ENDORSED

JAN 3 0 2013

By S. Lee, Deputy

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SACRAMENTO

VOLKSWAGEN GROUP OF AMERICA, INC.,

Petitioner,

v.

NEW MOTOR VEHICLE BOARD,

Respondent.

SHAYCO, INC. dba ONTARIO VOLKSWAGEN,

Real Party in Interest.

Case No. 34-2012-80001045-CU-WM-GDS

RULING ON SUBMITTED MATTER: PETITION FOR WRIT OF ADMINISTRATIVE MANDAMUS

Introduction and Summary of Court's Ruling

The Court heard oral argument in this matter on December 7, 2012. At the close of the hearing, the Court took the matter under submission for issuance of a written ruling. The following shall constitute the Court's final ruling on the petition.

This is a petition for writ of administrative mandamus under Code of Civil Procedure section 1094.5. Petitioner Volkswagen Group of America, Inc. ("Volkswagen") challenges a decision of respondent New Motor Vehicle Board ("the Board"), entered after an evidentiary hearing, sustaining a franchised dealer's protest of the establishment of a new dealership in its market area. The petition

presents, among other issues, the question of the Board's legal obligations when it elects to reject the proposed decision of an administrative law judge and decide the matter itself.

For the reasons stated below, the Court concludes that the Board failed to proceed in the manner required by law when it rejected the proposed decision in this case and made its own decision without first providing the parties the opportunity to present either oral or written argument to the Board itself. The Board's failure to proceed in the manner required by law deprived the parties of a fair hearing, and the matter must be remanded to the Board with directions to reconsider the matter after providing the parties with a fair hearing that complies with the requirements of law.

Factual Background

The procedural facts of this case are not disputed.[1] On July 30, 2010, petitioner Volkswagen gave notice to real party in interest Ontario Volkswagen that it intended to establish a new Volkswagen dealership in Montclair, California.

Ontario Volkswagen is the only existing Volkswagen dealership in the relevant market area. On August 13, 2010, Ontario Volkswagen filed a timely protest with the Board.

The Board assigned the evidentiary hearing on the protest to an Administrative Law Judge, who held the hearing over eight days in January, 2011. On May 19, 2011, the Administrative Law Judge submitted a Proposed Decision to the Board overruling Ontario Volkswagen's protest.

The Board considered the Proposed Decision at its General Meeting held on May 26, 2011, at which it received public comments from counsel for both parties. The Board then voted to issue an order remanding the matter to the Administrative Law Judge with instructions to reconsider specified issues.

Upon remand, the parties submitted additional briefs and evidence to the Administrative Law Judge, and the matter was submitted for decision on August 23, 2011. The Administrative Law Judge issued a Proposed Decision Following Remand on September 15, 2011. This proposed decision also overruled Ontario Volkswagen's protest.

The Board considered the Proposed Decision Following Remand at its General Meeting on

[1] Unless otherwise indicated, the following summary of the facts is based on the "Procedural Background" section of the Board's final decision in this case. (See, Administrative Record ("A.R."), Vol. 22, Tab 368.)

September 27, 2011. After hearing comments by counsel for the parties, the public members of the Board deliberated in closed Executive Session. In the Executive Session, Board member Flesh moved to reject the proposed decision with regard to its finding on the good cause factor in Vehicle Code section 3063(b), sustain the protest, and have the Board, in consultation with staff, draft its own decision to be considered at the December 7, 2011 General Meeting (subsequently re-scheduled to December 13, 2011). The motion was seconded and carried by a four-to-zero vote with one member (Brooks) abstaining because he missed some of the presentation. The Board returned to open session and its decision to reject the proposed decision and sustain the protest was announced on the record by the Board's Senior Staff Counsel, Robin P. Parker.[2]

On October 24, 2011, Parker sent counsel in the case the following e-mail message confirming the Board's action:

"As a result of the Board rejecting the Administrative Law Judge's Proposed Decision Following Remand in the above-referenced matter, the Board with the assistance of staff will draft its own decision sustaining the protest, and revise the findings of fact, analysis, and determination of issues pertaining to the good cause factor in Vehicle Code section 3063(b).

