



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

In the Matter of an Appeal Regarding a Cancelled
Title and License Plates on a Vehicle Owned by
Paul Underwood by the Department of
Transportation

Case No. TR-08-0027

FINAL DECISION

On June 2, 2008, the Division of Hearings and Appeals received an appeal pursuant to Wis. Stat. § 342.26 from Paul Underwood regarding the cancellation of a title and license plates for his antique Steyr-Puch Pinzgauer by the Department of Transportation. Pursuant to due notice, the Division of Hearings and Appeals held a hearing on July 14, 2008, in Madison, Wisconsin. Mark J. Kaiser, Administrative Law Judge, presided. The parties filed post-hearing briefs. The last submission was received on July 18, 2008.

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

Paul Underwood
1736 Barber Road
Blue Mounds, WI 53517

Wisconsin Department of Transportation, by

Attorney Paul Nilsen
DOT - Office of General Counsel
P. O. Box 7910
Madison, WI 53707-7910

The Administrative Law Judge (ALJ) issued a Proposed Decision in this matter on August 19, 2008. On September 2, 2008, Paul Underwood filed comments supporting the Proposed Decision. On September 3, the Department of Transportation (Department) filed objections to the Proposed Decision. The ALJ found that the record did not contain sufficient evidence to support the Department's decision to cancel the title and registration of Mr.

Underwood's Pinzgauer. The ALJ ruled that pursuant to Wis. Admin. Code § HA 1.12(3)(a) the Department had the burden of proof in this matter and that the Department had not satisfied its burden. Accordingly, the Proposed Decision reversed the Department's cancellation order.

In its objections, the Department objected to the assignment of the burden of proof.¹ The Department argued that notwithstanding Wis. Admin. Code § HA 1.12(3)(a), the burden of proof should have been assigned to Mr. Underwood. The Department cited the Wisconsin Supreme Court's opinion in *State v. McFarren*, 62 Wis. 2d 492, 215 N.W.2d 492 (1974), as authority for this contention. In *McFarren*, the Court listed several factors that should be considered in assigning the burden of proof. The Department primarily relied on two of those factors to support its contention that the burden of proof was incorrectly assigned to it.

The first factor listed in *McFarren* relied upon by the Department is that the party seeking change should have the burden of proof. In the instant matter, although Mr. Underwood is the petitioner, the Department is the party that is attempting to change the *status quo*. The Department issued a title and registration for Mr. Underwood's Pinzgauer. It is now seeking to cancel that title and registration. Mr. Underwood requested a hearing to challenge the Department's action. Mr. Underwood requested a hearing because he is seeking to maintain the *status quo*, not change it. Wis. Admin. Code § HA 1.12(3)(a) is consistent with this assignment of the burden of proof. Wis. Admin. Code § HA 1.12(3)(a) provides that "[i]n proceedings where an agency has issued an order . . . and the order recipient requests a hearing on the matter, the agency shall proceed first with the presentation of evidence and shall bear the burden of proof."

The other factor listed in *McFarren* relied upon by the Department is that the party seeking an exception should have the burden to prove the exception. The Department cancelled the title and registration to Mr. Underwood's Pinzgauer pursuant to Wis. Stat. § 341.10(6). Wis. Stat. § 341.10(6) prohibits the Department from issuing a title and registration for any motor vehicle that was "originally designed and manufactured for off-highway operation and did not meet the provisions of s. 114 of the national traffic and motor vehicle safety act of 1966, as amended." The Department argues that whether a motor vehicle meets the provisions of s. 114 of the national traffic and motor vehicle safety act of 1966 constitutes an exception.

In its objections, the Department asserts that it proved that Mr. Underwood's Pinzgauer was designed and manufactured for off-highway operation. However, the evidence in the record demonstrates and the ALJ found that the Pinzgauer is capable of off-highway operation, but that it is also equipped for on-highway operation. In his comments in support of the Proposed Decision, Mr. Underwood pointed out that his Pinzgauer was originally equipped with turn signals, side marker lights, windshield wipers, a horn, exterior side mirrors, a speedometer, a hand emergency brake, auxiliary road lamps, windshield washer, a defroster, three point front seat belts, and emergency flashers. The installation of this equipment not only makes the Pinzgauer safer for on road operation, it also suggests that the manufacturer intended the vehicle

¹ It should also be noted that in his opening statement at the outset of the hearing, the ALJ stated that the Department had the burden of proof in this matter. The Department did not object to the assignment of the burden of proof at that time.

for on-road operation. Additionally, the National Highway Traffic Safety Administration determined that Pinzgauers were “motor vehicles,” which means that it considers Pinzgauers to be “manufactured primarily for use on the public streets, roads, and highways” (exh. P33).

