Attachment A

2013-Ohio-2662

William R. Sims, et al., Appellants-Appellants,

v.

Nissan North America, Inc., Appellee-Appellee.

Nissan North America, Inc., Appellant-Appellant,

v.

William R. Sims et al., Appellees-Appellees.

Nos. 12AP-833, 12AP-835

Court of Appeals of Ohio, Tenth District, Franklin County.

June 25, 2013.

Morganstern, MacAdams & DeVito Co., L.P.A., and Christopher M. DeVito, for appellants William R. **Sims** and Buick-GMC Truck, Inc.

Taft, Stettinius & Hollister LLP, Joseph C. Pickens and Steven C. Fitch; Dorsey & Whitney LLP, Steven J. Wells and Rebecca Weisenberger, for appellee **Nissan** North America, Inc.

Stockamp & Brown, LLC, David A. Brown, Deanna L. Stockcamp and John C. Camillus, for Amicus Curiae.

DECISION

TYACK, J.

{¶ 1} This consolidated appeal originated as an administrative protest by **Sims** Buick GMC **Nissan** and William R. **Sims** ("**Sims**") against **Nissan** North America, Inc. ("**Nissan**") because **Nissan** sought to terminate **Sims'** new car dealership. **Sims** filed a protest with the Ohio Motor Vehicle Dealers Board ("Board") and prevailed at the administrative level. **Sims** was awarded attorney fees and costs, but in an amount less than requested by **Sims'** counsel.

{¶ 2} The Franklin County Court of Common Pleas affirmed the order of the Board sustaining the protest of **Sims**, affirmed the order not to award expert witness fees, affirmed the award of costs in the amount of $8, 447.80, and remanded the matter for an evidentiary hearing to support and justify the attorney fees of **Sims'** counsel.

{¶ 3} **Sims** has appealed the fee award, while **Nissan** has appealed the merits of the protest. Both the common pleas court and this court consolidated the appeals. In addition, the Ohio Automobile Dealers Association and the National Automobile Dealers Association conditionally filed a friend of the court brief and moved for leave to do so. We grant the motion.

I. BACKGROUND

{¶ 4} After **Nissan** provided notice to **Sims** that **Nissan** intended to terminate **Sims'** dealer agreement, **Sims** filed a protest with the Board under R.C. 4517.54(C) challenging **Nissan's** proposed termination. **Nissan's** reason for termination was **Sims'** failure to achieve **Nissan's** standard benchmark for sales performance, known as the regional sales effectiveness ("RSE"). **Sims** protested that the RSE formula was unreasonable and discriminatory under the unique circumstances of the case.

{¶ 5} The protest was heard by the Board's hearing examiner from October 18 through October 21, 2010. The primary issue in the protest was whether **Nissan's** use of the RSE sales penetration standard was reasonable under the unique circumstances of this case. The hearing examiner recommended that the Board sustain the protest, finding that **Nissan** had not met its burden of showing good cause for the termination. The Board approved the report and recommendation, and later granted in part **Sims'** request for attorney fees and costs.

II. ASSIGNMENTS OF ERROR

{¶ 6} In its appeal on the merits of the protest action, **Nissan** assigns the following as error:

> I. The Board and the Court erred as a matter of law by concluding that **Nissan's** sales performance standard, which **Nissan** uniformly applies to all of its dealers in Ohio and nationwide, was "unreasonable" pursuant to R.C. §§ 4517.55(A)(1),(7) and (B)(5) because it was not uniquely tailored to **Sims'** market, and by requiring **Nissan** to evaluate **Sims** using a sales performance standard different from that applied to all other Ohio **Nissan** dealers.
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> II. The Board erred as a matter of law by concluding that the statutory "good cause" factors set forth in R.C. §§ 4517.55(A)(1) and (7) weighed in favor of **Sims**, and the Court erred as a matter of law by upholding those Board conclusions.
>
> III. The Board erred as a matter of law when it filed to make any factual findings pursuant to R.C. §§ 4517.55(A)(1) and (7) regarding whether additional sales were available to **Sims**, despite its "conclusions of law" that these factors weighed in favor of **Sims**, and the Court erred as a matter of law by excusing the Board's failure.
>
> IV. The Court abused its discretion when it upheld the Board's conclusion that the "good cause" factors set forth in R.C. §§ 4517.55(A)(1) and (7) weighed in favor of **Sims** and that **Nissan's** sales performance standard was unreasonable.
>
> V. The Court erred by upholding the Board's conclusion that **Sims'** Protest should be sustained.

III. STANDARD OF REVIEW

{¶ 7} As an initial matter, we address the appropriate standard of review. A party adversely affected by an order of an agency may appeal that order to the court of common pleas. That court must affirm the order of the agency if "it finds, upon consideration of the entire record and any additional evidence the court has admitted, that the order is supported by reliable, probative, and substantial evidence and is in accordance with law." R.C. 119.12; *Pons v. Ohio State Med. Bd.*, 66 Ohio St.3d 619, 621 (1993). The court of common pleas' "review of the administrative record is neither a trial de novo nor an appeal on questions of law only, but a hybrid review in which the court `must appraise all the evidence as to the credibility of the witnesses, the probative character of the evidence, and the weight thereof.'" *Lies v. Veterinary Med. Bd.*, 2 Ohio App.3d 204, 207 (1st Dist.1981), quoting *Andrews v. Bd. of Liquor Control*, 164 Ohio St. 275, 280 (1955).

{¶ 8} The standard of review for a court of appeals in an administrative appeal is more limited than that of the court of common pleas. The court of appeals' review is limited to determining whether the court of common pleas abused its discretion. *Scheidler v. Ohio Bur. of Workers' Comp.*, 10th Dist. No. 04AP-584, 2005-Ohio-105, ¶ 10. "`The term "abuse of discretion" connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable.'" *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983), quoting *State v. Adams*, 62 Ohio St.2d 151, 157 (1980). On questions of whether the agency's order was in accordance with the law, this court's review is plenary. *Gralewski v. Ohio Bur. of Workers' Comp.*, 167 Ohio App.3d 468, 2006-Ohio-1529, ¶ 17.

{¶ 9} Here, a transcript of the proceedings was not part of the official record transmitted electronically to the court of common pleas on June 1, 2012. Although **Nissan** characterizes its arguments as questions of law, the failure to provide a transcript of the testimony of lay or expert witnesses does not allow us to review the factual determinations made on the basis of the testimony. We do not view selected excerpts submitted as part of an appendix as a substitute for a transcript.

Therefore, we accept all factual determinations as true.

IV. NISSAN'S APPEAL OF THE BOARD'S DECISION ON THE PROTEST

{¶ 10} **Nissan** argues that the Board erred as a matter of law by requiring it to apply different sales performance criteria in a discriminatory manner contrary to statute. The Ohio Motor Vehicle Dealer Act, R.C. 4517.01 et seq., governs the termination of new motor vehicle franchises. R.C. 4517.54(A) requires that "good cause" be established before a franchisor can terminate a new motor vehicle franchise. In addition, R.C. 4517.55(A) states, in pertinent part: "In determining whether good cause has been established by the franchisor for terminating * * * a franchise, the motor vehicle dealers board shall take into consideration the existing circumstances, including, but not limited to," and then the statute lists nine non-exclusive factors that may weigh for or against termination. One factor, in and of itself, can serve as a sufficient basis to establish good cause. If the Board does not find good cause, the franchisor may not terminate the franchise agreement. R.C. 4517.54(D). Moreover, R.C. 4517.55(B)(5) provides that "[f]ailure of the franchisee to achieve any unreasonable or discriminatory performance criteria" specifically does not constitute good cause to terminate a franchise. Here, the Board concluded that the performance criteria were unreasonable as applied to **Sims**.

{¶ 11} In addition, manufacturers are prohibited from "discriminating against a franchisee, as compared to a same line-make franchisee, with regard to * * * motor vehicle sales expectations, [and] motor vehicle market penetration. R.C. 4517.59(A)(15).

{¶ 12} According to the dealer agreement between **Sims** and **Nissan**, it is permissible for **Nissan** to measure the dealer's sales penetration in relation to the dealer's assigned primary market area ("PMA"). The hearing examiner found that:

> Sales penetration calculates a dealer's new vehicle sales (regardless of where they are registered) as a percentage of the registrations of all competitive makes in the dealer's PMA. To gauge sales penetration effectiveness, a dealer's sales penetration is then compared as a ratio to [**Nissan's**] sales penetration throughout the dealer's assigned region to determine whether the dealer being analyzed is penetrating its PMA below, at or above the average for all **Nissan** dealers in the region. * * * Expressed as a percentage, the resulting quotient calculates a dealer's "regional sales effectiveness" or "RSE."

Feb. 4, 2011 Report and Recommendation, at 7.

{¶ 13} **Sims** belonged to **Nissan's** Midwest Region, a region consisting of 13 states, including Ohio. His PMA was the Warren, Ohio/Trumbull County area. Warren, Ohio has an exceptionally large GM market share because of the presence of the Lordstown GM facility. Employees of the plant, their families, and retirees are loyal to the GM brand. Because of this "Lordstown effect," almost all import sales, including Honda and Toyota, were depressed. **Sims** requested that **Nissan** take into consideration GM's presence in the Warren PMA, but **Nissan** did not.

{¶ 14} **Nissan** argues that to do so with **Sims**' dealership is tantamount to violating R.C. 4517.59(A)(15) that prohibits discriminatory evaluations. **Nissan** believes that its RSE must be applied uniformly to Ohio dealers as a group to avoid discriminating against other dealers.

{¶ 15} However, **Nissan's** own dealer contract with **Sims** sets forth additional criteria to be considered in evaluating a dealer's sales performance. Specifically, "any special local marketing conditions" are to be taken into account where appropriate.

{¶ 16} The hearing examiner determined that the unique circumstances of **Sims**' PMA should be taken into account as part of the "existing circumstances" of the case as set forth in R.C. 4517.55(A). He said:

> The existing circumstances demonstrate that, in the Warren PMA, GM holds a competitive advantage over every other manufacturer, including [**Nissan**]. The influence of the GM Lordstown manufacturing facility upon the sales of GM vehicles in the Warren PMA creates a difficult environment for [**Sims**] to sell **Nissan** vehicles. The evidence adduced at hearing supports the conclusion that the presence of the Lordstown plant in this economically depressed geographic area was a substantial factor in preventing [**Sims**] from

> meeting the RSE standard. [**Nissan's**] failure to consider GM's influence on [**Sims**'] ability to make sales of **Nissan** products to achieve the RSE score renders its Notice of Termination unreasonable.

(Footnote omitted.) Feb. 4, 2011 Report and Recommendation, at 27.

{¶ 17} **Nissan** argues that the Board erred by requiring **Nissan** to use an individual performance standard for **Sims** that would be discriminatory in that it treated **Sims** differently than other Ohio **Nissan** dealers. **Nissan** states that a subjective standard that is adjusted for local market conditions of every dealer is, in reality, no standard at all.

{¶ 18} The Board did not say that **Nissan** could not use the RSE to terminate dealers. Rather, limited to the facts of this case, the existing circumstances, and other R.C. 4517.55(A) factors, **Nissan** could not meet its burden of showing good cause for the termination. The hearing examiner stated that under certain circumstances, a smaller geographic area in which to consider performance might be appropriate, and that this case presented those circumstances. The hearing officer devoted several pages to carefully detailing the facts that led him to the conclusion that the Warren PMA was one such situation. He found that **Nissan** did not consider GM's presence in Warren in evaluating **Sims**' performance. Therefore, he concluded that use of the RSE without taking into consideration the local market condition rendered the normal measure of performance unreasonable.

{¶ 19} To the extent **Nissan** is arguing that the hearing examiner's factual findings were wrong, unsupported, or internally inconsistent, the absence of a transcript defeats any such claim. There were conflicting expert opinions, and the trial court properly deferred to the Board's resolution of the battle of the experts. We will not substitute our judgment for that of the hearing examiner as to any factual determinations.

{¶ 20} R.C. 4517.55(A) is clear on its face. In determining whether good cause exists to terminate a dealer's franchise, the Board is required to take into consideration "existing circumstances." Nor is it discriminatory to utilize a reasonable performance standard, one that takes into account "existing circumstances." Here, there was a great deal of evidence about local market conditions that **Nissan** failed to take into account. This factor loomed large in the decision to find a strict adherence to the RSE to be unreasonable. Therefore, rigid adherence to the RSE was not a reasonable standard.

{¶ 21} We find no abuse of discretion in the court of common pleas affirming these facts and conclusions. **Nissan's** five assignments of error are overruled.

V. SIMS' APPEAL ON ATTORNEY FEES AND COSTS

{¶ 22} In its appeal on the issue of attorney fees and costs, **Sims** assigns the following as error:

> I. The Board and Common Pleas court erred as a matter of law by denying reimbursement of expert witness fees and other litigation expenses incurred, which are enumerated and required to be paid pursuant to the plain reading of R.C. 4517.65(C), in order to make the prevailing dealer whole in an administrative proceeding seeking injunctive relief.
>
> II. The Board and Common Pleas court erred as a matter of law by denying the reasonable attorney fees requested, which was supported by an affidavit, an itemized billing, and uncontroverted by any evidence in the Board record.
>
> III. The Board erred as a matter of law by reducing the amount of the uncontroverted attorney fees requested (1) without a hearing and (2) denying discovery requested, which violates constitutional due process rights.
>
> IV. The Common Pleas court erred as a matter of law by substituting its judgment for that of the Board, ignoring the undisputed amount of attorney fees requested, and failing to review and determine assignments of error presented for review.

VI. EXPERT WITNESS FEES AND COSTS

{¶ 23} In **Sims**' first assignment of error, we must decide whether the court of common pleas erred as a matter of law in affirming the hearing officer's decision not to allow an award of expert witness fees and other litigation expenses. On June 1, 2011, the hearing officer issued an order that disallowed expert witness fees and allowed only the costs to which officers, witnesses, and others were entitled in a civil action.

{¶ 24} In compliance with the request of the hearing examiner, **Sims**' counsel then prepared and submitted an affidavit in support of the requested attorney fees. **Sims'** counsel requested attorney fees of $411,623.32 (including a lodestar multiplier of 2), expert witness fees of $57,700.03, and itemized litigation costs of $13,982.94. Counsel also requested a hearing and discovery as to **Nissan's** fees and costs. **Nissan** did not submit any evidence in opposition to refute the requested fees. Instead, **Nissan** argued that the requested attorney fees were too high, certain itemized attorney entries should be excluded, and that expert witness fees and other litigation expenses were not recoverable.

{¶ 25} In the meantime, the Board appointed a new hearing examiner who had not heard testimony or presided over the protest. The new hearing examiner found **Sims'** uncontested hourly rate to be reasonable, denied **Sims'** request for discovery of **Nissan's** fees and costs, and denied **Sims'** request for a hearing. The hearing examiner then reduced the amount of attorney fees and costs by approximately $30,000, and rejected the lodestar multiplier x 2 thereby bringing the total fees and costs to a total of $175,324.99 in a report and recommendation dated March 1, 2012.

VII. FEE SHIFTING STATUTE

{¶ 26} The question before us is a matter of law and one of statutory interpretation. R.C. 4517.65(C) governs entitlement to fees in a protest action and provides as follows:

> The franchisor shall be liable to the franchisee or prospective transferee for reasonable attorney fees, witness fees, and any other costs incurred by the franchisee or prospective transferee in any protest filed under section 4517.50, 4517.53, 4517.54, or 4517.56 of the Revised Code in which the motor vehicle dealers board finds in favor of the protesting franchisee or prospective transferee.

{¶ 27} Because the Board found in favor of **Sims** in the matter of the protest, there is no doubt that **Sims** is entitled to its "reasonable attorney fees, witness fees, and any other costs" incurred in the action. **Sims** takes the position that the statutory language is broad, and must be construed in order to give effect to the spirit and intent of the statutory provision. **Nissan** takes the position that a body of case law has developed around the terms witness fees and costs, and that case law supports its interpretation of the statute.

{¶ 28} Prior cases have established the remedial nature of the fee shifting statute and the policy behind it. The statute is designed to make whole the dealer who successfully protests a termination.

{¶ 29} In *Lally v. Am. Isuzu Motors Inc.*, 10th Dist. No. 05AP-1137, 2006-Ohio-3315, ¶ 48, this court stated:

> We agree that R.C. Chapter 4517 is remedial in nature. See *Earl Evans Chevrolet, Inc. v. Gen. Motors Corp.* (1991), 74 Ohio App.3d 266, 276. We further agree that the attorney fees provision in R.C. 4517.65 "has the remedial purpose of deterring manufacturers from using their vast resources to outspend opponents." *Hall Artz Lincoln-Mercury.* Lastly, we agree that, when OMVDB finds in favor of a protesting franchisee or prospective transferee in a protest filed under R.C. 4517.50, 4517.53, 4517.54 or 4517.56, an award of attorney fees is mandatory.