"Government Code section 11517 of the Administrative Procedure Act applies to the Board pursuant to Vehicle Code sections 3066 and 3067. It provides that the Board shall not decide any case provided for in Section 11517(c)(2)(E) 'without affording the parties the opportunity to present either oral or written argument before the agency itself.' (Section 11517(c)(2)(E)(ii))

"In light of the above, the Board will allow counsel to present oral arguments before the Public Members of the Board pursuant to Government Code section 11517(c)(2)(E)(ii) at its December 7, 2011, General Meeting, in Sacramento. The agenda will be mailed on or about November 22, 2011, in light of Thanksgiving. The Decision will be sent to counsel once it is finalized."[3]

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[2] See, Reporter's Transcript of General Meeting, September 27, 2011, A.R., Vol. 9, Tab 177, p. 95.

[3] A copy of this message is attached to the Board's opposition brief as Exhibit D, and is authenticated by a declaration of the Board's counsel in this action that states that the document is part of the administrative record. The Court has not been able to locate the document in the administrative record, but since no other party has objected to this document, and it appears that it should have been in the record, the Court will consider it as part of the record.

On November 30, 2011, before the General Meeting of the Board, Glenn E. Stevens, the Vice President of the Board, signed a 45-page document entitled "Order Confirming Decision to Sustain Protest". The final paragraph of the Order stated:

"As indicated by a vote of the Public Members of the Board at its September 27, 2011, General Meeting, Protest No. PR-2265-10 has been sustained as of that date. Protestant Ontario VW has met its burden of proof under Vehicle Code section 3066(b) that there is good cause not to establish a Volkswagen dealership in Montclair. Respondent Volkswagen of America, Inc. shall not be permitted to proceed with the establishment of the new franchise at the proposed location in Montclair."

The Board mailed copies of the Order to counsel for the parties on December 1, 2011, also before the General Meeting had occurred.[4]

At the December 13, 2011 General Meeting, the Board permitted counsel for the parties to present oral argument. The Board then considered the matter in closed Executive Session, where it voted unanimously to adopt the Order Confirming Decision to Sustain Protest. The Board returned to open session and announced its decision.[5]

On December 14, 2011, the Board mailed copies of the Order to counsel for the parties. The Order was identical to the Order mailed on December 1, 2011, except that the original typed date of November 30, 2011 was crossed out and replaced with the handwritten date "13 December 2011".[6]

Petitioner Volkswagen filed the Verified Petition for Writ of Administrative Mandamus on January 24, 2012.[7] The Board and Ontario Volkswagen have filed separate opposition papers.

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[4] The Order and the letter are found at A.R., Vol. 22, Tab 367.

[5] See, Reporter's Transcript of General Meeting, December 13, 2011, A.R., Vol. 17, Tab 193.

[6] See, A.R., Vol. 22, Tab 368.

[7] Petitioner Volkswagen has made a request for judicial notice of two documentary exhibits: a "redlined" comparison of the Proposed Decision Following Remand and the Order Confirming Decision to Sustain Protest; and the legislative history of the New Motor Vehicle Board Act. Real party in interest Ontario Volkswagen objects to both exhibits. The request for judicial notice of the "redlined" comparison document is denied on the ground that the document is a composite document prepared by petitioner's counsel that is not, itself, decisional law of the state under Evidence Code section 451 or an official act of a state administrative agency under Evidence Code section 452(c). The request for judicial notice of the legislative history materials is granted on the ground that such materials normally are properly subject to judicial notice, and are potentially relevant to issues presented by the petition, although the Court notes that it has not relied on the legislative history of the New Motor Vehicle Board Act in reaching its decision in this case.

Summary of Applicable Law and Standard of Review

Code of Civil Procedure section 1094.5(b) sets forth the scope of the court's review in cases involving the validity of any final administrative order or decision made as the result of an evidentiary hearing. It provides:

"The inquiry in such a case shall extend to the questions of whether the respondent has proceeded without, or in excess of, jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence."