The evidence in the record does not support a finding that Mr. Underwood’s Pinzgauer was designed and manufactured for off-highway operation. Therefore, arguably, one does not need to even consider whether it falls within an exception by meeting “the provisions of s. 114 of the national traffic and motor vehicle safety act of 1966.” However, under the Department’s policy whether a vehicle meets “the provisions of s. 114 of the national traffic and motor vehicle safety act of 1966” is not an exception. As discussed in the Proposed Decision, the Department does not have a definition for an off-highway vehicle. The Department’s witnesses testified that the Department considers vehicles that have not been certified as meeting the applicable safety provisions as being designed and manufactured for off-highway operation. Since the Department uses “the provisions of s. 114 of the national traffic and motor vehicle safety act of 1966, as amended” to determine whether a vehicle is designed and manufactured for off-highway operation, meeting these provisions can not be considered an exception.

Wis. Stat. § 341.10(6) prohibits the titling and registration of motor vehicles that are designed and manufactured for off-highway operation. However, the Department’s policy goes beyond the unambiguous language in this statute. It is understandable, that the Department is attempting to develop a policy that is easy to apply. It may also be reasonable to require the owner of a unconventional vehicle, such as a Pinzgauer, to prove that it is not a vehicle designed and manufactured for off-highway operation or that it meets “the provisions of s. 114 of the national traffic and motor vehicle safety act of 1966” before the Division of Motor Vehicles will issue a title and registration for the vehicle. However, once the Department issues a title and registration, it is the Department’s burden to prove that the title and registration should be cancelled. The Department has not met this burden.

After reviewing the record and objections, the Proposed Decision is amended to explicitly find that Mr. Underwood’s Pinzgauer is not a vehicle that was designed and manufactured for off-highway operation, to respond to the objections raised by the Department, and to correct a typographical error related to the date on which Mr. Underwood applied for a title and registration for his vehicle. In all other respects, the Proposed Decision is adopted as the Final Decision in this matter.

Findings of Fact

The Administrator finds:

1. In June of 2002, Paul Underwood purchased a 1976 Steyr-Puch Pinzgauer (Pinzgauer). A Pinzgauer is a motor vehicle formerly built in Austria. The primary customer for Pinzgauers has been the Swiss military. The Pinzgauer purchased by Mr. Underwood was acquired by a Colorado motor vehicle dealer operating as Cold War Remarketing. Cold War

Remarketing imported the Pinzgauer into the United States in 2001 and subsequently sold it to Mr. Underwood.

2. On June 20, 2002, Mr. Underwood applied to the Wisconsin Department of Transportation (Department) for a Wisconsin title and registration for his Pinzgauer. The Department issued a Wisconsin title and registration to Mr. Underwood for his Pinzgauer.

3. A Pinzgauer is described as a multipurpose passenger carrying vehicle that is capable of climbing steep terrain off road. It is available as a four or six wheel vehicle. It is capable of reaching speeds of approximately sixty mph on highways. The Pinzgauer is commonly used by the Swiss military as a troop transport vehicle. After retirement by the Swiss military, Pinzgauers are auctioned off and are popular among off-road enthusiasts.

4. The processing of non-routine inquiries and applications for Wisconsin motor vehicle titles and registrations is handled by the research and information unit of the Department's Division of Motor Vehicles (DMV). In 2007, employees of the research and information unit investigated Pinzgauers in response to an inquiry from an individual named Robert Rainek. During their research on the Rainek inquiry, DMV employees discovered that Pinzgauers are former military vehicles. After discovering that Pinzgauers are former military vehicles, the DMV cancelled the title and registration for Mr. Rainek's Pinzgauer and did a search for other Pinzgauers titled in Wisconsin. The search disclosed another 29 Pinzgauers titled in Wisconsin, including the one owned by Mr. Underwood.

5. By order dated September 25, 2007, the Department cancelled the title and registration for Mr. Underwood's Pinzgauer (exh. R29). The grounds stated in the cancellation letter were that "[i]n order for a vehicle to be titled and registered in Wisconsin, the vehicle must be manufactured for road use and certified by the manufacturer, with the placement of a federal certification label on the vehicle. [Your Pinzgauer] was manufactured in Switzerland (sic) to be used as a military vehicle. Wisconsin does not issue title/registration on these types of vehicles." The Department subsequently identified the statute that it was relying on for the cancellation of the title and registration of Mr. Underwood's Pinzgauer as Wis. Stat. § 341.10(6). Wis. Stat. § 341.10(6) prohibits the registration of a motor vehicle if the "vehicle is originally designed and manufactured for off-highway operation unless the vehicle meets the provisions of s. 114 of the national traffic and motor vehicle safety act of 1966, as amended."