VIII. PROTEST ACTION V. CIVIL ACTION

{¶ 30} In an administrative protest governed by R.C. 4517.65(C), money damages are not available to a successful protestant. However, in a civil action brought under R.C. 4517.65(A), money damages, specifically double damages, are prescribed. The remedies in a civil action under the statute are double damages, reasonable attorney fees, and court costs. This language is at variance with the provision cited above for an administrative protest. Under R.C. 4517.65(C), double damages are not allowed, the word "court" is not used in connection with the word "costs," and the phrase "any other costs" is present but does not appear in R.C. 4517.65(A).

{¶ 31} We infer from the difference in the language that the General Assembly made a distinction between the civil action, which provides for double monetary damages, court costs, and reasonable attorney fees, and the administrative action in which a successful protestant is to receive injunctive relief, reasonable attorney fees, witness fees, and any other costs incurred.

{¶ 32} It is a cardinal rule of statutory interpretation that we look to the language of the statute itself in determining legislative intent. *State ex rel. Van Dyke v. Pub. Emp. Retirement Bd.*, 99 Ohio St.3d 430, 2003-Ohio-4123. If statutes relate to one another they should be read together with the differences in language carefully compared. *See Chrysler Corp. v. Bowshier*, 10th Dist. No. 01AP-921 (Mar. 28, 2002) ("R.C. 4517.65(A) and (B) relate to one another and must be read together. Indeed, R.C. 1.42 states that words and phrases shall be read in context and construed according to the rules of grammar and common usage."). Because the legislature created both civil and administrative remedies, we cannot overlook the plain language of the statute that uses different language to describe different relief.

{¶ 33} We note that the term "witness fees" is not even present in what is recoverable in a civil action, presumably because R.C. 2335.06(A)(1) sets forth the fees and mileage in civil cases, to wit: "Twelve dollars for each full day's attendance and six dollars for each half day's attendance at a court of record * * * to be taxed in the bill of costs." Additionally, the board of county commissioners sets the reimbursement rate for mileage.

{¶ 34} **Nissan** is correct in stating that a body of law has developed around the terms "witness fees" and "costs." However, we note that many statutes dealing with the issue are concerned about expenditure of public funds by the state agency that is paying witness fees and mileage. *See* 1999 Ohio Atty.Gen.Ops. No. 99-011, (discussing agency responsibility for payment of witness fees in proceedings before state agencies). In many, but not all situations, lay witnesses are entitled to receive the witness fees and mileage set forth in R.C. 2335.05 or 2335.06. *Id.* For example, R.C. 4517.32 deals with the rule-making powers of the Board, hearings, and witnesses. In pertinent part, the statute states:

> The board may, through its secretary, issue a subpoena for any witness * * * directed to the sheriff of the county where such witness resides or is found, which subpoena shall be served and returned in the same manner as a subpoena in a criminal case.
>
> [T]he fees of the sheriff shall be the same as that allowed in the court of common pleas in criminal cases. Witnesses shall be paid the fees and mileage provided for under section 119.094 of the Revised Code. The fees and mileage shall be paid in the same manner as other expenses of the board.

{¶ 35} This statute, contained in the same chapter of the Revised Code as the statute we are construing, uses specific language for witness fees that are to be paid by the Board, and that they are to be paid in accordance with fees in the court of common pleas. However, in the instant case, we are not dealing with the expenditure of public funds. Instead, R.C. 4517.67(C) is a *fee shifting* statute that shifts the fees from the dealer to the manufacturer in a successful protest. Thus, we are not persuaded that the use of the terms "witness fees and any other costs incurred by the franchisee" is as restrictive as the court of common pleas found them to be.

{¶ 36} The phrase "any other" with respect to costs is both more generous and more inclusive than the phrase "court costs." The cases cited by **Nissan** are appropriate to civil actions pursuant to R.C. 4517.65(A). It appears the legislature intended that double damages, reasonable attorney fees, and court costs (including witness fees), were sufficient compensation in a civil action.

{¶ 37} However, in a protest action brought under R.C. 4517.65(C) and decided by the Board, the language is targeted to make a dealer whole without the availability of money damages. By not allowing expert fees as part of the "any other costs incurred by the franchisee," the remedial purpose of the statute is defeated. The effect on dealers who wage a successful protest is that they must absorb the cost of experts and other litigation costs even though expert testimony and the costs associated therein may be critical to their success.

{¶ 38} It is reasonable that "any other costs of the action" include expert witness fees because many if not most protest actions require expert testimony. This case, for example, involved expert witnesses for both **Nissan** and **Sims**. In order to make a successful protestant whole, expert witness fees, if shown to be necessary and reasonable to the protest, are a necessary component of making the dealer whole. Thus, "witness fees and any other costs incurred by the franchisee" in this context has a broader meaning than the statutory amount authorized in civil or criminal actions by R.C. 2335.05 and 2335.06. Limiting witness fees and costs to those available in civil actions is not appropriate where, as here, a statute provides an expressly broader definition for the reimbursement of costs incurred by the dealer.[1]

{¶ 39} Based on the plain language of the statute, particularly when the administrative action is compared to civil court proceedings, and based on the legislative intent expressed in court cases interpreting the statute, we conclude that the Board has the authority to allow expert witness fees and litigation costs in an action brought under R.C. 4517.65(C). We do not read R.C. 4517.65(C) as giving the Board unrestrained discretion to tax costs to reimburse a successful protestant for every expense he or his attorney has seen fit to incur in the conduct of his case. Items proposed by prevailing dealers as costs should always be given careful scrutiny.

{¶ 40} Therefore, **Sims**' first assignment of error is sustained in part and remanded to the Board to award expert witness fees and any other costs after a determination of the reasonableness of the expert fees and costs submitted by **Sims'** counsel.

IX. ATTORNEY FEES

{¶ 41} **Sims**' remaining assignments of error concern the amount of attorney fees awarded in the action. The undisputed evidence demonstrates that **Sims**' counsel submitted an affidavit showing 446.95 hours of legal services billed between $200 — $500 per hour, for a total fee of $205,811.66. Counsel for **Sims** asserted that considering the novelty and difficulty of the questions presented, the professional skill required, the reputation of the attorneys, and the results obtained, the Board should multiply the lodestar amount of attorney fees billed by a multiplier of two for a total attorney fee award of $411,623.60.

{¶ 42} **Sims** requested discovery of **Nissan's** attorney fees and costs in the matter. **Nissan** did not object to the reasonableness of time expended or the hourly rate charged. Because **Nissan** did not attack the reasonableness of the claimed attorney fees by opposing affidavit or any other evidence, the Board determined that **Sims** was not entitled to discovery of **Nissan's** attorney fees and costs. Instead, **Nissan** argued that time spent on unsuccessful claims should be excluded, and that expert witness fees and other litigation expenses should not be recoverable.

{¶ 43} The hearing officer and the Board accepted the hourly rate but rejected the lodestar multiplier and excluded approximately $30,000 of attorney services related to the unsuccessful argument about expert witness fees, other time not associated with the protest, and a re-argument of certain unsuccessful claims under R.C. 4517.59. As previously noted, this reduced the Board's total award to $175,324.99.

{¶ 44} The court of common pleas found the billing statement provided by counsel to be inadequate. The court found that **Sims** failed to produce evidence that its hourly rate was reasonable. Even so, the court presumed that the hearing examiner had sufficient information to make a determination of customary rates. The court also took issue with the incremental billing reflected on the statement. The court took note that the customary norm in Franklin County for incremental billing is .10 of an hour or six-minute increments. The court found that **Sims'** counsel billed in .17 of an hour or 10-minute increments. The court declined to speculate on whether the use of such an increment inflated the bill unreasonably.

{¶ 45} The court's chief concern was the use of "block billing," which is the practice of stating a number of legal tasks in a paragraph followed by an amount of time that does not individually reflect what time was spent on what task. The court stated that the use of such a practice requires a tribunal to speculate as to what task was performed, how long it took to complete the task, and the specific nature of the task. The court then remanded the matter to the Board for an evidentiary hearing where **Sims** would have the right to present competent evidence in support of the fee request and to justify its counsel's fee.

{¶ 46} Where a tribunal is empowered to award attorney fees by statute, the amount of such fees is within the sound discretion of the tribunal hearing the matter. *Brooks v. Hurst Buick-Pontiac-Olds-GMC, Inc.*, 23 Ohio App.3d 85, 91 (12th Dist.1985). In determining an amount of fees to award, the tribunal must first compute the "lodestar" figure, the number of hours expended multiplied by a reasonable hourly rate. *Bittner v. Tri-County Toyota, Inc.* 58 Ohio St.3d 143, 145. Once a tribunal calculates the lodestar figure, the tribunal may modify that calculation by the factors set forth in the Ohio Rules of Prof.Cond.R. 1.5(a) which provides, in pertinent part:

> The factors to be considered in determining the reasonableness of a fee include the following:
>
> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
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> (3) the fee customarily charged in the locality for similar legal services;
>
> (4) the amount involved and the results obtained;
>
> (5) the time limitations imposed by the client or by the circumstances;
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> (6) the nature and length of the professional relationship with the client;
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> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services;
>
> (8) whether the fee is fixed or contingent.

{¶ 47} An application for attorney fees must present sufficient documentation of the hours worked and the work performed to permit a determination regarding the merits of the application. *Miller v. Leesburg*, 10th Dist. No. 97APE10-1379 (Dec. 1, 1998), citing *Natl. Assn. of Concerned Veterans v. Secy. of Defense*, 675 F.2d 1319, 1327 (C.A.D.C.1982). The burden of proving that the time was fairly and properly used and the reasonableness of the hours expended rests upon the attorney. *Climaco, Seminatore, Delligatti & Hollenbaugh v. Carter*, 100 Ohio App.3d 313, 323 (10th Dist.1995). The tribunal must base its determination of reasonable attorney fees upon the actual services performed, and there must be some evidence that supports the tribunal's determination. *Id.*

{¶ 48} In *Earl Evans Chevrolet, Inc. v. Gen. Motors Corp.*, 74 Ohio App.3d 266 (11th Dist.1991) the argument was rejected that claims of counsel alone were insufficient evidence upon which reasonable attorney fees could be awarded. The court found that when an attorney's recapitulation of his fees is accepted as evidence and is uncontradicted by opposing counsel, it is, standing alone, sufficient to maintain the motion for fees. *Earl Id.* at 286. Such is the case here.

{¶ 49} The court of common pleas, acting as an appellate court, must determine whether there is reliable, probative, and substantial evidence in support of an award of attorney fees. R.C. 119.12. The court of common pleas substituted its judgment for that of the hearing officer and the Board with regard to the determination of the fees. The Board had before it some evidence of the reasonableness of the attorney fees, and in the absence of any evidence to the contrary, it was not an abuse of discretion to award the requested attorney fees. Furthermore, the attorney fees disallowed with respect to arguing expert witness fees should be reinstated given our determination that such fees are allowable as a matter of law.

X. LODESTAR MULTIPLIER X 2

{¶ 50} Neither the Board nor the court of common pleas found that an upward deviation from the lodestar was warranted. **Sims** contends that since R.C. 4517.65(A) authorizes double damages for a prevailing dealer, then double actual attorney fees should be awarded in a successful protest. We disagree. Double attorney fees are never mentioned in R.C.

4517.65(C). There is no evidence in the record that this case was especially difficult or required exceptional professional skill other than **Sims**' counsel's assertion that he was entitled to an upward deviation from the lodestar.

{¶ 51} Given our disposition of the attorney fee issue, there is no need to address **Sims'** due process argument regarding the necessity of a hearing.

XI. CONCLUSION

{¶ 52} For the reasons stated above, **Nissan's** five assignments of error are overruled. **Sims'** first assignment of error is sustained in part and overruled in part and remanded to the Board for a determination of the reasonableness of the expert fees and any other costs originally submitted by **Sims** and denied by the hearing officer. **Sims'** second assignment of error is sustained in part and the matter remanded to the Board for reinstatement of the uncontroverted amount of attorney fees requested ($205,811.66) minus any attorney fees not associated with the protest including time spent on claims under R.C. 4517.59(A) and (M). **Sims'** second assignment of error is overruled as to any lodestar multiplier. **Sims** third assignment of error is overruled in part with respect to a lodestar multiplier, rendered moot with respect to the constitutional due process claim, and sustained in part with respect to reinstating the attorney fees for the recovery of expert fees. **Sims'** fourth assignment of error is sustained. The matter is remanded to the Board for further proceedings in accordance with this decision.

Motion for leave to file a friend of the court brief is granted; judgment affirmed in part and reversed in part; remanded for further proceedings.

BROWN and DORRIAN, JJ., concur.

[1] Counsel for **Sims** represented at oral argument that it is common practice to award expert fees in dealer protests.

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Attachment B

186 B.R. 977 (1995)

In re CLAREMONT ACQUISITION CORPORATION, INC.; Claremont Pontiac/GMC Truck, Inc.; Claremont Ford, Inc.; Claremont Cadillac, Inc.; Claremont Isuzu, Inc.; and Claremont Hyundai, Inc., Debtors. FORD MOTOR COMPANY and General Motors Corp., Appellants, v. CLAREMONT ACQUISITION CORPORATION, INC.; Claremont Pontiac/GMC Truck, Inc.; Claremont Ford, Inc.; Claremont Cadillac, Inc.; Claremont Isuzu, Inc.; and Claremont Hyundai, Inc.; Cal Worthington and Worthington Dodge, Inc.; and General Electric Capital Corporation, Appellees.

Nos. CV 95-3248 MRP, CV 95-3891 MRP. Bankruptcy Nos. LA 94-52638-KM, LA 94-52627-KM, LA 94-52635-KM, LA 94-52637-KM, LA 94-52639-KM and LA 94-52642-KM.

United States District Court, C.D. California.

September 7, 1995.

979 *978 *979 Michael S. Kogan, Arter & Hadden, Los Angeles, CA, for debtors.

Wallace M. Allan, O'Melveny & Myers, Los Angeles, CA, for General Motors Corp.

Kimberly S. Winick, Mayer, Brown & Platt, Los Angeles, CA, Keith A. Langley, Dallas, TX, for Ford Motor Company.

James J. Joseph, Danning, Gill, Diamond & Kollitz, Los Angeles, CA, for Sidney G. (Jack) Head and Louis Frahm, Lessor of Acura Store.

Bruce L. Ishimatsu, Bryan Cave, Los Angeles, CA, for American Isuzu Motors, Inc.

Gregory Bray, Murphy, Weir & Butler, Los Angeles, CA, for G.E. Capital.

Adam H. Bloomenstein, Hyundai Motor America, Fountain Valley, CA, for Hyundai Motor America.

John C. Tobin, Best, Best & Krieger, Riverside, CA, for City of Claremont and City of Claremont Redevelopment Agency.

Gary E. Klausner, Robinson, Diamant, Brill & Klausner, Los Angeles, CA, for Cal Worthington and Worthington Dodge, Inc.

OPINION

PFAELZER, District Judge.

Ford Motor Company ("Ford") and General Motors Company ("GM") appeal an order of the bankruptcy court compelling GM and Ford to accept assignment of Debtors' franchise agreements to Worthington Dodge, Inc. ("Worthington Dodge") which is owned by Cal Worthington ("Worthington"). The questions presented by these appeals are: (1) whether the bankruptcy court erred in applying California Vehicle Code § 11713.3(e) to the assignment of the automobile franchise agreements; (2) whether the bankruptcy court applied the correct legal standard under Cal.Veh.Code § 11713.3(e); (3) whether the factual record supports the bankruptcy court's determination that GM and Ford's refusal to consent to the assignment to Worthington was unreasonable; and (4) whether the bankruptcy court erred in interpreting § 365(b)(2)(D) of the Bankruptcy Code, 11 U.S.C. § 365(b)(2)(D), as relieving the Debtors from the obligation of curing the default arising from their failure to operate the franchises for more than seven days prior to the bankruptcy filings.[1]

980 *980 **I.**

BACKGROUND

The Debtors operated Cadillac, Pontiac/GMC Truck, Ford, Isuzu and Hyundai dealerships at the Claremont Auto Center in Claremont, California. On or about November 7, 1994, Debtors ceased operating the automobile dealerships. On November 20, 1994, the Debtors filed individual Voluntary Petitions for Relief under Chapter 11 of the Bankruptcy Code. Each of the Debtors has been operating as a debtor in possession since that time and the individual cases are being jointly administered. On March 31, 1995, the bankruptcy court approved Worthington as purchaser of the Debtors' assets, including the dealer franchises, for $1,700,000. Applying Cal.Veh.Code § 11713.3(e), which prohibits transfer of automobile franchise agreements without the consent of the manufacturer whose consent may not be unreasonably withheld, the bankruptcy court required the consent of the automobile manufacturers prior to ordering assignment of the franchise agreements. Isuzu, Ford and GM refused to consent to the assignment of the franchise agreements to Worthington. On April 18, 1995, the Debtors sought an order compelling the assignment of the franchises over the objections of the manufacturers. On May 3 and 17, 1995, the bankruptcy court held hearings on Debtors' motion. On June 1, the bankruptcy court entered a Consolidated Order Authorizing Debtors to Assume and Assign Automobile Dealership Franchise Agreements and Consolidated Findings of Fact and Conclusions of Law Regarding Debtors' Motion to Assume and Assign Automobile Dealership Franchise Agreements ("Findings and Conclusions") finding that GM and Ford had been unreasonable in refusing to consent to the assignment.

