg. 62) Ms. Powell stated that the records of the Commission indicate that the bid card number of Kimuel Lee’s card matched the number assigned to the bid card issued to Ms. Janet Lee. (R., tr.pg. 62)

Ms. Kelly testified that she is familiar with Kimuel and Janet Lee. (R., tr.pg. 69) She testified that an employee of IAA advised Mr. Lee that he could not use his wife’s bid card number to purchase vehicles on the IAA site. She testified that when Mr. Lee was told this, he argued and stated that he “never had one and [he] will never get one.” (R., tr.pgs. 74, 79) She testified that approximately two weeks later, IAA received a faxed bid card in the name of Kimuel Lee that appeared to be altered. (R., tr.pg. 74) Ms. Kelly further testified that Kimuel Lee is the only person who would benefit from the submission of a fraudulent card in his name. (R., tr.pg. 79)

Mr. and Ms. Lee did not testify. No evidence or testimony was introduced at the hearing to rebut the testimonies of Ms. Powell and Ms.

Kelly. As such, considering the documentary evidence and the testimony introduced at the hearing, we cannot say that the district court erred in its ruling. These assignments of error lack merit.

**ASSIGNMENT OF ERROR NO. 6-
DISMISSED CHARGES**

In assignment of error number six, appellants allege that the district court erred in affirming the findings of guilt as to Mr. and Mrs. Lee regarding certain charges which appellants allege were voluntarily dismissed at the administrative hearing, but for which appellants were nevertheless found guilty. A review of the record indicates that this assignment of error is without merit. Specifically, Ms. Lee d/b/a Foreign Car Sales, L.L.C., was initially charged with the following:

- 1.) One count of LSA-R.S. 32:775(A)(6)(d) and one count of R.S. 32:775(A)(6)(e);
- 2.) One count of LSA-R.S. 32:775(A)(7)(b);
- 3.) One count of LSA-R.S. 32:775(A)(3).

At the hearing, counts 1 and 3 were dismissed. The judgment of the Commission, which incorporates its written findings of fact and conclusions of law, clearly states that said counts were withdrawn. Ms. Lee d/b/a Foreign Car Sales, L.L.C. was only found guilty of a violation of one count of LSA-R.S. 32:775(A)(7)(b), enumerated as number 2 above, and which violation was not withdrawn.

Appellants further allege that Mr. Lee was found guilty of certain violations that were allegedly voluntarily dismissed. Again, a review of the record indicates that the Commission charged and convicted Mr. Lee of the following violations:

- 1.) One count of LSA-R.S. 32:775(A)(6)(d), and
- 2.) One count of LSA-R.S. 32:774(A)(1).

There is nothing in the record to indicate that either charge was dismissed as to Mr. Lee. As such, this assignment of error lacks merit.

**ASSIGNMENT OF ERROR NO. 8-
JURISDICTION OF THE COMMISSION OVER KIMUEL LEE**

Appellants next allege that the district court erred in affirming the decision of the Commission, urging that because Mr. Lee is not a licensed used car salesman, the Commission has no jurisdiction over him. We disagree. Louisiana Revised Statute 32:774 (A) makes it a violation for *anyone* to “engage in business as, or serve in the capacity of, or act as a used motor vehicle dealer or used motor vehicle salesperson” *without obtaining a license*. The very fact that Mr. Lee did not obtain a license creates the violation. It would be absurd to conclude that only those who obtain a license could ever be subject to the jurisdiction of the Commission and be found guilty of not obtaining a license. Accordingly, this assignment of error also lacks merit.

**ASSIGNMENT OF ERROR NO. 9-
THE COMMISSION FAILED TO NOTIFY APPELLANTS OF
WHICH FACTS SUPPORTED WHICH CHARGES**

Finally, appellants allege that the district court erred in affirming the decision of the Commission because the Commission failed to specify the facts upon which it would rely at the hearing in order to find appellants in violation. We do not agree.

In a May 25, 2005 letter, the Commission specifically notified appellants of the violations of which they were accused. In that same letter, the Commission enumerates the facts upon which it would rely to support findings of guilt. Pursuant to LSA-R.S. 49:961(C), the agency must give

appellants notice “of facts or conduct which warrant the intended action.” Appellants seem to argue that the May 25, 2005 notice sent by the Commission was insufficient because within the fact section of the notice, the Commission does not “tag” each fact as supportive of a particular violation. There is no requirement that the agency make such particular specification. Further, appellants cite no authority to support this nonsensical argument. This assignment of error lacks merit.

CONCLUSION

For the reasons stated above, the decision of the district court is affirmed. Costs of this appeal are assessed to appellants.

AFFIRMED.