6. Neither the Wisconsin statutes nor Department administrative rules define the phrases "off-highway" or "on-highway" use.² The phrase "meets the provisions of s. 114 of the national traffic and motor vehicle safety act of 1966, as amended" refers to whether the motor vehicle meets national motor vehicle safety standards (NMVSS). To determine whether a motor vehicle manufactured for the United States market, the DMV relies on a manufacturer's certification, an importer's certification, or a listing by the National Highway Traffic Safety Administration (NHTSA) that the vehicle meets NMVSS (exh. P48). The DMV will

² A Department witness testified that for DMV's purpose, an off-road vehicle is any vehicle not built to meet NHTSA United States on-road standards.

only issue Wisconsin titles and registrations for motor vehicles that meet NMVSS for the year the vehicle was manufactured.

7. The DMV primarily relies on the presence of a federal certification label for determining that a motor vehicle meets NMVSS. Alternatively, the DMV may also be able to tell from the motor vehicle's vehicle identification number (VIN) whether the vehicle meets NMVSS. VINs for newer motor vehicles include information regarding the vehicle's equipment. The research and information unit has software that can decode VINS and indicate whether the vehicle meets NMVSS.

8. The research and information unit receives between 11,000 and 15,000 telephone calls per week, about 100 pieces of mail per day and numerous emails (testimony of Andrea O'Brien). Because of the high volume of inquiries and applications considered by the research and information unit, the Department attempted to develop clear guidelines between vehicles that could be registered and those that could not. Prior to 2007, these guidelines were passed down orally to new employees of the research and information unit during training. In December of 2006, the Division of Motor Vehicles drafted written guidelines for determining which motor vehicles can be titled and registered (exh. R30). According to Department witnesses, the written guidelines did not alter Departmental policy, but merely attempted to set forth longstanding policy in writing.

9. The Department's written guidelines state that "vehicles manufactured for military use in any other country" should not be registered. Despite this unequivocal statement, Mr. Underwood and other Wisconsin owners of Pinzgauers presented credible testimony at the hearing in this matter that at the time they applied for Wisconsin titles and registrations for their Pinzgauers they described their respective vehicles as ex-military vehicles. The Department issued titles and registrations for the vehicles prior to subsequently cancelling them. This testimony suggests that prior to the preparation of the written guidelines at the end of 2006, the Department's policy either was not clear or was not applied consistently.

10. The Department's written policy also does not appear to be consistent with the provisions of Wis. Stat. § 341.10(6). The Department's policy excludes from registration ex-military vehicles, while the statute refers to vehicles originally designed and manufactured for off highway operation. The Department concluded that Pinzgauers could not be registered because they were ex-military vehicles, not because they were determined not to meet NMVSS for the year they were manufactured.

11. Since 1968, motor vehicles made for the United States market will have a manufacturer certification indicating that the vehicle met NMVSS for the year that the vehicle was manufactured. Motor vehicles not made for the U.S. market within the last 25 years may be certified by the manufacturer, the importer, or listed by NHTSA as meeting NMVSS. NHTSA exempts vehicles more than 25 years old from meeting safety standards. Accordingly, a vehicle more than 25 years old may be imported without being certified.

12. Because there were no national safety standards before 1968, the Department will register a vehicle designed for on-road use without any certification. A vehicle less than 25 years old will only be registered if it has a certification label. A gray area exists for imported vehicles manufactured between 1968 and 25 years ago, *i.e.* 1983 at this time. If these vehicles were not intended to be exported to the U.S. they will not be manufacturer certified and will be exempt from NHTSA certification. Mr. Underwood's Pinzgauer falls into this gray area.

13. Mr. Underwood submitted several reviews of the Pinzgauer as evidence at the hearing. These articles focused on the Pinzgauer's ability to climb steep inclines and cross rugged terrain. The articles trumpeted the Pinzgauer's ability to travel off road; however, there is nothing in any of the articles that indicates Pinzgauers are unsafe to operate on public roadways. Although Mr. Underwood's Pinzgauer is designed to be capable of rugged off-road operation, based on the equipment originally installed on the vehicle by the manufacturer and the speeds the vehicle is capable of maintaining, it is not a vehicle that was designed and manufactured for off-highway operation.