Ford and GM appeal the order compelling assignment of the franchise agreements. On June 8, 1995, this Court granted Ford and GM's request for an emergency stay pending appeal.

II.

STANDARD OF REVIEW

This Court reviews the bankruptcy court's interpretation of applicable law *de novo,* and the findings of fact for clear error. *In re Tucker,* 989 F.2d 328, 330 (9th Cir. 1993).

III.

DISCUSSION

A. Applicability of California Vehicle Code Section 11713.3(e)

California law restricts an automobile franchisee's ability to assign the franchise without the consent of the manufacturer.

> It is unlawful and a violation of this code for any manufacturer, manufacturer branch, distributor, distributor branch licensed under this code to do any of the following:
>
> . . . .
>
> (e) To prevent, or attempt to prevent, a dealer from receiving fair and reasonable compensation for the value of the franchised business. *There shall be no transfer or assignment of the dealer's franchise without the consent of the manufacturer or distributor, which consent shall not be unreasonably withheld.*

Cal. Veh.Code § 11713.3 (emphasis added). The bankruptcy court held that this statute applied to the assignment of Debtors' automobile franchise agreements and inquired into the reasonableness of GM and Ford's refusal to consent to the assignment of the franchises to Worthington. Worthington now argues on appeal that it was error to apply this statute. Worthington contends that § 365(f)(1) of the Bankruptcy Code does not permit courts to look to state laws prohibiting the assignment of executory contracts. Worthington argues that the Court should not inquire whether the refusal to consent was "reasonable" under California law, but should inquire instead whether the proposed assignee has given the manufacturers "adequate assurances of future performance." 11 U.S.C. § 365(f)(2)(B).

The Bankruptcy Code provisions governing the assignment of executory contracts have caused considerable confusion. Section 365(f)(1) provides:

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> *981 Except as provided in subsection (c) of this section, notwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law, that prohibits, restricts, or conditions the assignment of such contract or lease, the trustee may assign such contract or lease. . . .

Subsection (c), the exception to this assignability rule, provides:

> The trustee may not assume or assign any executory contract or unexpired lease of the debtor, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if —
>
> (1)(A) applicable law excuses a party, other than the debtor, to such a contract or lease

> from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties. . . .

11 U.S.C. § 365(c)(1)(A).

The First Circuit in *In re Pioneer Ford Sales, Inc.,* 729 F.2d 27 (1st Cir.1984) held that a Rhode Island law which prohibited assignment of automobile franchises without the consent of the manufacturer was "applicable law" excusing the manufacturer from accepting performance from an assignee. GM and Ford argue that *Pioneer Ford* was correctly decided and urge this Court to follow that decision. In *Pioneer Ford,* Justice Breyer read the Bankruptcy Code in a manner which avoids conflict between the two provisions. He interpreted (f)(1) to apply to those state laws which enforce contractual anti-assignment provisions, and (c)(1)(A) to apply to those state laws which prohibit assignment regardless of whether the contract contains an anti-assignment provision.[2] *Id.* at 29. Under this analysis, (f)(1) prohibits the enforcement of contractual anti-assignment provisions in a bankruptcy proceeding, regardless of state laws validating those provisions. However, (c)(1)(A) requires the bankruptcy court to enforce those state laws which specifically prohibit the assignment of certain types of agreements. *Accord In re CFLC, Inc.,* 174 **B.R.** 119, 121 (N.D.Cal.1994) ("[S]ubsection (f) operates to delete a nonassignability clause from a contract and render it `silent' regarding assignment, but subsection 365(c) restores the nonassignability if applicable law holds such `silent' contracts to be nonassignable"); *In re Van Ness Auto Plaza, Inc.,* 120 **B.R.** 545 (Bankr.N.D.Cal. 1990) (following *Pioneer Ford* and applying Cal. Veh.Code § 11713.3); *In re Nitec Paper Corp.,* 43 **B.R.** 492, 498 (S.D.N.Y.1984) ("[Subsection (f)] allows a trustee to assign a contract even when the contract bars such an assignment, and even if `applicable law' in the state gives legal force to contractual provisions barring assignment. It does not allow a trustee to assign a contract in violation of a specific federal or state statutory mandate forbidding assignment.")

Other courts have been critical of the approach to §§ 365(f)(1) and (c)(1)(A) taken in *Pioneer Ford.* In *In re Magness,* 972 F.2d 689 (6th Cir.1992), the Sixth Circuit found the *Pioneer Ford* statutory construction unpersuasive: "There is simply nothing in the language of § 365(f) which supports the limitation read into it by that court [that (f)(1) applies only to statutes making contractual nonassignment clauses enforceable]." 972 F.2d at 695. The concurring opinion in *Magness* points out that § 365(f) "specifically includes within its scope situations in which the bar to assignment is not contractual but purely a product of the law," and thus should not be read to apply only to state laws enforcing anti-assignment clauses. *Id.* at 699. Faced with this conflict, the *Magness* majority concluded that "[n]either *Pioneer Ford* nor any other decision to date provides a defensible explication of the parameters of the § 365(c) exception." *Id.* at 695.

982 *982 Both opinions in *Magness* resolve the conflict between the two subsections by narrowing the scope of (c)(1), as opposed to the *Pioneer Ford* court's narrowing of (f)(1).

> We must read sections 365(f) and (c) together. At first, it might seem that they are not consistent, but a careful parsing of the provisions suggests that § 365(f) contains the broad rule and § 365(c) contains a carefully crafted exception to the broad rule made necessary by general principles of the common law and our constitutions.
>
> Subsection (f) states that although the contract or applicable law prohibits assignment,

> these provisions do not diminish the broad power to assume and assign executory contracts granted the trustee by § 365(a). In other words, a general prohibition against the assignment of executory contracts, i.e., by contract or "applicable law," is ineffective against the trustee. . . . However, subsection (f), by specific reference to subsection (c), allows one specific circumstance in which the power of the trustee may be diminished. Subsection (c) states that if the attempted reassignment by the trustee will impact upon the rights of a non-debtor third party, then any applicable law protecting the right of such party to refuse to accept from or render performance to an assignee will prohibit assignment by the trustee. While subsections (f) and (c) appear contradictory by referring to "applicable law" and commanding opposite results, a careful reading reveals that each subsection recognizes an "applicable law" of markedly different scope.

Id. Other than citing to the concurring opinion and suggesting that "the applicable law of controlling significance to the solution of this problem addresses the interests of the non-debtor third parties, rather than law relating to general prohibitions or restrictions on assignment of executory contracts covered by § 365(f)," *id.*, the Sixth Circuit offers no further explanation of the scope of "applicable law" under subsection (c).

The concurring opinion in *Magness* expresses the following view on the interplay between subsections (c)(1) and (f)(1) as follows:

> I need not resolve the problem, however, nor fully articulate my perception that the two sections refer to completely different legal concerns, with 365(f) covering "applicable law" (and contractual clauses) prohibiting or restricting assignments as such, and 365(c) embracing legal excuses for refusing to render or accept performance, regardless of the contract's status as "assignable" according to state law or its own terms.

972 F.2d at 699. Thus, both the majority and the concurring opinions appear to interpret "applicable law" in 365(c) as limited to those situations where the common law would permit the non-debtor party from refusing to accept performance from a proposed assignee, even in the absence of an express anti-assignment rule. *In re Antonelli*, 148 **B.R.** 443, 447 (D.Md.1992).[3]

The Eleventh Circuit in *In re James Cable*, 27 F.3d 534 (11th Cir.1994) adopted an approach similar to that taken by the *Magness* court and which Worthington urges this Court to follow:

> In determining what constitutes applicable law within the meaning of § 365(c)(1), § 365(c) should not be read in a vacuum. Rather, we must read it together with the other subsections in § 365. . . .
>
> . . . .
>
> . . . Subsection (f) states that `applicable law' prohibiting an assignment of an executory contract does not bar assignment of an executory contract by a trustee (or a debtor in possession). Thus, the `applicable law' to which subsection (c) refers must mean `applicable law' other than general prohibitions barring assignment . . . Subsection (c), as applied to this case, therefore, asks whether Tennessee law excused the City from

> accepting performance under the cable franchise agreement from a third party. . . .

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> *983 A general prohibition against assignment does not excuse the City from accepting performance from a third party within the meaning of (c)(1). In order to be excused from accepting performance, the City would need to point to applicable law such as a Tennessee law that renders performance under the cable franchise agreement non-delegable.

27 F.3d at 538.

> Worthington argues that
>
> the Eleventh Circuit essentially found that a state statute which prohibits an assignment of a specific type of executory contract is not `applicable law' which `excuses' performance within the context of 365(c)(1), but that such a statute is governed by 365(f)(1). In order for the narrow exception carved out by (c)(1) to apply, there must be applicable law which makes the duties to be performed under the contract non-delegable.

From the language of the *James Cable* opinion, however, it is not clear that the court viewed the exception in (c)(1) as narrowly as Worthington suggests. The court in *James Cable* held that a municipal ordinance which granted a cable television franchise and restricted its assignment was not "applicable law." 27 F.3d 534. The court expressly noted that no other Tennessee law prohibited assignment of cable franchises. *Id.* at 538. The municipal ordinance at issue in that case seems more closely analogous to a contractual provision barring assignment than to a state law prohibiting assignment of a particular type of contract. Applying the analysis of the case to a statute like Cal.Veh.Code § 11713.3(e) which prohibits assignment of a class of contracts, however, it is not clear that the decision in *James Cable* suggests, as Worthington argues, that this statute is not "applicable law" for the purposes of (c)(1). Section 11713.3(e) is not a "general prohibition against assignment" and makes the duties of an automobile franchisee "non-delegable," if the manufacturer reasonably refuses to consent to the proposed franchisee.

Worthington attempts to define the exception (c)(1) as applying only in those situations where the contract is "nonassignable as a matter of ordinary contract law" or where the contract involves "inherently non-delegable duties." These formulations are very similar to the widely rejected interpretation of (c)(1) as applying only to personal services contracts and suffer from the same defects. The statute itself contains no language limiting its application to "inherently nonassignable contracts" or "nondelegable duties." *Magness*, 972 F.2d at 699. *See also Pioneer Ford*, 729 F.2d at 28-29; *In re Midway Airlines, Inc.*, 6 F.3d 492, 495 (7th Cir.1993); *In re Braniff Airways, Inc.*, 700 F.2d 935, 943 (5th Cir.1983). In addition, the question of whether a particular duty is "personal" is a difficult one, which is simplified by looking to state law, including state statutory law, making certain types of contracts nonassignable.[4] Finally, the formulations suggested by Worthington render the exception in (c)(1) too narrow to be meaningful.

Recognizing the limitations of the approaches taken by both the *Pioneer Ford* and *Magness* courts, one commentator has suggested that Congress created an irreconcilable conflict in the statute by using the terms "applicable law" both in the rule, subsection (f)(1), and the exception to the rule, subsection (c)(1), and suggests that

> [p]erhaps the best approach is to recognize that the apparent conflict likely results from an effort by Congress to accommodate competing interests and that the best approach balances fairness to the nondebtor party with maximizing the bankruptcy estate.

1 *Norton Bankruptcy Law and Practice 2d* § 39:32.[5] In this case, the balance points toward the
984 application of Cal.Veh.Code *984 § 11713.3 and excusing the manufacturers from accepting performance from an assignee, so long as this refusal is reasonable. While maximization of the estate is clearly a primary goal of the Bankruptcy Code, § 365(c) recognizes that some executory contracts will not be assignable. In this particular case, virtually all of the proceeds from the sale will go to GE Capital, the Debtors' secured creditor. GE Capital, which has already been granted relief from the automatic stay, stated on the record in the bankruptcy court that the amount it would receive as a result of the sale is only marginally greater than what it would receive by foreclosing on its collateral. In the amended order authorizing the sale of the dealerships, the total allocated to all of the franchises is only $100,000 of the $1.7 million sale price. Fairness to the manufacturers requires allowing them some measure of control over the assignment of their franchise agreements. In weighing this balance of fairness to the manufacturer and the interests of the estate, it is also significant that the California prohibition on assignment is not absolute. Manufacturers are only excused from accepting performance from assignees when their refusal is "reasonable."

Given the contradictory language in subsections (f)(1) and (c)(1), no interpretation will be entirely satisfactory. The rule and the exception cannot be equivalent. The meaning of "applicable law" in one of the two subsections must be interpreted in such a way as to make sense of the statutory provision and this Court is persuaded that the *Pioneer Ford* decision strikes the proper balance. By interpreting (f)(1) to apply to state laws that validate contractual anti-assignment provisions, this subsection prohibits parties from relying on contractual anti-assignment provisions, regardless of state law. However, where federal or state statutory or common law prohibits assignment of certain types of agreements, even when these agreements are silent on the issue of assignment, it is appropriate to apply these laws in a bankruptcy proceeding.[6]

Worthington also argues that subsection (c)(1) does not apply because the California Vehicle Code does not "excuse" the manufacturers from accepting performance from someone other than the initial franchisee, but is rather a law which "prohibits, restricts or conditions" assignment, making subsection (f)(1) applicable. Worthington cites only one case relying on this distinction in interpreting subsections (f)(1) and (c)(1), *Matter of Fulton Air Service, Inc.*, 34 **B.R.** 568, 572 (Bankr.N.D.Ga.1983). This distinction is not particularly helpful, nor is it clear how it would be applied in this case. Worthington offers no convincing argument why Cal. Veh. Code § 11713.3(e) is not properly seen as "excusing" a manufacturer from accepting performance from an assignee, so long as the refusal to consent to the assignment is reasonable.

B. Standard for "Reasonable" Refusal to Consent Under Cal. Veh.Code § 11713.3(e)

There are no published decisions by a California state court interpreting Cal. Veh. Code § 11713.3(e). The only published opinion discussing the proper standard to apply under this statute is *In re Van Ness Auto Plaza, Inc.*, 120 **B.R.** 545 (Bankr.N.D.Cal. 1990). The court in that case looked to the law governing assignment of leases for guidance in selecting a standard of "reasonableness." The court reviewed several standards which have been employed in defining reasonableness in that context and concluded:

985 Although the standards set forth in the authorities quoted above differ from one *985 another to some extent, they are alike in that they focus not on whether the lessor's decision to withhold consent is correct, but on whether there is a substantial basis for the lessor's decision under relevant criteria. None of the authorities suggest that a court is to review the lessor's refusal to consent *de novo* and find that decision is unreasonable because the court would have decided differently. The quotation from the *Grossmann* [*v. Barney*] decision [359 S.W.2d 475 (Tex.Civ.App.1962)] expressly states that withholding consent may be reasonable even if the decision is wrong. The quotation from the *Thurman* [*v. Meridian Mut. Ins. Co.*] decision [345 S.W.2d 635, 639 (Ky.1961)] states that withholding consent is reasonable if, on the facts of the case, reasonable minds could differ as to whether consent should be withheld.

Id. at 548. Because an automobile dealership involves a closer relationship between the parties than the typical lease, and because it is more difficult to determine whether a proposed franchisee is capable of performing the duties of an automobile dealer, the court concluded that a manufacturer's refusal to consent to assignment of its automobile franchise should be afforded even greater deference than is commonly granted lessors in deciding to withhold consent. *Id.*

The court described the standard of reasonableness that it was adopting as follows:

> I conclude that withholding of consent to an assignment of an automobile franchise is reasonable under California Vehicle Code section 11713.3(e) if it is supported by substantial evidence showing that the proposed assignee is materially deficient with respect to one or more appropriate, performance-related criteria.[7] This test is more exacting than whether the manufacturer subjectively made the decision in good faith after considering appropriate criteria. It is an objective test that requires the decision to be supported by evidence. The test is less exacting than one which requires that the manufacturer demonstrate by a preponderance of the evidence that the proposed assignee is deficient. Although the initial burden of explaining the basis for the decision is on the manufacturer, the ultimate burden of persuasion is on the assigning dealer to demonstrate that the manufacturer's refusal to consent is unreasonable.

Id. at 549.

Ford contends that the standard applied by the *Van Ness* court is not sufficiently deferential to manufacturers. It argues that unreasonable means "irrational, foolish, unwise, absurd, silly, preposterous, senseless, and stupid." *Van Ness* at 548, citing *Mitchell's Inc. v. Nelms*, 454 S.W.2d 809 (Tex.Civ. App.1970). Ford suggests that its refusal to consent should be upheld if it "acted for a valid business reason," *Perez v. Jefferson Standard Life Ins. Co.*, 781 F.2d 475, 480 (5th Cir.1986), and argues that the appropriate standard is "something more than arbitrary and capricious and something less than supported by substantial evidence." *Harper v. United States*, 769 F.Supp. 362, 366 (M.D.Fla.1991).