The petition in this case challenges the Board's decision on a number of legal and factual grounds. Petitioner Volkswagen contends that the Board failed to proceed in the manner required by law by making its final decision without complying with the requirements of law, by basing its decision on improper factors, and by failing to make legally-adequate findings. Petitioner Volkswagen also contends that many of the findings are not supported by the evidence.

Because an automobile franchise is not considered to be a fundamental vested right, decisions of the Board generally are reviewed using the substantial evidence standard of review. However, when the court bases its review of a decision of the Board on undisputed facts, the conclusion to be drawn from those facts is an issue of law, upon which the court exercises its independent judgment. (See, *Duarte & Witting, Inc. v. New Motor Vehicle Board* (2002) 104 Cal. App. 4th 626, 633.)

The law applicable to dealer protests may be summarized as follows. An existing franchised dealer has the right to protest the establishment of a new dealership in its relevant market area as provided in Vehicle Code section 3062. The Board, or an Administrative Law Judge designated by the Board, has jurisdiction to conduct an evidentiary hearing on the protest under Vehicle Code section 3066. Following the hearing, Vehicle Code section 3067(a) requires the Board to issue a written decision that contains findings of fact and a determination of the issues presented, and that sustains, conditionally sustains, overrules, or conditionally overrules the protest. In making its decision, the Board is required to take into

consideration the existing circumstances, including those factors listed in Vehicle Code section 3063.

Significantly for the outcome of this case, Vehicle Code section 3066(a) provides that Government Code section 11517 applies to the protest proceedings.

Government Code section 11517(c)(2)(E) sets forth the legal duties of an administrative agency when it rejects the proposed decision of an administrative law judge, as occurred here. It provides that the agency, within 100 days of receipt of the proposed decision, may:

"Reject the proposed decision, and decide the case upon the record, including the transcript, or upon an agreed statement of the parties, with or without taking additional evidence. By stipulation of the parties, the agency may decide the case upon the record without including the transcript. If the agency acts pursuant to this subparagraph, all of the following provisions apply:

"(i) A copy of the record shall be made available to the parties. The agency may require payment of fees covering direct costs of making the copy.

"(ii) The agency itself shall not decide any case provided for in this subdivision without affording the parties the opportunity to present either oral or written argument before the agency itself. If additional oral evidence is introduced before the agency itself, no agency member may vote unless the member heard the additional oral evidence.

"(iii) The authority of the agency to decide the case under this subdivision includes authority to decide some but not all issues in the case.

"(iv) If the agency elects to proceed under this subparagraph, the agency shall issue its final decision not later than 100 days after rejection of the proposed decision. If the agency elects to proceed under this subparagraph, and has ordered a transcript of the proceedings before the administrative law judge, the agency shall issue its final decision not later than 100 days after receipt of the transcript. If the agency finds that a further delay is required by special circumstance, it shall issue an order delaying the decision for no more than 30 days and specifying the reasons therefore. The order shall be subject to judicial review pursuant to Section 11523."

Discussion

It is not necessary to engage in further summary or discussion of the specifics of the Board's decision or its factual findings, because the Court finds the undisputed procedural facts to be dispositive of the petition. The Court has exercised its independent judgment on the issue of law presented by those undisputed facts, and finds that the facts demonstrate, as a matter of law, that the Board failed to proceed in the manner required by Government Code section 11517(c)(2)(E)(ii). In particular, the Board failed to comply with the statute when it sustained the protest without first affording the parties a meaningful opportunity to present oral or written argument before the Board.

As quoted above, Government Code section 11517(c)(2)(E)(ii) permits an administrative agency to reject the proposed decision of the administrative law judge who conducted the evidentiary hearing in the case and decide the case itself upon the record, but not before affording the parties the opportunity to present oral or written argument regarding the final decision before the agency itself. Thus, the statute establishes an orderly process for consideration and decision which ensures that the parties will have an opportunity to be heard before the final decision is made. As applied to the Board's cases involving dealer protests, the process should operate as follows: first, the Board determines whether to reject the proposed decision; then, the Board considers the record; then, the Board affords the parties the opportunity to present argument as to the final decision; and lastly, the Board makes its final decision to sustain or overrule the protest after hearing such argument.