Discussion

According to the cancellation order, the initial reason the Department gave for cancelling the Wisconsin title and registration of Mr. Underwood's Pinzgauer is that it had determined that Pinzgauers are ex-military vehicles. The Department subsequently clarified that the statutory basis for the cancellation was Wis. Stat. § 341.10(6). Wis. Stat. § 341.10(6) provides:

The department shall refuse registration of a vehicle under any of the following circumstances:

(6) The vehicle is originally designed and manufactured for off-highway operation unless the vehicle meets the provisions of s. 114 of the national traffic and motor vehicle safety act of 1966, as amended, except as otherwise authorized by the statutes.

Despite approximately six hours of testimony and 148 exhibits, the record contains little evidence specific to the equipment of Mr. Underwood's Pinzgauer. The Department's evidence in this matter consists almost exclusively of attempting to show that it has a long standing policy of treating ex-military vehicles as off-road vehicles and that its decision to cancel the title and registration of Mr. Underwood's Pinzgauer was consistent with that policy. Mr. Underwood's evidence included generic literature and reviews of Pinzgauers, but very little specific to his Pinzgauer.

The Pinzgauer is a rugged all terrain vehicle that could be considered to have been designed and manufactured for off-highway operation. However, the literature clearly shows and NHTSA has concluded that Pinzgauers are also "designed and intended to be routinely used on the public roads." (exh. R36) The Department has not shown that Mr. Underwood's

Pinzgauer was originally designed and manufactured for off-highway operation. Accordingly, the titling and registration of his vehicle is not prohibited by Wis. Stat. § 341.10(6).

The Department's position is if a vehicle has not been certified as meeting NMVSS it is should be considered to be a vehicle designed and manufactured for off-highway operation. The DMV's reliance on the federal certification and the VIN consistency software it uses is understandable. Based on the volume of inquiries and applications DMV employees handle, it would be nearly impossible for them to attempt to make an independent determination of whether a particular vehicle meets NMVSS. However, the cancellation of the Wisconsin title and registration for his Pinzgauer undoubtedly has been a hardship for Mr. Underwood since he has not been able to lawfully operate it on public highways. The inability to obtain a Wisconsin title and registration for the vehicle also has likely resulted in a loss of value for the vehicle.

The Department argues that it made a mistake when it issued a Wisconsin title and registration for Mr. Underwood's Pinzgauer. If it was clear that the Department did make a mistake, its decision to cancel Mr. Underwood's title and registration should be affirmed. However, one can not determine from the evidence in the record whether the Department did in fact make a mistake or whether Mr. Underwood's Pinzgauer is eligible for titling and registration in Wisconsin. Since there is no evidence in the record that will permit one to make a conclusive finding on this issue, the question becomes which party has the burden of proof. Department witnesses testified that in addition to federal certification they will also sometimes consider materials provided by an applicant for a motor vehicle title and registration. This suggests that the Department places the burden to prove that a vehicle is eligible for titling and registration on the applicant. At the time of application this is a reasonable policy. However, in the instant matter the Department issued a cancellation order.

Pursuant to Wis. Admin. Code § HA 1.12(3)(a), the burden of proof in a proceeding where an agency has issued an order and the order recipient requests a hearing, is on the agency. This assignment of the burden of proof is also consistent with normal rules of procedure used in courts. In this case the Department is the party seeking to alter the *status quo* and, therefore, should have the burden of proof. The Department has the burden of proof to show that Mr. Underwood's Pinzgauer was originally designed and manufactured for off-highway operation or does not "meet the provisions of s. 114 of the national traffic and motor vehicle safety act of 1966." The Department has not satisfied its burden of proof and the cancellation order should be reversed.

Conclusions of Law

The Administrator concludes:

1. The Division of Hearings and Appeals has authority pursuant to Wis. Stat. § 342.26, to issue the following order.

2. Pursuant to Wis. Admin. Code § HA 1.12(3)(a), the Department has the burden to prove the grounds for cancellation of Paul Underwood's Pinzgauer. The Department has not shown grounds to support the order cancelling the Wisconsin title and registration of the subject vehicle.

Order

The Administrator orders:

For the reasons set forth above, the Department's order cancelling the Wisconsin title and registration of the Pinzgauer owned by Paul Underwood is reversed.

Dated at Madison, Wisconsin on September 18, 2008.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
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By: _____
David H. Schwarz
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 insure 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 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
5005 University Avenue, Suite 201
Madison, Wisconsin 53705-5400

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.