The standard of reasonableness elaborated in *Van Ness* is an appropriate one, and to the extent the bankruptcy court adopted that standard, this Court agrees with that decision. *Harper* is a case considering the ability of the Internal Revenue Service to make jeopardy assessments against taxpayers, a situation which is in no way analogous to a manufacturer's decision to withhold consent to the assignment of a franchise agreement. Ford's arguments for the very high degree of deference to manufacturers' refusals of consent to transfer franchise agreements fail to take into account that Cal.
986 Veh.Code § 11713.3(e) also has as a purpose the protection of the franchisee.[8] The standard *986 adopted by the *Van Ness* court strikes an appropriate balance between the interests of the manufacturer and the interests of the franchisee.

C. Application of the *Van Ness* Standard to the Facts of This Case

In its June 1, 1995 Findings and Conclusions, the bankruptcy court found that

> The Debtor and Worthington have proven by a preponderance of the evidence that it is unreasonable for Ford, GMC and Isuzu to withhold their consent to the assumption and assignment of the Franchise Agreements to Worthington, viewing all evidence presented by all parties. The evidence presented by the franchisors to justify their refusals to consent to transfer of the franchises to Worthington is not substantial evidence that Worthington is materially deficient with respect to one or more relevant criteria. The evidence presented by debtors and Worthington rebutted and overcame the evidence presented by the franchisors, so that viewing all the evidence movants met the standard of proving by a preponderance that the manufacturers['] refusal to consent to Worthington was unreasonable.

Findings and Conclusions, ¶ 14.

1. GM's refusal to consent to the assignment to Worthington

GM argues that the bankruptcy court erred by determining that GM had not presented "substantial evidence" to justify its refusal to consent to transfer and by improperly balancing the evidence to conclude that Worthington's evidence "rebutted and overcame" GM's evidence. This Court agrees and, accordingly, reverses the order compelling transfer of the franchise agreements as to GM.

GM presented evidence that Worthington had received seriously deficient Customer Satisfaction Index ("CSI") ratings at his Chevrolet dealerships in Sacramento, California, Houston, Texas and Cupertino, California. As of February 1995, Worthington's Sacramento Chevrolet dealership's 12 month rating was 73, compared to a regional average of 86 and nationwide average of 88. Worthington Chevrolet ranked 87th out of 88 dealerships in his Marketing Sales and Service Area ("MSSA"), and 4401 out of 4428 dealers nationwide. GM's evidence showed that the Sacramento dealership's CSI ratings declined from 1992 to 1994. GM also presented evidence of poor CSI ratings at the Houston and Cupertino dealerships, which Worthington no longer owns. In 1991, the last full year Worthington owned the Houston dealership, its CSI rating was 72, 14 points below the MSSA average of 86, ranking Worthington Chevrolet 53 out of 56 dealerships in the MSSA.

The bankruptcy court found that

> Worthington's poor Customer Satisfaction Index ratings ("CSI") relating to three Chevrolet dealerships owned and operated by Worthington do not constitute a reasonable basis, alone or in conjunction with any other factors cited by Ford, GMC or Isuzu, for their refusal to consent to the assumption and assignment of their respective Franchise Agreements to Worthington. Worthington's rating under the PDS System which is being substituted by GMC for the CSI rating system is better than Worthington's CSI rating. Worthington has entered into an agreement with Caren Myers to become the general manager for the Cadillac and Pontiac-GMC Truck franchises being acquired by Worthington. Myers will obtain an equity interest in Worthington's Cadillac dealership. Myers successfully operated the Pontiac and Cadillac franchises at the Claremont location when they were owned by a prior owner. Myers has extraordinarily good CSI ratings with GMC in connection with the
> 987 Cadillac *987 dealership which she is currently managing.

Findings and Conclusions ¶ 16.

This finding demonstrates that the bankruptcy court improperly balanced evidence presented by Worthington against the evidence presented by GM. While recognizing that GM had presented evidence of very low CSI ratings, the bankruptcy court discounted the importance of this evidence by pointing out a recent improvement over a three month period at the Worthington Chevrolet dealership in Sacramento under a new rating system, "PDS," and by pointing out that Worthington had entered into an agreement with a very successful manager of Cadillac dealerships, Caren Myers ("Myers"), to manage the Claremont Cadillac and Pontiac/GMC Truck dealerships. The bankruptcy court did not limit itself to the question of whether the CSI evidence presented by GM was "substantial," but went on to determine that a recent upward trend in customer satisfaction under the new PDS system and the hiring of Caren Myers "rebutted and overcame" GM's evidence. This was an improper application of the legal standard discussed in *Van Ness*. The bankruptcy court required more than "substantial evidence" and, in effect, placed upon the manufacturer the burden of proving that Worthington was deficient as a proposed assignee, an approach rejected by the *Van Ness* court. 120 **B.R.** at 549.

The finding that GM had not presented substantial evidence that Worthington is materially deficient in one or more performance related criteria is clearly erroneous. The *Van Ness* court stressed the importance of customer satisfaction and concluded that

> It is not beyond the realm of reasonable decisions for a manufacturer of luxury cars to refuse to accept a dealer with CSI rankings that are average at best and possible well-below average.

120 **B.R.** at 550.[9] Here, there is no question that Worthington's CSI ratings are far below average; the Sacramento dealership is in the bottom 1% of Chevrolet dealerships nationwide. GM's refusal to transfer a franchise for its luxury line, Cadillac, is not unreasonable given the undisputed CSI evidence.

That Worthington and his proposed manager, Myers, have positive attributes is also not seriously in dispute. Worthington has had a long career in the automobile business, and has sold a large number of cars over the years. Also, Myers has been a very successful manager and has achieved high CSI ratings at the Cadillac dealership she currently manages. However, these positive attributes do not change the fact that GM has shown Worthington to be materially deficient in his CSI ratings. Reasonable minds might differ as to whether GM should have withheld consent, but the decision was based on substantial evidence and the court should not substitute its judgment for that of the manufacturer.[10]

2. Ford's refusal to consent to the assignment to Worthington

Ford contends that it also presented substantial evidence to support its decision to refuse to consent to transfer of the Ford franchise to Worthington. Like GM, Ford argues that the bankruptcy court applied the incorrect legal standard by improperly balancing the evidence offered by Ford and Worthington regarding his qualifications. Ford's position is that regardless of whether the bankruptcy court improperly balanced the evidence, the court's finding that Ford had not presented substantial evidence was clearly erroneous.

988 *988 Ford's evidence supporting its decision to refuse to consent to the assignment is found in the declaration of Richard L. Basile, Jr. ("Basile"), Regional Market Representation Manager for the Los Angeles Region of Ford. In evaluating dealer candidates, Ford considers four criteria: (1) Capital; (2) Character, focusing on the candidate's standing in the community and personal and financial reputation; (3) Capacity, meaning sales performance and management skills; and (4) Customer Satisfaction. Evaluating Worthington's application, Ford concluded that Worthington was deficient with regard to three of the four "Cs": character, capacity and customer satisfaction.

Ford determined that Worthington was deficient in character due to four consent decrees which Worthington entered into between 1979 and 1986. The bankruptcy court found that Ford's reliance on this criteria was unreasonable:

> The existence of consent decrees and a Federal Trade Commission order involving Worthington owned and operated dealerships during the period between 1979 and 1985 did not create a reasonable basis, alone or in conjunction with other factors cited by Ford, GMC or Isuzu, for their refusal to consent to the assumption and assignment of their respective Franchise Agreements to Worthington. The consent decrees and Federal Trade Commission order did not involve any findings of fraud. Worthington was awarded twelve dealerships after the issuance of the consent decrees and Federal Trade Commission order, three of which were awarded by GMC and one of which was awarded by Ford.

Findings and Conclusions, ¶ 15. This finding is not clearly erroneous. The fact that the consent decrees did not involve findings of fraud and that Worthington had been awarded numerous dealerships after the consent decrees had been entered into provides ample basis for the conclusion that Ford was unreasonable in relying on deficiencies in Worthington's character as a basis for refusing to consent to the transfer of the franchise agreement.

With regard to capacity, Ford determined that Worthington was deficient based on what Ford regarded as insufficient sales performance. Ford pointed to below average market share performance, which is calculated by comparing the dealer's sales to the percentage of vehicles registered in the region which were sold by Ford. Thus, if Ford sells 10% of the vehicles in the dealer's region, that dealer is expected to sell at least 10% of the vehicles in his or her primary market area. Ford's position is that sales performance less than 100% of the regional average is unacceptable. Ford presented evidence that Worthington Ford Long Beach was 79.4% of regional average on retail car performance and 86.3% on retail truck performance. With regard to Worthington Ford in Anchorage, Alaska, the market performance was 87.4% of the Seattle regional average on retail car performance and 115.3% of average on retail truck performance. Ford, however, says that these numbers are inaccurate as they give Worthington Ford, the only Ford dealer in Anchorage, credit for all Ford registrations in the area, even when the car or truck was not actually sold by Worthington. Considering registrations from Worthington Ford alone, market performance is 82.2% on retail car performance and 67.3% on trucks.

Worthington disputes both the accuracy and importance of these figures. As to the Anchorage dealership, Worthington presented evidence that the market share numbers are distorted because Ford automobiles enter that market from various sources not considered by Ford in calculating Worthington's market performance. Worthington presented evidence that Ford allows a Lincoln Mercury dealership in Anchorage to purchase Fords from dealers in other states and sell them in Alaska and that various car rental companies also sell Fords in the area. Worthington also presented evidence that he had won numerous sales awards for his Ford dealerships' performance.[11]

989 *989 The bankruptcy court apparently determined that the regional average comparison was an inappropriate measure of sales performance and that it was unreasonable for Ford to rely on this figure as the exclusive measure of sales performance. Other courts have considered factors which might depress a dealer's sales performance when measured in comparison to a regional average and have held that a manufacturer's refusal to consent to transfer on this basis to be unreasonable, when the regional average comparison is misleading. In *Key v. Chrysler Motors Corp.*, 119 N.M. 267, 889 P.2d 875 (N.M.Ct.App. 1995), the trial court determined that the proximity of the franchise in question to other dealerships in a separate marketing region made the comparison to the regional average an inaccurate measure of sales performance and found that it was unreasonable for Chrysler to rely on this factor in refusing to consent to the assignment of the franchise. In *Marquis v. Chrysler Corp.*, 577 F.2d 624 (9th Cir.1978), the Ninth Circuit held that failure to meet regional average sales alone was not sufficient grounds for termination of a dealer's franchise agreement.[12] "The nature of [a regional average comparison] renders it suspect as the single indicator of satisfactory sales performance." *Id.* at 632. Given that numerous dealers will by definition be below average, allowing manufacturers to rely heavily on a regional average comparison as the sole measure of sales performance would give them too great an opportunity to terminate dealerships or refuse to consent to the transfer of franchises to qualified candidates.

It was not an impermissible weighing of the evidence for the bankruptcy court to reject Ford's reliance on a regional average comparison as the sole measure of sales performance. Given the recognized difficulties with such a measure and the evidence regarding the nature of the market in Anchorage, it was not clearly erroneous for the bankruptcy court to conclude that Ford was being unreasonable in refusing to consent to transfer based on a failure to make sales at or above the regional average.

With regard to customer satisfaction, Ford admits that Worthington Long Beach is "marginally acceptable" and that Worthington Anchorage is "acceptable." However, Ford still found Worthington unacceptable based on the customer satisfaction ratings of Worthington Dodge in Carlsbad, California and Worthington Chevrolet in Sacramento. It was not error for the bankruptcy court to reject Ford's reliance on the experience of other manufacturers in refusing to consent to Worthington. Given Worthington's demonstrated ability to satisfy Ford customers, his difficulty satisfying Dodge or Chevrolet customers is not a relevant criteria.

Although the bankruptcy court found that Worthington's evidence "rebutted and overcame" Ford's evidence, there was not an improper balancing of the evidence in the case of Ford. A manufacturer cannot rely on unreasonable criteria in rejecting a proposed assignee. When a manufacturer's evidence is shown to relate to unreasonable criteria or is shown to be inaccurate, it is properly rejected. This is the case with Ford's evidence regarding the deficiencies of Worthington. The bankruptcy court did not err in finding that Ford had not presented substantial evidence to support its refusal to consent to the transfer of the franchise agreement to Worthington.

D. Applicability of 11 U.S.C. § 365(b)(2)(D)

On or about November 7, 1994, Debtors ceased operating the automobile dealerships. The bankruptcy cases were not filed until November 20, 1994. The franchise agreements provide that the manufacturer may terminate the franchise for failure to operate the business for seven consecutive business days.
990 Ford and GM argue that the debtors' failure to operate the franchises constitutes *990 an incurable default, rendering the franchises non-assignable.

The bankruptcy court held that § 365(b)(2)(D) relieved the debtor from the obligation of curing the default. This section provides:

> Paragraph (1) of this subsection [imposing the requirement of curing defaults prior to assumption and assignment] does not apply to a default that is a breach of a provision relating to —
>
> . . . . .
>
> (D) the satisfaction of any penalty rate or provision relating to a default arising from any failure by the debtor to perform nonmonetary obligations under the executory contract or unexpired lease.

11 U.S.C. § 365(b)(2)(D). The bankruptcy court held that the failure to operate the dealerships was a nonmonetary default which, according to § 365(b)(2)(D), did not have to be cured before the franchise agreements could be assumed and assigned. This Court agrees with the bankruptcy court's interpretation and, accordingly, affirms with regard to this issue.

Ford and GM argue that subsection (b)(2)(D) refers only to the payment of penalties that a debtor would be required to pay as a result of a pre-petition breach. The plain language of the statute does not support this construction. The statute refers to a "penalty rate *or* provision relating to a default arising from any failure by the debtor to perform nonmonetary obligations under the executory contract. . . ." The most natural reading of this language supports the interpretation given it by the bankruptcy court — that a trustee or debtor in possession is not required to cure nonmonetary defaults in order to assume and assign executory contracts and leases.

GM and Ford argue that this plain interpretation of the language should not be followed as it works a "radical" change in the law and that Congress did not intend such a radical change. In support of their position, the manufacturers argue that the legislative history suggests a more narrow purpose for the amendment to § 365(b):

> Finally, section 365(b) is *clarified* to provide that when sought be a debtor, a lease can be cured at a nondefault rate (*i.e.,* it would not need to pay penalty rates).

5 U.S. Congressional and Administrative News at p. 3359 (1994) (House Report No. 103-835, § 220 of the Bankruptcy Reform Act) (parenthetical in original) (emphasis added). From this legislative history the manufacturers argue that the only Congressional purpose in enacting § 365(b)(2)(D) was to relieve the trustee or debtor in possession from any requirement of paying penalties prior to assumption of the executory contract or lease. This resort to legislative history is insufficient to defeat the expression of intent found in the plain language of the statute.

> [I]n rare cases the literal application of a statute will produce a result demonstrably at odds with the intention of its drafters, and those intentions must be controlling. We have reserved "some `scope for adopting a restricted rather than a literal or usual meaning of its words where acceptance of that meaning . . . would thwart the obvious purpose of the statute.'" *Commissioner of Internal Revenue v. Brown,* 380 U.S. 563, 571, 85 S.Ct. 1162, 1166, 14 L.Ed.2d 75 (1965) (quoting *Helvering v. Hammel,* 311 U.S. 504, 510-511, 61 S.Ct. 368, 371, 85 L.Ed. 303 (1941).

Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571, 102 S.Ct. 3245, 3250, 73 L.Ed.2d 973 (1982). GM and Ford have not demonstrated that the interpretation of § 365(b)(2)(D) as eliminating the requirement of curing nonmonetary defaults prior to assumption and assignment is "demonstrably at odds" with the intentions of the drafters or that it "thwarts the obvious purpose of the statute." The obvious purpose of § 365(b)(2)(D) was to make it easier to cure certain defaults, and the bankruptcy court's interpretation of the statute is consistent with that purpose.[13]

991 *991 For the foregoing reasons, the bankruptcy court's order compelling assignment of the Cadillac and Pontiac/GMC Truck franchise is reversed and the order compelling assignment of the Ford franchise is affirmed.

[1] In addition, Ford appeals the bankruptcy court's decision to overrule numerous of its objections to Worthington's evidence. Ford has not specified the grounds for its appeal. This Court has considered Ford's appeal and affirms the bankruptcy court's evidentiary rulings.

[2]

As a matter of logic, however, we see no conflict, for (c)(1)(A) refers to state laws that prohibit assignment "whether or not" the contract is silent, while (f)(1) contains no such limitation. Apparently (f)(1) includes state laws that prohibit assignment only when the contract is *not* silent about assignment; that is to say, state laws that enforce contract provisions prohibiting assignment. *See* 1 Norton, *Bankruptcy Law and Practice,* § 23.14. These state laws are to be ignored. The section specifically excepts (c)(1)(A)'s state laws that forbid assignment even when the contract *is* silent; they are to be heeded.