In this case, the Board did not follow that process. Instead, it simultaneously rejected the proposed decision and entered its own final decision sustaining Ontario Volkswagen's protest at the September 27, 2011 General Meeting. This is demonstrated clearly by the following statement of the Board's Senior Staff Counsel on the record after the Board returned from Executive Session: "[T]he Board has rejected the Administrative Law Judge's decision with regard to the good-cause factor in Vehicle Code section 3063(b). It's sustaining the protest."[8]

[8] Transcript, page 95:17-20. The Board's Senior Staff Counsel further stated: "The Board, in consultation with the staff, will draft its own Proposed Decision. That is tentatively – excuse me – its own decision." (Transcript, page 95:21-23.) This on-the-record correction tends to refute any contention that the Board's decision sustaining the

Moreover, the Board appears to have taken action to sustain the protest without giving the parties prior notice that it intended to do so. The Board's Agenda for the September 27, 2011 General Meeting is not in the record, so the Court cannot find that the parties were given advance notice through the Agenda that the Board might make its own decision to sustain or overrule the protest at that time.[9] In any event, it is clear from the transcript of the Board's September 27, 2011 General Meeting that nothing said by members of the Board prior to the time the Board went into Executive Session gave notice to the parties that the Board intended to enter its own decision sustaining or overruling the protest on that date. It was only after the parties had made their presentations regarding the proposed decision and the Board had returned from Executive Session that it announced its decision to sustain the protest. Thus, when the parties presented their arguments prior to the Executive Session, they did not know, and cannot have known, that the Board intended to enter its own decision sustaining the protest at that Meeting. They therefore could not address such action in their arguments.

The Court therefore concludes that the arguments the parties presented prior to the Executive Session on September 27, 2011 may not be considered as satisfying the requirement of Government Code section 11517(c)(2)(E)(ii).

The Board appears to have recognized this problem, because the October 24, 2011 e-mail message from its Senior Staff Counsel (quoted above) may be interpreted as an attempt to cure it by offering the parties the opportunity to present oral argument at the December General Meeting. If so interpreted, that attempt failed. The Board did not rescind its earlier action, taken on the record at the September Meeting, sustaining Ontario Volkswagen's protest. That decision thus remained in effect. Moreover, even after the October 24, 2011 e-mail had been sent, the Board once again acted in a manner that affirmed its earlier decision before hearing further argument: on December 1, 2011, it issued its "Order Confirming Decision to Sustain Protest" with a date of November 30, 2011. That Order clearly stated that the protest had been

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protest was intended to be only a tentative ruling, a proposed decision, or some suggestion of how the Board ultimately might rule after hearing arguments.

[9] A copy of a cover letter dated September 15, 2011 transmitting the Agenda for the September 27, 2011 General Meeting to counsel is in the record, but the actual Agenda is not attached to the letter. (See, A.R., Tab 131, page AR001864.)

sustained as of September 27, 2011.

Nothing in any of the Board's actions at the September 27, 2011 General Meeting or thereafter indicated that its decision to sustain the protest was tentative, proposed, or provisional in any way. Instead, the Board's acts indicated clearly that its decision had been made as of the September Meeting. Thus, the Board made its final decision to sustain Ontario Volkswagen's protest before hearing and considering what even the Board deemed to be the legally-required arguments of the parties on that matter.

Further evidence that the final decision had been made before hearing argument comes from the fact that, after hearing the arguments, the Board simply re-issued the November 30 order on the following day, with only one change: the new, handwritten date. This action undermines any contention by the Board or Ontario Volkswagen that a prior failure by the Board to comply with the requirements of law was cured simply by hearing the arguments at the December Meeting.[10]

By making its final decision before hearing the arguments of the parties, the Board failed to proceed in the manner required by Government Code section 11517(c)(2)(E)(ii). The Court concludes that this failure deprived the parties, and petitioner Volkswagen in particular, of their right to a fair hearing. As petitioner persuasively argues, the right to a fair hearing implicitly includes the requirement that the hearing be meaningful and provide the parties with the opportunity to influence the final decision. Otherwise, the hearing is a mere formality or an idle act. The Court cannot determine, based on the factual record before it, that the final hearing provided to the parties in this case was indeed meaningful, and provided them with a real opportunity to influence the final decision. Indeed, all of the facts here indicate that the decision had been made long prior to December 13, 2011, and that hearing argument on that date was little more than a charade played out to satisfy legal requirements.