729 F.2d at 29.

[3] The court in *Antonelli* recognized that the limitation on "applicable law" in 365(c) is "somewhat facile," but felt that it "opens the way to a thoughtful and just resolution of the issues." 148 B.R. at 448.

[4] *See In re Headquarters Dodge*, 13 F.3d 674, 683 (3d Cir.1993) (remanding for determination whether automobile franchise was a "personal services" contract under Michigan law.)

[5] The court in *In re Catron*, 158 **B.R.** 629 (E.D.Va.1993) dealt with conflict between (f)(1) and (c)(1) by simply disregarding the language "applicable law" in subsection (f)(1), producing a result identical to that in *Pioneer Ford:* (f)(1) refers to contractual anti-assignment clauses and state laws which make them enforceable and (c)(1) refers to state and federal laws which make nonassignable even contracts which are silent on the issue of assignment.

[6] The other cases cited by Worthington are either inconsistent with the *Pioneer Ford* case or are factually distinguishable. In *In re Wills Motors, Inc.*, 133 **B.R.** 303 (Bankr.S.D.N.Y.1991), the court found that the manufacturer had no reasonable basis for its decision to refuse to consent to the transfer of the franchise agreement. In *In re Tom Stimus Chrysler-Plymouth, Inc.*, 134 **B.R.** 676 (Bankr.M.D.Fla.1991), the court incorrectly limited the scope of § 365(c)(1) to personal service contracts. The other cases cited involved no statutory prohibition on assignment. *In re Sunrise Restaurants, Inc.*, 135 **B.R.** 149 (Bankr. M.D.Fla.1991); *In re U.L. Radio Corp.*, 19 **B.R.** 537 (Bankr.S.D.N.Y.1982); *In re Bronx-Westchester Mack Corp.*, 20 **B.R.** 139 (Bankr.S.D.N.Y. 1982); *In re Varisco*, 16 **B.R.** 634 (Bankr. M.D.Fla.1981); *In re Rooster, Inc.*, 100 **B.R.** 228 (Bankr.E.D.Pa.1989).

[7]

Relevant considerations include: (1) whether the proposed dealer has adequate working capital; (2) the extent of prior experience of the proposed dealer; (3) whether the proposed dealer has been profitable in the past; (4) the location of the proposed dealer; (5) the prior sales performance of the proposed dealer; (6) the business acumen of the proposed dealer; (7) the suitability of combining the franchise in question with other franchises at the same location; and (8) whether the proposed dealer provides the manufacturer sufficient information regarding its qualifications.

Van Ness, 120 **B.R.** at 547.

[8]

It is unlawful and a violation of this code for any manufacturer, manufacturer branch, distributor, distributor branch licensed under this code to do any of the following:

. . . . .

To prevent, or attempt to prevent, a dealer from receiving fair and reasonable compensation for the value of the franchised business.

Cal.Veh.Code § 11713.3(e).

[9] *See Bill Call Ford, Inc. v. Ford Motor Co.*, 48 F.3d 201, 203 (6th Cir.1995) (not unreasonable for manufacturer to condition transfer on assignees ability to meet CSI targets).

[10] GM argues that Worthington was deficient in several other performance related criteria as well. GM argues that the bankruptcy court did not properly consider evidence that Worthington was deficient with regard to sales and profit history, working capital, existence of consent decrees related to sales and advertising practices, and his failure to provide all requested information in connection with his application to take over the Claremont Cadillac and Pontiac/GMC Truck dealerships. Some of these alleged deficiencies were disputed by Worthington, especially the question of whether his Sacramento Chevrolet dealership was undercapitalized, and the bankruptcy court apparently found that the other alleged deficiencies were not material. This finding is not clearly erroneous.

[11]

Worthington has consistently been ranked among the top 100 dealers nationally among Ford dealers in sales. Worthington has regularly won the Ford "Super Bowl" competition for his Ford dealerships both in Anchorage, Alaska and Long Beach, California. With regard to the Anchorage dealership, Worthington has ranked first in sales volume of all dealers in the state of Alaska and has consistently won sales contests based on sales volume.

Findings and Conclusions, ¶ 26.

[12] Over an eight year period, the dealer in *Marquis* had attained the regional average in only one year, and in the remaining years his sales were 50-80% of the regional average.

[13] Ford argues in addition that application of § 365(b)(2)(D) to this case is an impermissible retrospective application of the statute.

However, section 702 of the Reform Act clearly provided that the amendments would be applicable to bankruptcy cases filed after October 22, 1994. As these bankruptcy cases were filed after that date, § 365(b)(2)(D) applies. Further, application of this statute to these franchise agreements does not affect property rights of the type at issue in *United States v. Security Indus. Bank,* 459 U.S. 70, 103 S.Ct. 407, 74 L.Ed.2d 235 (1982) and the fact that the provision affects existing contractual rights does not render it invalid. *Id.*, 459 U.S. at 80, 103 S.Ct. at 413.

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338 S.E.2d 114 (1985)
78 N.C. App. 521

GENERAL MOTORS CORPORATION, PONTIAC MOTOR DIVISION AND OLDSMOBILE DIVISION

v.

Samuel Lee KINLAW d/b/a Knox Olds-Pontiac: R.W. Wilkins, Jr., In his official capacity as Commissioner of the Division of Motor Vehicles; and Robert A. Pruett, In his official capacity as Hearing Officer for the Division of Motor Vehicles.

No. 8510SC217.

Court of Appeals of North Carolina.

December 31, 1985.

117 *117 Poyner, Geraghty, Hartsfield & Townsend by Cecil W. Harrison, Jr., Raleigh, for petitioner-appellant.

Manning, Fulton & Skinner by Howard E. Manning and Charles E. Nichols, Jr., Raleigh, for respondent-appellee.

WHICHARD, Judge.

Petitioner contends the evidence is not sufficient to support the Commissioner's finding that the failure to renew the franchise agreements was without "good cause." Review of a decision by the Commissioner of Motor Vehicles is governed by N.C.Gen.Stat. 150A-51. *See* N.C.Gen.Stat. 20-300. An agency decision may be reversed or modified if it is "[u]nsupported by substantial evidence ... in view of the entire record as submitted." N.C.Gen.Stat. 150A-51(5). This standard of review is known as the "whole record" test. *Thompson v. Board of Education,* 292 N.C. 406, 410, 233 **S.E.2d** 538, 541 (1977). When, in applying this test, reasonable but conflicting views emerge from the evidence, this Court cannot replace the agency's judgment with its own. It must, however, "take into account whatever in the record fairly detracts from the weight" of the evidence which supports the decision. *Id.* Ultimately it must determine whether the decision has a rational basis in the evidence. *In re Rogers,* 297 N.C. 48, 65, 253 **S.E.2d** 912, 922 (1979).

Respondent instituted this proceeding 14 April 1983 by filing a petition pursuant to N.C.Gen.Stat. 20-305 (1978), which provides:

> It shall be unlawful for any manufacturer, factory branch, distributor, or distributor branch, or any field representative, officer, agent, or any representative whatsoever of any of them:
>
> (6) Notwithstanding the terms of any franchise agreement to terminate, cancel, or refuse to renew the franchise of any dealer, without good cause, and unless (i) the dealer and the Commissioner have received written notice of the franchisor's intentions at least 60 days prior to the effective date of such termination, cancellation, or the expiration date of the franchise, setting forth the specific grounds for such action, and (ii) the Commissioner has determined, if requested in writing by the dealer within such 60-day period, and after a hearing on the matter, that there is good cause for the termination, cancellation, or nonrenewal of the franchise ... provided that in any case where a petition is made to the Commissioner for a determination as to good cause for the termination, cancellation, or nonrenewal of a franchise, the franchise in question shall continue in effect pending the Commissioner's decision....

118 Effective 6 August 1983, N.C.Gen.Stat. 20-305(6) was amended. 1983 Sess.Laws ch. 704, sec. 25. Rather than substantively changing the statute, many portions of the amendments merely clarified the original intent. *See* N.C.Gen.Stat. 20-305(6) (1978); N.C.Gen.Stat. 20-305(6) (1983). *See also* *Childers v. Parker's Inc.,* 274 N.C. 256, 260, 162 **S.E.2d** 481, 483 (1968) ("In construing a statute with reference to an amendment it is presumed that the legislature intended either (a) to change the substance of the original act, or (b) to clarify the meaning of it."). Much of N.C.Gen.Stat. 20-305(6) (1978) has not been judicially interpreted and, although the statute as amended does not affect litigation

pending at the time of its enactment, 1983 Sess.Laws ch. 704, sec. 25, portions of the amendments are helpful in ascertaining the intent of the legislature in enacting the original version. *See* *Investors, Inc. v. Berry,* 293 N.C. 688, 695, 239 **S.E.2d** 566, 570 (1977) ("In interpreting statutes, the primary duty of this Court is to ascertain and effectuate the intent of the Legislature. *118 [L]ight may be shed upon [that] intent... by reference to subsequent amendments which ... may be interpreted as clarifying it.").

N.C.Gen.Stat. 20-305(6) (1983) reads, in pertinent part,

> a. Notwithstanding the terms, provisions or conditions of any franchise or the terms or provisions of any waiver, good cause shall exist for the purposes of a termination, cancellation or nonrenewal when:
>
> 1. There is a failure by the new motor vehicle dealer to comply with a provision of the franchise which provision is both reasonable and of material significance to the franchise relationship....
>
> 2. If the failure by the new motor vehicle dealer, defined in 1 above, relates to the performance of the new motor vehicle dealer in sales or service, then good cause shall be defined as the failure of the new motor vehicle dealer to comply with reasonable performance criteria established by the manufacturer if the new motor vehicle dealer was apprised by the manufacturer in writing of such failure; and ... the new motor vehicle dealer's failure was not primarily due to economic or market factors within the dealer's relevant market area which were beyond the dealer's control.
>
> b. The manufacturer shall have the burden of proof under this section.

We find the above provisions indicative of legislative intent in the original enactment of N.C.Gen.Stat. 20-305(6) (1978), and we therefore consider them in analyzing the Commissioner's decision. Thus, to prove that poor sales performance constitutes good cause for its failure to renew respondent's franchise agreements, petitioner must demonstrate that:

1. Respondent failed to comply with a provision of the franchise agreements which required satisfactory sales performance;

2. Petitioner's performance standards are reasonable; and

3. Respondent's failure was not due primarily to economic or market factors beyond his control.

The "Dealer Sales and Service Agreement," which outlines the rights and obligations of petitioner and respondent, provides that respondent "is responsible for: (a) actively and effectively selling ... new Motor Vehicles to customers of Dealer; and (b) actively and effectively promoting, through Dealer's own advertising and sales promotion activities, the purchase and use of new Motor Vehicles...." Thus, nothing else appearing, respondent's poor sales performance could constitute good cause for petitioner's nonrenewal.

Having reviewed the record as a whole, however, we find substantial evidence to support the Commissioner's determination that petitioner's failure to renew the agreements was without cause. The Commissioner found that during the period in question respondent's sales performance was affected by high interest rates, rising unemployment, and a general economic recession. Respondent testified that as a result of rising interest rates the cost of maintaining a large inventory rose dramatically. The manager of the sales finance department for Wachovia Bank testified that his department's financing of automobiles, automobile dealers, and automobile agencies dropped off by as much as forty percent during 1980, 1981 and 1982. A salesman for Knox Olds-Pontiac testified that during the same period other dealerships in the area significantly reduced their inventories. The director of Industrial and Agricultural Development for Robeson County testified regarding the county's generally high unemployment rate and various industrial layoffs and shut-downs, all of which could have affected the demand for new automobiles. According to respondent, to remain in business under these economic conditions he had to reduce inventory, cut back on sales staff, and in general "pull back and hold in...."

In addition the Commissioner determined that petitioner's distribution system was partially responsible for respondent's
119 poor *119 sales performance. Respondent testified that Robeson County is generally an agricultural community; as a

result, consumers tend to purchase cars in the fall after having received money for their crops. During the months of August, September and October petitioner distributes its new model cars according to a "controlled distribution" system. The number of cars a dealer receives is based on the number sold by that dealer from January through July. Thus, respondent was unable to stock cars in periods of high demand.

Petitioner maintains that its evidence refutes the proposition that respondent's sales performance was the result of poor economic conditions. Petitioner's evidence establishes that from 1979-82 respondent's sales were below national, regional, and local sales figures, while the sales of two nearby Oldsmobile/Pontiac dealerships, affected by economic conditions similar to those affecting respondent's dealership, were above the same sales standards. In addition petitioner's evidence established that during all relevant periods more Oldsmobiles and Pontiacs were purchased in respondent's area of primary responsibility than were sold by respondents. Thus, according to petitioner, respondent was not fully servicing the demand for Oldsmobiles and Pontiacs within his area of primary responsibility.

Petitioner assesses the performance of its dealerships by comparing an individual dealer's market penetration with national, regional and local levels of market penetration. A dealership's market penetration is determined by dividing the number of cars it sold by the total number of cars sold in its area of primary responsibility. Petitioner's national, regional, and local market penetrations are comparisons between the number of all cars sold in a given market and the number of Oldsmobiles and Pontiacs sold in the same market.

Throughout its dealings with respondent, petitioner maintained that respondent had to achieve a market penetration in its area of primary responsibility equal to national and regional (North and South Carolina) levels. These levels do not necessarily reflect economic conditions affecting an individual dealership. Further, a dealership's performance relative to other dealerships cannot adequately be assessed based on national, regional, and local penetration levels alone. For example, in 1981 Oldsmobile's national market penetration was 9.9, *i.e.,* approximately ten out of every one hundred cars sold nationwide in 1981 were Oldsmobiles. While Oldsmobile's national penetration was 9.9, the market penetration achieved by individual dealerships varied. Petitioner did not present any evidence regarding the number of dealerships below national or regional penetration levels. Assuming an even distribution, in any given year one-half of all petitioner's dealers have market penetration below national and regional levels. Petitioner failed to identify any acceptable level below national and regional levels. The Commissioner thus could find petitioner's standards unreasonable. Petitioner's method of assessing sales performance could enable it to terminate half its franchise agreements. Accordingly, the success of two nearby dealerships in achieving national and regional levels of market penetration, while respondent did not, is not dispositive.

Petitioner asserts that, rather than poor economic conditions, respondent's attitude toward not having received a standard five-year dealership agreement accounted for the dealership's poor sales performance. It points to respondent's testimony:

> Well, then I got a letter notifying me that they were going to extend it for another year, and I called Gary and I told him, I said, Gary, I said, this is not what we discussed. I said, you promised me that you were either going to terminate me on May 31st of `82 or you were going to give me my normal Five-Year Sales Agreement. *I explained to Gary, I said, if you'll go ahead and do this we can get the show on road, but just another year's extension is going to be doing it the same way. In other words, we're going to pull back and hold in....*

120 *120 Respondent repeatedly insisted that he was entitled to a five-year franchise agreement and maintained that if given a five-year agreement he would implement petitioner's requests that he stock more cars, hire more sales persons, and launch a new advertising program. It is clear from respondent's testimony, however, that given the extant economic conditions he did not consider petitioner's requests prudent. He was thus willing to take the risks involved in financially extending himself in a recessionary period only if he had the protection from termination he believed a five-year contract would afford. While in view of N.C.Gen.Stat. 20-305(6) respondent was perhaps mistaken in believing a five-year contract would provide greater protection from termination than his two-year agreements, the Commissioner nonetheless could find that he was not required to implement measures he reasonably considered improvident under the circumstances.

Petitioner contends the Commissioner was influenced by arbitrary and capricious factors. An agency decision infected by consideration of arbitrary and capricious matters which substantially affect a party's rights violates N.C.Gen.Stat. 150A-51(6) and cannot be affirmed. A & T University v. Kimber, 49 N.C.App. 46, 51-52, 270 **S.E.2d** 492, 495 (1980).

The Commissioner made numerous findings of fact regarding the sales performance of Knox Olds-Pontiac during the period 1976-79. Petitioner maintains that these findings are not relevant to a determination of whether good cause for terminating respondent's franchise existed, since respondent did not enter into the franchise agreements until June and November of 1980. However, petitioner presented testimony which established that a dealer's supply of new cars is based on sales made by that dealership in the preceding year. Thus, the Commissioner could examine the number of cars ordered by, delivered to, and sold by Knox Olds-Pontiac prior to respondent's franchise agreement to determine the extent to which respondent's poor sales performance was a function of factors beyond respondent's control.

In addition petitioner maintains the Commissioner's determination is infected by his unsupported findings that petitioner "insisted" and "demanded" that respondent take certain steps to improve sales performance. Petitioner admits that its agents repeatedly "*recommended*" that respondent increase inventory, employ more sales persons, and launch a new advertising program. Petitioner's Charlotte zone manager testified that respondent's failure to implement the above recommendations was a primary factor in the decision to terminate respondent's franchise agreements. We find that the Commissioner's choice of words to state his findings is supported by substantial evidence in the record.

Petitioner also objects to the Commissioner's finding that it "began planning to terminate the Knox Olds-Pontiac dealership as early as February 1981." The finding, however, is supported by substantial evidence. By letter dated 12 February 1981 the following information was circulated among petitioner's management personnel:

> The Interim Selling Agreement for the above dealer [respondent] expires on May 31, 1982. It is important that we maintain a record of routine contacts with Sam Kinlaw showing that we have covered the sales and registration requirements for Oldsmobile with him.
>
> We should also recite any agreement or lack of agreement which he would or would not cooperate with. Of course, include in your report his agreement or refusal to order adequate cars for his market.

In addition a salesman for respondent testified that early in 1981 petitioner's district manager told him petitioner was trying to find someone to take over the dealership.

For the foregoing reasons, we hold the superior court's affirmance of the Commissioner's order proper insofar as that
121 order found petitioner to have failed to renew *121 respondent's franchise agreements without cause and directed that the agreements not be terminated.

Petitioner next contends the Commissioner exceeded his authority in ordering it to enter "a regular five (5) year motor vehicle dealer sales agreement" with respondent. We agree. The Commissioner has "only such authority as is properly conferred upon [him] by the Legislature." Insurance Co. v. Gold, Commissioner of Insurance, 254 N.C. 168, 173, 118 **S.E.2d** 792, 796 (1961); *Insurance Co. v. Lanier, Comr. of Insurance,* 16 N.C.App. 381, 384, 192 **S.E.2d** 57, 58-59 (1972). In addition to the powers expressly vested in an agency by statute, those powers reasonably necessary for the agency to function properly are implied from the legislature's general grant of authority. In re Community Association, 300 N.C. 267, 280, 266 **S.E.2d** 645, 654-55 (1980); *Insurance Co.,* 16 N.C.App. at 384, 192 **S.E.2d** at 58.

Neither N.C.Gen.Stat. 20-301 (1978), which delineates the powers of the Commissioner, nor N.C.Gen.Stat. 20-305(6) (1978), pursuant to which this proceeding was initiated, expressly vest the Commissioner with the power to order parties to enter into a contract. Further, the proper functioning of the Department of Motor Vehicles under Article 12 of the General Statutes, "Motor Vehicle Dealers and Manufacturers Licensing Law," does not require that the Commissioner hold such power. N.C.Gen.Stat. 20-305(6) requires the Commissioner, upon a dealer's request, to determine whether there is "good cause" for a franchisor's nonrenewal of a dealership agreement. Once the Commissioner determines that good cause does not exist, the franchisor's attempts to terminate relations with the dealership are in violation of Article 12 and the Commissioner may seek to enjoin the franchisor's actions by initiating a proceeding pursuant to N.C.Gen.Stat. 20-301(d). Thus, the franchise continues in effect until termination for good cause is effected pursuant to N.C.Gen.Stat. 20-305(6) (1983) or until both parties consent to cancellation. The statutory prohibition on franchise termination except for cause remains intact. *See* Note, *Adjusting the Equities in Franchise Termination: A Sui Generis Approach,* 30 Clev.St.L.Rev. 523, 547 (1981). It is not necessary that the Commissioner have the power to order parties to enter into contracts to enable the agency to function properly.

A similar result was reached in *Mazda Motors v. Southwestern Motors,* 36 N.C.App. 1, 15, 243 **S.E.2d** 793, 803 (1978), *modified in part on other grounds,* 296 N.C. 357, 250 **S.E.2d** 250 (1979). There this Court found that the notice requirements for termination pursuant to N.C.Gen.Stat. 20-305(6) had not been met. As a result the franchise agreement was held to remain in effect until notice was perfected.

In ordering the parties to enter a five-year contract the Commissioner exceeded the authority vested in him by the General Assembly. Accordingly, the superior court should have vacated that portion of the Commissioner's order. The franchise agreements continue in effect until petitioner makes a proper termination pursuant to N.C.Gen.Stat. 20-305(6) (1983) or until the parties mutually agree to terminate. Petitioner may again seek to terminate the agreements by complying with the notice provisions of N.C.Gen.Stat. 20-305(6) (1983).

The order of the superior court, except for its affirmance of those portions of the Commissioner's order requiring petitioner to enter "a regular five (5) year motor vehicle dealer sales agreement" with respondent, is affirmed. Insofar as the order affirms the portions of the Commissioner's order requiring petitioner to enter "a regular five (5) year motor vehicle dealer sales agreement" with respondent, it is reversed, and the cause is remanded with instructions to modify the order by vacating those portions.

Affirmed in part, reversed in part, and remanded.

EAGLES and COZORT, JJ., concur.

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212 S.W.3d 425 (2006)

AUSTIN CHEVROLET, INC. d/b/a Munday Chevrolet/Geo and General Motors Corporation, Appellants,

v.

MOTOR VEHICLE BOARD AND MOTOR VEHICLE DIVISION OF THE TEXAS DEPARTMENT OF TRANSPORTATION and Landmark Chevrolet Corporation, Appellees.

No. 03-05-00355-CV.

Court of Appeals of Texas, Austin.

June 9, 2006.
Rehearing Overruled July 21 and September 19, 2006.

428 *428 Howard V. Rose, Walter H. Mizell, Brown McCarroll, Austin, for Austin Chevrolet.

J. Bruce Bennett, Cardwell, Hart & Bennett, LLP, Austin, for Landmark Chevrolet Corporation.

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Dent M. Morton, Eric D. Franz, Burr & Forman, LLP, Birmingham, AL, pro hac vice.

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Before Chief Justice LAW, Justices PATTERSON and PEMBERTON.

OPINION

JAN P. PATTERSON, Justice.

This is an appeal from a final order issued by the Motor Vehicle Board of the Texas Department of Transportation[1] in a *Subaru* proceeding.[2] *See* Subaru of Am., Inc. v. David McDavid Nissan, Inc., 84 **S.W.3d 212**, 226 (Tex.2002). In this case, Landmark Chevrolet Corporation (Landmark) filed a lawsuit against General Motors Corporation (GM) and Austin Chevrolet, Inc., d/b/a Munday Chevrolet/Geo (Munday) (together "GM/Munday"), alleging that GM defrauded Landmark out of its right to protest[3] Munday's dealership application in 1993 and discriminated against Landmark in the allocation of Suburbans and Tahoes from 1994 to 1997. The district court abated the suit and referred these two issues to the Board for determination. *See* Tex. Occ.Code Ann. §§ 2301.151, .251-.266 (West 2004); *Butnaru v. Ford Motor Co.,* 84 **S.W.3d** 198, 206 (Tex.2002); *Subaru,* 84 **S.W.3d** at 223. After an administrative law judge (ALJ) conducted a hearing and prepared a proposal for decision (PFD), the Board ruled for Landmark on the first issue and for GM/Munday on the second issue.

GM/Munday now appeal the issue decided in favor of Landmark, contending that the Board acted in an arbitrary and capricious manner by refusing to answer the question posed by the district court and by ignoring the Board's precedent. We affirm the Board's order.

429 *429 FACTUAL AND PROCEDURAL BACKGROUND

This appeal arises out of a dispute over the establishment and relocation of the Munday dealership in the north Houston area. In 1993, Munday filed an application with the Board for a new franchised motor vehicle dealer's license for a dealership to be located in northwest Houston, at F.M. 1960 and Cypress Station Drive, approximately one-half mile west of Interstate Highway 45. This application was timely protested by Landmark, a large-volume dealership located ten miles south of the proposed Munday location on Interstate Highway 45. GM intervened in the protest proceeding on Munday's behalf. A pretrial conference was held, discovery conducted, and a hearing on the merits was scheduled. Prior to the commencement of the hearing, Landmark dismissed its protest of the Munday application after, it contends, it was assured that GM would give consideration to Landmark's concerns about the proposed dealership. The Board then issued a license to Munday. Soon after, Munday completed construction of the dealership and commenced operations.

In 1997, Munday filed an application with the Board to relocate the dealership directly onto Interstate Highway 45. Landmark filed this lawsuit against GM/Munday, alleging, among other things, that GM defrauded Landmark out of its right to protest Munday's 1993 application. Landmark alleged that GM was biased in the 1993 matter because GM had conditioned its offer of the Chevrolet franchise to Munday on Munday's purchase, for above-market value, of the GM-owned property at F.M. 1960 and Cypress Station Drive.

On motions filed by GM/Munday, the district court abated the suit and referred the matter to the Board to answer the following question at issue in this appeal:

> If Landmark had not withdrawn its protest of the license application at issue in William F. Munday d/b/a Bill Munday Chevrolet/Geo, Applicant v. Landmark Chevrolet Corp., Protestant and General Motors Corporation, Intervenor, before the Texas Department of Transportation, Division of Motor Transportation; Docket No. 93-094, under § 4.06(c) of the Texas Motor Vehicle Commission Code,[4] would Landmark have obtained a final order denying the license application?[5]

This abatement was predicated upon decisions issued by the supreme court in *Butnaru* and *Subaru,* wherein the court determined that the Board has the exclusive jurisdiction to determine violations of the motor vehicle code. *See* Butnaru, 84 **S.W.3d** at 206; *Subaru,* 84 **S.W.3d** at 223. Following the district court's abatement, Landmark initiated a contested-case proceeding by filing a complaint with the Board against GM/Munday so the Board could answer the district court's question. The role of the Board in this matter was to interpret the code so that the district court could determine if damages were to be assessed against GM/Munday. *See* Subaru, 84 **S.W.3d** at 224.

430 *430 In the contested-case proceeding, GM/Munday had the burden to show good cause for the establishment of the new Munday dealership pursuant to § 2301.652(a) of the occupations code, which states,

> (a) The board may deny an application for a license to establish a dealership if, following a protest, the applicant fails to establish good cause for establishing the dealership. In determining good cause, the board shall consider:
>
> (1) whether the manufacturer or distributor of the same line-make of new motor vehicle is being adequately represented as to sales and service;
>
> (2) whether the protesting franchised dealer representing the same line-make of new motor vehicle is in substantial compliance with the dealer's franchise to the extent that the franchise is not in conflict with this chapter;
>
> (3) the desirability of a competitive marketplace;
>
> (4) any harm to the protesting franchised dealer; and
>
> (5) the public interest.

See Tex. Occ.Code Ann. § 2301.652(a) (West 2004). The second factor was not in dispute; the other four factors were contested.

The Board found that GM/Munday failed to prove good cause for the addition of the Munday dealership. As a result, the Board found that if Landmark had not withdrawn its protest of Munday's license application in 1993, its protest would have been granted and Munday's application would have been denied. GM/Munday filed an administrative appeal in district court and Landmark removed the appeal to this Court pursuant to section 2301.751(b) of the occupations code. *See id.* § 2301.751(b) (West 2004).

ANALYSIS

The Controversy

GM/Munday contend that after the parties had agreed to refer the question to the Board, the Board improperly recast the question. GM/Munday further contend that the Board improperly excluded evidence, specifically the testimony of the former executive director of the Board, which it sought to proffer. GM/Munday also argue that, in analyzing the statutory good-cause factors on harm and adequacy of representation, the Board abandoned precedent and penalized GM/Munday for using a previously approved standard, thus violating their due process and equal protection rights.

Landmark and the Board respond that the Board properly conducted the proceedings and that its decision was supported by substantial evidence.

Standard of Review

We review the Board's decision under the substantial-evidence standard. Tex. Occ.Code Ann. § 2301.751(a); *see* Tex. Gov't Code Ann. § 2001.174 (West 2000); *Subaru,* 84 **S.W.3d** at 224. "'Broadly speaking, the substantial evidence rule is a court review device to keep the courts out of the business of administering regulatory statutes enacted by the Legislature; but it remains the business of the courts to see that justice is administered to competing parties by governmental agencies.'" *Board of Regents v. Martine,* 607 S.W.2d 638, 641 (Tex.Civ.App.-Austin 1980, writ ref'd n.r.e.) (quoting *Lewis v. Metropolitan Savs. and Loan Ass'n,* 550 S.W.2d 11, 13 (Tex.1977)).

Under a substantial-evidence review, we presume that the Board's order is supported by substantial evidence, and the appellant has the burden of overcoming this presumption. *Graff Chevrolet Co., Inc. v. Texas Motor Vehicle Bd.,* 60
431 **S.W.3d** *431 154, 159 (Tex.App.-Austin 2001, pet. denied). When a court is applying the substantial-evidence standard of review to an agency decision, the issue for the reviewing court is not whether the agency's decision was correct, but whether the record demonstrates some reasonable basis for the agency's action. *Central Power & Light Co. v. Public Util. Comm'n,* 36 **S.W.3d** 547, 561 (Tex.App.-Austin 2000, pet. denied). We may not substitute our judgment for that of the agency on matters committed to agency discretion. Tex. Gov't Code Ann. § 2001.174; *H.G. Sledge, Inc. v. Prospective Inv. & Trading Co., Ltd.,* 36 **S.W.3d** 597, 602 (Tex.App.-Austin 2000, pet. denied). The agency is the sole judge of the weight of the evidence and the credibility of the witnesses. *Central Power & Light,* 36 **S.W.3d** at 561.

District Court's Question

In its first and second issues, GM/Munday contend that the Board improperly recast the district court's issue as "what would have happened had it taken the parties to 2002 to get to hearing, but with evidence of market data beyond 1993 excluded?" GM/Munday assert that by recasting the case in this manner, and by excluding the testimony of the former executive director of the Board in 1993, the Board "engaged in an irrelevant thought experiment" that failed to answer the question posed by the district court.

We disagree. In this case, the district court's order did not instruct the Board on methodology; rather, it properly deferred to the Board's authority and expertise in determining whether there was good cause to add the Munday dealership in 1993. In deferring to the Board, the district court followed the guidance of the supreme court in *Subaru. See Subaru,* 84 **S.W.3d** at 221.

In *Subaru,* the court stated, "Trial courts should allow an administrative agency to initially decide an issue when: (1) an agency is typically staffed with experts trained in handling the complex problems in the agency's purview; and (2) great benefit is derived from an agency's uniformly interpreting its laws, rules, and regulations. . . ." *Id.* In the district court's order, it sought the Board's "special competence, expertise and experience" in interpreting and applying the code to cases involving the proposed addition of a dealership to a market. The order recognized that the Board and its staff regularly deal with the questions raised in the issue in their administration of protest proceedings, and that the Board had developed rules for determining such issues, had expertise in applying those rules, and had made prior decisions on applications for the addition of a dealership into a market.

GM/Munday contend that the proper way to answer this question was to determine how Board members sitting at that time would have ruled after considering the evidence and witnesses that would have been presented in 1993. We disagree. The inquiry proposed by GM/Munday would have been beyond the Board's jurisdiction because it is not authorized by the former motor vehicle commission code or the occupations code. Furthermore, although the Board has expertise and experience in making the good cause determination in protest proceedings and has developed rules and procedures for these proceedings, it has no expertise, experience, or rules relevant to a determination of how Board members sitting in the past would have reasoned or ruled, or in determining what evidence, witnesses, and theories the parties might have proffered in a past proceeding.

GM/Munday ask the Board to conduct an impossible task, one that it admitted in its pleadings was "too speculative for the Board to definitively answer." If the Board were to have chosen this path, it would have had to resolve many complicating
432 factors. For example, discovery was *432 never completed in the 1993 proceeding, several of the listed experts had not prepared reports when Landmark withdrew its protest, and it is impossible to know when the PFD would have been completed in an effort to determine who would have been on the Board at the time of its consideration. Even if all these complications could be resolved, the final determination would still, in the words of the Board, "inescapably require speculation concerning the subjective mental perceptions of past Board members."

Neither the supreme court in *Subaru* nor the district court here contemplated that the Board would make a determination for which it had no relevant expertise, experience, or rules, nor does the former motor vehicle commission code or the occupations code authorize it. Rather, the district court followed the rationale and language of *Subaru* by asking the current Board to use its authority and expertise, within the Board's sound discretion, to apply the statutory factors and determine whether there was good cause to add the Munday dealership in 1993.[6] *See id.*

Evidentiary Rulings

In accord with its position that the current Board must step into the shoes of the 1993 Board, GM/Munday contend that the Board erroneously excluded the testimony of Russell Harding, Executive Director of the Motor Vehicle Division from 1975 to 1993, who was prepared to testify that "it was highly unlikely" that Landmark's 1993 protest would have prevailed before the Board as composed in 1993.