In discussing the importance of properly constituted findings in administrative agency decisions, the California Supreme Court stated that proper findings "...serve a public relations function by helping to persuade the parties that administrative decision-making is careful, reasoned, and equitable." (See,

[10] The Court also notes that the public members of the Board asked no questions of counsel at the December 13, 2011 General Meeting, but simply allowed them to make their presentations without interruption. This is in contrast to the September 27, 2011 meeting, at which members Flesh and Stevens actively questioned counsel regarding factual issues.

Topanga Association for a Scenic Community v. County of Los Angeles (1974) 11 Cal. 3rd 506, 517.) The same critical public relations function is served when an administrative agency provides the parties with a meaningful hearing before deciding a case, and most certainly is ill-served when, as here, the hearing seems to have been only for the purpose of "rubber-stamping" a decision that already had been made.

The Board's procedure in this case failed to comply with legal requirements, deprived the parties of a fair hearing, and did not contribute to showing all concerned that its decision-making process was careful, reasoned, and equitable. The Court therefore concludes that the petition for writ of mandate should be granted, and that the Board should be directed to vacate its final decision in this case.

Petitioner Volkswagen argues that the Court should also direct the Board to enter a new decision overruling the protest. The Court does not agree. The appropriate remedy for violation of the right to a fair hearing is to order the respondent to provide the petitioner with a fair hearing. (See, *Clark v. City of Hermosa Beach* (1996) 48 Cal. App. 4th 1152, 1174.) Doing more than that in this case would interfere with the legitimate scope of the Board's discretion to decide dealer protests. The Court therefore concludes that the appropriate remedy in this case is an order remanding the matter to the Board and directing it to reconsider the matter in compliance with Government Code section 11517(c)(2)(E)(ii) by deciding it upon the record after affording the parties an opportunity to present oral or written argument.

Disposition

The petition for writ of administrative mandamus is granted on the ground that respondent New Motor Vehicle Board abused its discretion by failing to proceed in the manner required by law, as found above. The writ shall direct the Board to vacate its final decision in this case, dated December 13, 2011, and shall remand the matter to the Board with directions to reconsider the matter in compliance with Government Code section 11517(c)(2)(E)(ii) by deciding it upon the record after affording the parties an opportunity to present oral or written argument. The writ shall further command respondent Board to make and file a return within 60 days after issuance of the writ, setting forth what it has done to comply with the writ. The Court shall reserve jurisdiction in this action until there has been full compliance with the writ.

Because the Board may enter a different decision, or make different findings, on remand, the Court finds that it is unnecessary to address any of petitioner's remaining contentions, and the Court makes no ruling on them.

In accordance with Local Rule 9.16, counsel for petitioner Volkswagen is directed to prepare an order granting the petition, incorporating this ruling as an exhibit to the order, and a separate judgment and writ as set forth herein; submit them to counsel for respondent Board and real party in interest Ontario Volkswagen for approval as to form in accordance with Rule of Court 3.1312(a); and thereafter submit them to the Court for signature and entry in accordance with Rule of Court 3.1312(b).

DATED: January 30, 2013

MICHAEL KENNY

Judge MICHAEL P. KENNY
Superior Court of California,
County of Sacramento

CERTIFICATE OF SERVICE BY MAILING
(C.C.P. Sec. 1013a(4))

I, the undersigned deputy clerk of the Superior Court of California, County of Sacramento, do declare under penalty of perjury that I did this date place a copy of the above-entitled **RULING ON SUBMITTED MATTER** in envelopes addressed to each of the parties, or their counsel of record as stated below, with sufficient postage affixed thereto and deposited the same in the United States Post Office at 720 9th Street, Sacramento, California.

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Superior Court of California,
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Dated: January 30, 2013

By: S. LEE
Deputy Clerk