We review an agency's rulings on the admission or exclusion of evidence under the abuse of discretion standard we apply to trial courts. *City of Amarillo v. Railroad Comm'n,* 894 S.W.2d 491, 495 (Tex. App.-Austin 1995, writ denied). Specifically, the Board has broad discretion in deciding whether to admit expert testimony in an administrative hearing, and its decision will not be disturbed absent an abuse of discretion. *See Fay-Ray Corp. v. Texas Alcoholic Bev. Comm'n,* 959 S.W.2d 362, 367 (Tex.App.-Austin 1998, no pet.). Because the legislature gave the Board exclusive jurisdiction to determine the issue of good cause, based on its expertise and experience in making this determination, it was, as a matter of law, uniquely and exclusively qualified to make that determination in this case. The question of how best to resolve the issue was a matter for the Board's discretion, and it did not abuse its discretion when it concluded that Harding's testimony was irrelevant to this inquiry. We conclude that the Board acted within its discretion when it rejected Harding's proposed testimony.

GM/Munday further argue that the Board's exclusion of post-1993 market data was error. However, post-1993 market data is irrelevant to a determination of whether good cause existed to add the Munday dealership in 1993. To be sure, post-1993 market data would be irrelevant to GM/Munday's preferred determination—how the Board sitting in 1993 would have ruled. In any event, agencies are afforded broad discretion in admitting and excluding evidence, and it was within the Board's discretion to limit the evidence in this case as it did.

We overrule GM/Munday's first and second issues.

Harm

In demonstrating good cause for the establishment of a new dealership, GM/Munday were required to show that the
433 Munday dealership would not "harm" *433 the protesting franchised dealer. GM/Munday contend that the Board's finding of harm to Landmark based on a lessening of profits is inconsistent with previous Board precedent equating harm with "demise, threatened viability, or significant harm." GM/Munday further contend that there is no evidence of any decrease in sales by Landmark.

The Board has addressed harm to protesting dealers where, as here, there is no showing of lost opportunity in any significant quantity beyond that which is already being captured by the existing dealer body. In *Lewisville Cycle Center v. Action Imports and Z Yamaha,* the Board stated, "In evaluating the potential effects of the granting of the application upon the Protestants, it must again be pointed out that there has been no showing of any inadequacy of representation of Yamaha." *See* Texas Dep't of Transp., *Lewisville Cycle Center v. Action Imports and Z Yamaha,* Proc. No. 247, 1, 32 (Motor Vehicle Bd. Aug. 26, 1982) (final order). The Board continued,

> Without some showing that there is an existing untapped market potential available in the Lewisville area which can serve the Applicant and the Protestants without eroding the Protestants' existing market, it is not reasonable to conclude that the granting of the application will not be harmful to the Protestants and therefore the approval of the application would not be in the public interest.[7]

Id. at 33.

In the instant case, GM/Munday failed to prove that there was a significant amount of lost opportunity beyond that which was already being captured by the existing dealer body. The Board found a level of opportunity so low that Munday's options, upon entry into the Houston market, were limited to "cannibalization of its closest intrabrand competitors in order to merely survive." As a "high-cost, high-volume dealer," the evidence showed that Landmark's new car sales department had operated at a loss even during its best years, and it had relied on its used car, service, parts and body shop business to maintain its profitability. The Board found that adding Munday to this market in 1993 would have decreased Landmark's low profitability across all departments, and caused it and other dealerships in the market to change their operations in a way that would have resulted in poorer service to the public. The Board further predicted that the addition of Munday to the dealer body in Houston, where sufficient opportunity had not been verified, was likely to have ramifications in all corners of the market, as "dealership operational strategies are altered to the public's detriment in an effort to regain or retain profit."

The Board also found, consistent with precedent, that existing dealers in a market with little to no opportunity should not be forced to reduce service to the public for the benefit of a new dealer. *See, e.g.,* Texas Dep't of Transp., *Bill Munday Pontiac, Inc. v. Hendrix GMC Trucks, Inc., et. al.,* Docket No. 80-213, 1, 22 (Motor Vehicle Bd. March 13, 1981) (final
434 order) (if the probable result of the establishment of an additional dealer in the Austin market *434 would be the failure of an existing dealer *or the reduction of service to the public,* then it would not be in the public interest for the Commission to approve the application); Texas Dep't of Transp., *Hudiberg Chevrolet, Inc. v. Frontier GMC, Inc., et. al.,* Docket No. 80-193, 1, 40 (Jan. 8, 1981) (final order) (it would not be in the public interest for the Commission to approve the application if it results in the demise or failure of one or both of the dealerships *or reduction of service to the public*).

GM/Munday cite Board decisions that stand for the proposition that an existing dealer in a flourishing market is not necessarily harmed because it must share the market with a new dealer, even if it means that the existing dealer will profit less after the dealer network expands. *See, e.g.,* Texas Dep't of Transp., *Marathon Corp. v. American Kawasaki of Garland, Inc.,* Docket No. 93-159, 1, 20 (Sept. 29, 1994) (final order); Texas Dep't of Transp., *Gene Harmon Ford, Inc. v. David McDavid Nissan,* Docket No. 96-151, 1, 22 (Sept. 18, 1997) (final order). Here the Board agreed, stating that if Landmark had been in a flourishing market, the Board would expect Landmark to have adjusted its business strategy to capture untapped opportunity in the market. But this was not the case in 1993.

Furthermore, we disagree with GM/Munday's contention that there is no evidence of any decrease in sales on the part of Landmark. Landmark's expert, Dr. Ernest Manuel, testified in his report that if Munday had been in existence in 1992, the most recent year available for the purposes of this suit, "Landmark's new retail Chevrolet sales would have been from 15 percent to 30 percent lower than they actually were." Dr. Manuel also testified that if Munday were added, Landmark's future sales would be 15% to 30% lower than what they would have been had Munday not been present.

GM/Munday contend that Dr. Manuel's testimony regarding Landmark's future sales is insufficient to prove harm because it proves only that Landmark would have been deprived of increased profits if Munday had been added to the dealer base. We disagree. Dr. Manuel forecast an absolute decline in Landmark's future sales had Munday been added to the market as it existed in 1993.

Landmark elicited testimony that in 1993 the Houston economy and auto market were suffering from an extended decline. Landmark presented the expert report of Dr. M. Ray Perryman that described the state of the economy in the Houston area at the end of 1992 as "sluggish and stagnant." The report further stated that the overriding climate in the Houston area during this period was one of "unemployment and job insecurity," as the unemployment rate in Houston in 1992 reached 7.4%, double the rate in 1980, and the city faced a corresponding decline in the real wages of workers and increase in personal bankruptcy filings. According to the report, new automobile sales, as represented by retail registration data, exhibited a pattern similar to the employment figures. New automobile sales in Houston in 1992 were 20.7% below the sales level in 1984, and new automobile sales in the north Houston area declined in 1991 and 1992. The report concluded that the market was characterized by "a decade of sluggishness, a declining trend in new automobile sales, stagnant wages, substantial layoffs, and only modest growth projections."

Within the context of the sluggish Houston market in 1992, Dr. Manuel testified, "if the [automobile] market were flat or only increasing slightly, then you could have an absolute decline, but if the automobile market is expanding at a rapid rate
435 . . . then we would be looking at a reduction *435 in what Landmark sales would have been otherwise." In other words, Dr. Manuel forecast an absolute decline in future sales by Landmark if Munday was added to the market described in Dr. Perryman's report. Dr. Manuel concluded that a market "did not exist" for Munday's 2,000-plus unit planned new vehicle volume and that the public interest would not have been served by adding Munday's redundant facilities and capital.

Because the Board's holding is consistent with its previous decisions and its statutory duty to consider "*any* harm to the protesting franchise dealer," *see* Tex. Occ.Code Ann. § 2301.652(4) (emphasis added), we overrule GM/Munday's third issue.

Adequacy of Representation

GM/Munday contend that the Board acted arbitrarily when it failed to follow its precedent by rejecting the Texas average adjusted ("TAA") standard for measuring "adequacy of representation" in the Houston market. *See* Tex. Occ.Code Ann. § 2301.652(1). GM/Munday assert that it relied upon this standard in presenting its case on the issue of adequacy of representation, and that, without notice, the Board decided that the standard was flawed and that GM/Munday had not proven their case. The Board responds that the application of a different standard—the Texas multiple dealer area (MDA) standard—was consistent with its precedents, within its discretion, and more appropriate to the Houston market.

The Board has not committed itself to the use of a single standard and has used a variety of standards in its decisions. The standard employed by the Board varies based on the facts and circumstances in each case. *See, e.g.,* Texas Dep't of Transp., *John Roberts BMW, Inc. v. Classic Cars, Inc.,* Proc. No. 169, 1, 14 (Motor Vehicle Bd. Sept. 18, 1979) (final order) (BMW national average and top fifteen metropolitan markets average); Texas Dep't of Transp., *Burns Motors v. Ed Payne Motors, Inc.,* Docket No. 00-0001 LIC, 1, 31 (Motor Vehicle Bd. Oct. 18, 2001) (final order) (national and zone averages). GM/Munday acknowledged the Board's use of more than one standard in their motion to the Board for rehearing, which stated, "The Board has never said that any one average or statistical approach must be used," and GM has presented evidence comparing different standards in prior cases before the Board. In recommending a standard in *Jupiter Chevrolet-Geo, Inc. v. Young Chevrolet,* GM, through the same expert that testified before the Board in the instant case, James Anderson, presented a comparison of the Dallas MDA standard, the Texas standard, the national standard and adjusted versions of the latter two. *See* Texas Dep't of Transp., *Jupiter Chevrolet-Geo, Inc. v. Young Chevrolet,* Docket No. 93-130, 1, 17 (Motor Vehicle Bd. Aug. 15, 1994) (final order). In the instant case, Anderson considered and compared two different standards, the national standard and Texas average standard. After considering both standards, Anderson selected the TAA standard, which is the Texas average standard "adjusted for local Houston area consumer preferences."

We disagree that GM/Munday should have been able to rely on the Board's use of the TAA standard alone. GM/Munday knew from previous decisions that the Board's choice of standard was varied, and its own expert's report and testimony show that it prepared its case accordingly. Additionally, because GM/Munday and Landmark exchanged expert reports and exhibits and deposed each other's experts prior to trial, GM/Munday had notice that Landmark would attack the TAA standard and propose a different standard to the Board. As a result, GM/Munday's contention that, "without notice, the
436 Board suddenly decided *436 that the standard was flawed" has no merit.

Furthermore, the Board did not determine that the TAA standard was flawed in all cases. It determined, based on the evidence presented at the hearing, that Landmark's standard was more appropriate to calculate adequacy of representation on the facts of this case.

The Board described Landmark's attack on Anderson's methodology as "scathing," and recounted an "all-out war over the appropriate method by which to gauge adequacy of representation." Although the Board had accepted Anderson's methodology before, on different evidence from a different market, *see* Texas Dep't of Transp., *North Arlington Auto. Co., d/b/a Performance Chevrolet, v. Graff Chevrolet Co. and General Motors Corp.,* Docket No. 97-777, 1, 15 (Motor Vehicle Bd. Sept. 9, 1999) (final order), it noted that "the evidence and argument offered by Landmark and highlighting significant problems with Mr. Anderson's methodology [had not been] readily apparent . . . in past cases before the Board." The Board added that, in this case, Landmark had brought forth a plausible alternative to Anderson's standard.

Landmark attacked the applicability of the TAA standard to the Houston market as it existed in 1993 by proving that it was fundamentally dissimilar to the vast majority of the markets used in creating the TAA standard. Landmark, through its expert, Dr. Manuel, adduced evidence that 249 of the 259 Chevrolet markets in Texas used by Anderson to calculate Chevrolet's expected market penetration were single dealer areas (SDAs), while only ten were MDAs. The Board found that Chevrolet dealers in SDAs have a "big advantage" over Chevrolet dealers in MDAs because they are not required to compete within their areas of primary responsibility with other Chevrolet dealers and do not have the same level of competition from interbrand competitors. As a result, the Board found that the expected penetration rate for Chevrolet dealers in SDAs are, "as a rule, higher than those of Chevrolet dealers in fiercely competitive MDAs." The Board concluded that it could not "endorse a process that characterizes a market as `underperforming' simply because it fails to meet a standard so profoundly influenced by markets bearing so little resemblance to the market in question."

Landmark further attacked the TAA standard by targeting Anderson's "segmentation analysis," by which he adjusted the Texas average to account for differences in consumer preferences and product mix from market to market. Landmark disputed that segmentation was capable of refining the TAA standard to account for the profound differences between MDAs and SDAs. In addition to the evidence already discussed, Landmark adduced evidence that people who live in MDAs have a preference for imported automobiles, showing that manufacturers of Asian automobiles alone made 40% of all retail sales in the Houston MDA in 1992. Landmark argued that the TAA was further skewed by the fact that it is dominated by markets where imports are not readily available, showing that 61% of the import dealerships in Texas are located in the 10 MDAs. Additionally, Landmark adduced testimony that product preference contributes to the higher Chevrolet penetration in SDAs, specifically because of the popularity of trucks in SDAs and Chevrolet's relative strength in that market. Landmark also adduced testimony showing an inverse relationship between high household income and propensity to buy a Chevrolet, and showed that household income in SDAs was 40% lower than in MDAs. In light of this
437 evidence, the Board agreed that Anderson's segmentation *437 analysis did not "sufficiently account for all measurable differences."

Despite Landmark's "scathing" attack on the TAA standard and Anderson's methodology, the Board recounted "a refusal by GM to address, head-on, any shortcomings in the Texas standard that motivated Landmark to offer an alternative standard in the first place." Additionally, by not providing any evidence based on the Texas MDA standard, GM/Munday took the calculated risk that if the Board accepted that standard, it would be left with no evidence. The Board's order noted that "Munday and GM have given the ALJ precious little reason to reject the Texas MDA standard out of hand."

In sum, the Board did not find the TAA standard to be per se unreasonable. Instead, based on the evidence presented and the facts of this case, the Board found that the record did not support a finding that the TAA standard was "a useful tool for accurately gauging Chevrolet's performance in the Houston MDA." Further, the Board found the Texas MDA standard to be appropriate because it did not "unfairly raise the expected average for the Houston MDA by including in its calculation the routinely higher expected averages enjoyed by SDA markets," and conservative because "it included in its calculation markets that are both adequately and inadequately represented." We find that the Board's use of the Texas MDA standard was supported by the evidence and within the Board's discretion.

The Board found that a comparison of Chevrolet's performance in the Houston MDA to *any* of the standards, including the TAA proposed by GM/Munday, "failed to confirm a sufficient amount of shortfall to justify a finding in respondent's favor on the issue of adequacy of representation." As the Board noted, even using the TAA standard, the registration shortfall in the entire Houston MDA in 1992 was only 1,173 units, a figure that decreased even further to 549 units in 1993. These figures were far below the 1,200 to 1,500-unit break-even point and the 2,296-unit planned potential for the proposed Munday dealership.

GM/Munday respond that the Board's numbers are inaccurate because it failed to properly consider gross loss and insell. However, the Board dismissed GM/Munday's gross loss figure, determined by GM/Munday by adding together the shortfall in each census track that did not meet the expected penetration based on the TAA standard, because of its reliance on the flawed TAA standard. The Board dismissed GM/Munday's insell figure, which is the number of units registered in the Houston MDA that were sold by Chevrolet dealers outside of the Houston MDA, because it did not adequately consider the marketing advantages enjoyed by dealers on the geographical fringes of the Houston market. The Board found that there was insufficient evidence in the record to support a finding that Munday was capable of capturing insell from fringe dealers, who have been able to successfully communicate to Houstonians that they sell their products at lower prices than their MDA competitors.

The Board found that GM/Munday's calculation of gross loss and insell were further skewed because GM/Munday relied on figures from the entire MDA, without regard to the amount of gross loss or insell available to Munday within a twenty-mile radius from its location, a distance beyond which a dealer's chance of contributing to its brand's market share was considered remote by the Board. The Board noted that GM/Munday failed to provide enough information to properly calculate gross loss or insell based on a more reasonable standard and distance.

438 *438 *Due Process and Equal Protection*

As part of its fourth issue, GM/Munday contend that its equal protection and due process rights were violated when the Board deviated from prior announced standards without notice. *See* U.S. Const. amend. XIV, § 1 (equal protection, due process); Tex. Const. art. I, §§ 3, 19 (equal protection, due process). Specifically, GM/Munday contend that the Board acted in an arbitrary and capricious manner when the Board rejected GM/Munday's use of the TAA standard, and the data derived therefrom, and applied a different and new standard "after the hearing" and without explanation.

In administrative proceedings, due process requires that parties be accorded a full and fair hearing on disputed fact issues. *Office of Pub. Util. Counsel v. Public Util. Comm'n,* 185 **S.W.3d** 555, 576 (Tex.App.-Austin 2006, pet. filed). At a minimum, it requires that the "rudiments of fair play" be observed. *Id.; State v. Crank,* 666 S.W.2d 91, 94 (Tex.1984). Although the strict rules applicable to courts do not apply to agencies, agencies cannot be arbitrary or inherently unfair. *Office of Pub. Util. Counsel,* 185 **S.W.3d** at 576. Furthermore, a licensing authority acts arbitrarily and unlawfully if it treats similarly situated applicants differently without an articulated justification. *BMW of N. Am. v. Motor Vehicle Bd.,* 115 **S.W.3d** 722, 726 (Tex.App.-Austin 2003, pet. denied).

As previously discussed, the Board applied established standards in this case and did not create new rules or policies after the hearing. Because GM/Munday were given notice during pre-trial discovery of the standards Landmark would employ to measure harm and adequacy of representation, there was no surprise to GM/Munday or lack of opportunity to introduce contravening evidence. Furthermore, the Board fully explained its decisions regarding adequacy of representation and harm and did not act in an arbitrary or capricious manner.

The cases cited by GM/Munday do not hold otherwise. GM/Munday cite *Flores v. Employees Retirement System of*

Texas, 74 **S.W.3d** 532, 533-34 (Tex.App.-Austin 2003, pet. denied), and *Madden v. Texas Board of Chiropractic Examiners*, 663 S.W.2d 622, 627 (Tex.App.-Austin 1983, writ ref'd n.r.e.), cases in which this Court determined that it was improper for an agency to retroactively apply a newly created rule or policy.

In *Flores* we stated, "an agency is not bound to follow its decisions in contested cases in the same way that a court is bound by precedent." *Flores*, 74 **S.W.3d** at 544. We added, however, that an agency is required by courts to "explain its reasoning when it `appears to the reviewing court that an agency has departed from its earlier administrative policy or there exists an apparent inconsistency in agency determinations.'" *Id.* at 544-45. After acknowledging that it had previously accepted Anderson's methodology on adequacy of representation, the Board explained why it was trumped in the instant case by the evidence and argument offered by Landmark, which did not inflate the expectations for the Houston market. Regarding harm, the Board acknowledged its prior decisions and distinguished the instant case, finding that GM/Munday failed to provide sufficient evidence of lost opportunity beyond that which was already being captured by the existing dealer body.

It necessarily follows and we hold that the Board did not create a new policy or rule. The Board determined, based on the evidence presented during the hearing process, that Landmark had the more convincing experts and more appropriate methodology to evaluate the statutory good cause factors for the Houston market during the time in question.

439 *439 GM/Munday also cite *Starr County v. Starr Industrial Services, Inc.*, in which this Court determined that it was arbitrary and capricious for an agency to consider, after the hearing, a factor outside the statutory criteria. 584 S.W.2d 352, 356 (Tex.Civ.App.-Austin 1979, writ ref'd n.r.e.). But in the instant case, the Board did not add any new criteria to the statutory good cause factors.

Accordingly, we overrule GM/Munday's fourth issue.

CONCLUSION

Because we find that the Board did not act in an arbitrary or capricious manner and its order is supported by substantial evidence, we affirm the Board's order.

[1] The Board was abolished in 2005. *See* Act of May 30, 2005, 79th Leg., R.S., ch. 281, § 7.01, sec. 2301.002(2), (10), 2005 Tex. Gen. Laws 778, 839. We will, however, continue to refer to the Board as it issued the order under review. The Motor Vehicle Division of the Texas Department of Transportation is now headed by a division director. *See id.*

[2] A *Subaru* proceeding is required when a party files suit in district court, but includes claims within the Board's exclusive jurisdiction under the Texas Occupations Code as issues to be decided in the lawsuit. As the supreme court concluded in *Subaru*, the district court lacks jurisdiction to consider code-based claims falling within the Board's exclusive jurisdiction and should abate the trial proceedings to allow this jurisdictional defect to be cured by presenting those claims to the Board for review and final decision. *Subaru of Am., Inc. v. David McDavid Nissan, Inc.*, 84 **S.W.3d 212**, 227-28 (Tex.2002). Once the Board renders a final decision on the code-based claims, the parties may then utilize the Board's findings for purposes of the lawsuit. *Id.* at 228.

[3] A new car dealer may protest a manufacturer's decision to establish a new car dealership of the same line-make within a fifteen-mile radius of the existing dealership. *See* Tex. Occ.Code Ann. § 2301.652(b)(2) (West 2004).

[4] The former Texas Motor Vehicle Commission Code, the Board's enabling statute, was codified at Chapter 2301 of the Texas Occupations Code, effective on June 1, 2003. *See* Act of May 22, 2001, 77th Leg., R.S., ch. 1421, § 5, sec. 2301, 2001 Tex. Gen. Laws 2570, 4921-68. The Board order under review involved the "protest" provision in the 1993 version of the Motor Vehicle Commission Code. Although codification altered the numbering system, the relevant portions of the protest provision have not changed. We will refer to the current code provisions, unless otherwise stated.

[5] The district court referred a second question to the Board, but that question is not at issue in this appeal.

[6] We do not address the district court's consideration of the Board's order in the pending lawsuit.

[7] Until 1989, the protest section did not include harm to the protesting dealer as a separate factor to be considered in protest proceedings. Instead, it considered harm as an aspect of "public interest." *See, e.g.*, Texas Dep't of Transp., *Voltex Corp d/b/a Nils Sefeldt Volvo v. Barney Garver Motors and Mazda Motors of Am., Inc.*, Proc. No. 126, 1, 25-26 (Motor Vehicle Bd. July 5, 1978) (final order). This section

was amended in 1989 to state that the "Board *shall* consider . . . *any* harm to the protesting franchise dealer." *See* Tex. Occ.Code Ann. § 2301.652(4) (emphasis added).

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862 N.E.2d 209 (2007)
224 Ill.2d 1
308 Ill.Dec. 611

GENERAL MOTORS CORPORATION et al., Appellants,
v.
The STATE of Illinois MOTOR VEHICLE REVIEW BOARD et al., Appellees.

Nos. 101585, 101601.

Supreme Court of Illinois.

January 8, 2007.

215 *215 Edward R. Gower, Charles R. Schmadeke, of Hinshaw & Culbertson, Springfield, and Jeffrey J. Jones, J. Todd Kennard, of Jones Day, Columbus, Ohio, for appellant General Motors Corporation.

William J. Harte, Ltd., Joseph E. Tighe, P.C., Chicago, for appellant Loren Buick, Inc.

Lisa Madigan, Attorney General, Springfield (Gary Feinerman, Solicitor General, John P. Schmidt and Brett E. Legner, Assistant Attorneys General, Chicago, of counsel), for appellees Illinois Motor Vehicle Review Board and Terrence M. O'Brien.

Ira M. Levin, Jay S. Dobrutsky, of Burke, Warren, MacKay & Serritella, P.C., and Richard M. Karr, of Gordon & Karr, Chicago, for appellees North Shore, Inc., doing business as Muller Pontiac/GMC Mazda, et al.

James R. Vogler, of Barack Ferrazzano Kirschbaum Perlman & Nagelberg, L.L.P., Chicago, Seth P. Waxman, Robert D. Cultice, Jonathan Nuechterlein and Nora Freeman Engstrom, of Wilmer Cutler Pickering Hale & Dorr, L.L.P., Washington, D.C., for amici curiae Alliance of Automobile Manufacturers and Association of International Automobile Manufacturers.

Anthony Sanders, Chicago, Deborah J. La Fetra and Timothy Sandefur, Sacramento, California, for amicus curiae Pacific Legal Foundation.

Dennis M. O'Keefe, Lake Forest, for amici curiae National Automobile Dealers Association, McLean, Virginia, Illinois Automobile Dealers Association, Springfield, and Chicago Automobile Trade Association, Oak Brook Terrace.

Chief Justice THOMAS delivered the judgment of the court, with opinion:

In this case, General Motors Corporation (GMC) sought to add two new automobile dealerships in the greater Chicago area: one on Chicago's far west side at Jacobs Twin Buick (Jacobs) and the other in Glenview, Illinois, at Loren Pontiac-Buick (Loren). Various existing GMC dealerships challenged the newly proposed dealerships by filing a protest with the State of Illinois Motor Vehicle Review Board (Board) pursuant to the Motor Vehicle Franchise Act (Franchise Act or Act) (815 ILCS 710/1 *et seq.* (West 2004)), which allows an existing dealer to file a protest when a manufacturer attempts to locate a new franchise within an existing dealer's relevant market area. It is undisputed that the proposed sites for the additional franchises (add points) were within the protesting dealers' relevant market area. The Board granted the protests, and the circuit court of Sangamon County confirmed that decision. GMC and Loren appealed, arguing that the Board failed to apply the Act's "good cause" standard in reaching its decision to grant the protests. GMC and Loren also argued that the Act is unconstitutional and that the Board's decision was against the manifest weight of the evidence. The appellate court rejected GMC's and Loren's arguments, with one justice dissenting. 361 Ill.App.3d 271, 297 Ill.Dec. 172, 836 N.E.2d 903. We allowed the petitions for leave to appeal filed by GMC and Loren and have consolidated the cases. 210 **Ill.2d** R. 315. We also allowed various organizations to file *amicus curiae* briefs on behalf of the respective parties. Loren has adopted the briefs of GMC before this court.

BACKGROUND

216 Illinois' Motor Vehicle Franchise Act is comparable to legislation adopted by *216 a number of states designed to protect existing dealers and consumers from the negative impact of aggressive franchising practices by automobile manufacturers whose desires to establish excessive competing franchises are considered to be a potential threat to the public welfare. See *Fireside Nissan, Inc. v. Fanning,* 30 F.3d 206, 211 (1st Cir.1994); 2 Franchise & Distribution L. & Prac. § 14:31 (1990). Most of the states having such legislation allow existing dealers of the same line make that are within a specified distance of a proposed new dealership to protest. These statutes generally provide that no new franchise may be established unless the trier of fact, usually a motor vehicle review board, decides that the appointment is for "good cause," which requires the assessment of a number of statutory factors to make that determination. See, *e.g.,* Ark.Code Ann. § 23-112-311 (West 2004); Cal. Vehicle Code § 3062 (Deering Supp.2006); Conn. Gen.Stat. Ann. § 42-133dd (West Supp.2006); Mass. Gen. Laws Ann. 93B § 6 (West 2005).[1]

Our Franchise Act requires a manufacturer wishing to grant an additional franchise in the relevant market area of an existing franchise of the same line make to give 60 days written notice to each existing dealer of the same line make whose relevant market area includes the proposed location. 815 ILCS 710/4(e)(8) (West 2004). The "[r]elevant [m]arket [a]rea" for purposes of this case is defined by statute as "the area within a radius of 10 miles from the principal location of a franchise or dealership." 815 ILCS 710/2(q) (West 2004). An existing franchise has 30 days from the receipt of the notice from the manufacturer to file a protest with the Board. 815 ILCS 710/4(e)(8) (West 2004). If a protest is filed, the manufacturer has the burden of proof to establish that "good cause" exists to allow the grant or establishment of the additional franchise. 815 ILCS 710/4(e)(8) (West 2004).

Section 4(e)(8) of the Act provides that the determination of whether "good cause" exists for allowing an additional franchise "shall be made by the Board under subsection (c) of Section 12 of this Act." 815 ILCS 710/4(e)(8), 12(c) (West 2004). Section 12(c) provides that, in considering whether "good cause" has been established for granting a proposed additional franchise, the Board shall consider "all relevant circumstances" in accordance with subsection (v) of section 2 of this Act, including but not limited to, 11 statutory factors set forth in section 12(c) (815 ILCS 710/12(c) (West 2004)). Section 2(v) of the Act is part of the definitions section of the statute and provides that "'[g]ood cause' means facts establishing commercial reasonableness in lawful or privileged competition and business practices as defined at common law." 815 ILCS 710/2(v) (West 2004). The "relevant circumstances" that the Board is required to consider are listed in section 12(c) as follows:

> "(1) whether the establishment of such additional franchise or the relocation of such motor vehicle dealership is warranted by economic and marketing conditions including anticipated future changes;
>
> (2) the retail sales and service business transacted by the objecting motor vehicle dealer or dealers and other motor vehicle dealers of the same line make with a place of business in the relevant market area to be
> 217 served by the additional *217 franchise or the relocated motor vehicle dealership during the 5 year period immediately preceding such notice as compared to the business available to them;
>
> (3) the investment necessarily made and obligations incurred by the objecting motor vehicle dealer or dealers and other motor vehicle dealers of the same line make with a place of business in the relevant market area to be served by the additional franchise or the relocated motor vehicle dealership to perform their obligations under existing franchises or selling agreements; and, the manufacturer shall give reasonable credit for sales of factory repurchase vehicles purchased by the objecting motor vehicle dealer or dealers and other motor vehicle dealers of the same line make with the place of business in the relevant market area to be served by the additional franchise or the relocated motor vehicle dealership, or the additional motor vehicle dealership or other facility limited to the sale of factory repurchase or late model vehicles, at manufacturer authorized or sponsored auctions in determining performance of obligations under existing franchises or selling agreements relating to total new vehicle sales;
>
> (4) the permanency of the investment of the objecting motor vehicle dealer or dealers and other motor vehicle dealers of the same line make with a place of business in the relevant market area to be served by

the additional franchise or the relocated motor vehicle dealership;

(5) whether it is beneficial or injurious to the public welfare for an additional franchise or relocated motor vehicle dealership to be established;

(6) whether the objecting motor vehicle dealer or dealers and other motor vehicle dealers of the same line make with a place of business in the relevant market area to be served by the additional franchisee or relocated motor vehicle dealership are providing adequate competition and convenient consumer care for the motor vehicles of the same line make owned or operated in the area to be served by the additional franchise or relocated motor vehicle dealership;

(7) whether the objecting motor vehicle dealer or dealers and other motor vehicle dealers of the same line make with a place of business in the relevant market area to be served by the additional franchisee or the relocated motor vehicle dealership have adequate motor vehicle sales and service facilities, equipment, vehicle parts and qualified personnel to reasonably provide for the needs of the customer; provided, however, that good cause shall not be shown solely by a desire for further market penetration;

(8) whether the establishment of an additional franchise or the relocation of a motor vehicle dealership would be in the public interest;

(9) whether there has been a material breach by a motor vehicle dealer of the existing franchise agreement which creates a substantially detrimental effect upon the distribution of the franchiser's motor vehicles in the affected motor vehicle dealer's relevant market area or fraudulent claims for warranty work, insolvency or inability to pay debts as they mature;

(10) the effect of an additional franchise or relocated motor vehicle dealership upon the existing motor vehicle dealers of the same line make in the relevant market area to be served by the additional franchisee or relocated motor vehicle dealership; and

218 (11) whether the manufacturer has given reasonable credit to the objecting *218 motor vehicle dealer or dealers and other motor vehicle dealers of the same line make with a place of business in the relevant market area to be served by the additional franchise or relocated motor vehicle dealership or additional motor vehicle dealership or other facility limited to the sale of factory repurchase or late model vehicles, for retail sales of factory repurchase vehicles purchased by the motor vehicle dealer or dealers at manufacturer authorized or sponsored auctions." 815 ILCS 710/12(c)(1) through (c)(11) (West 2004).

In February and March of 2001, GMC sent notices to all existing dealers in the relevant market area of its two proposed franchise add points. Castle Buick-Pontiac-GMC (Castle) and Grossinger Autoplex, Inc. (Grossinger), filed timely protests with the Board as to the Jacobs site. With respect to the Loren site, timely protests were filed by North Shore, Inc., doing business as Muller Pontiac/GMC Mazda (Muller), Grossinger,[2] and Joe Mitchell/GMC Truck, Inc. (Mitchell). Castle is located five miles from the proposed Jacob's add point. Grossinger is 6.8 miles from the proposed Jacob's add point, and 6.5 miles from the proposed Loren add point. Muller is 4.9 miles from the proposed Loren add point. Within a 10-mile radius of the Jacob's add point, there are three existing GMC dealers, and within a 10-mile radius of the Loren add point, there are also three existing GMC dealerships. In addition, four GMC dealers are located just outside of the 10-mile radius applicable to the Jacob's add point. In all, there are a total of 27 GMC dealerships in the Chicago area.

By agreement of the parties, the cases were consolidated. The transcripts of the hearings are voluminous, and the parties together presented approximately 200 exhibits. The record contains 59 volumes.

In May 2003, the hearing officer entered his findings of fact, conclusions of law, and recommended decision. The hearing officer recommended that the protests against both the Jacobs and Loren add points be upheld and that the Board should not approve the additional GMC franchises. In September 2003, the Board entered a final order that granted the dealers' protests and adopted and incorporated into its final order the findings of fact, the conclusions of law and the recommended decision of the hearing officer. The Board also awarded the protesting dealers attorney fees and costs to be determined at a later hearing.

The circuit court confirmed the decision of the Board. GMC and Loren appealed. The appellate court found that the attorney fees and costs award should not have been entered because it was not yet ripe for resolution and therefore vacated the award. In all other respects, the appellate court affirmed the circuit court's judgment, which upheld the dealers' protests. 361 Ill.App.3d at 291, 297 Ill.Dec. 172, 836 N.E.2d 903.

ANALYSIS

I. The Good-Cause Standard

GMC first argues before this court that the Board did not apply the Act's "good cause" standard correctly. It points to section 2(v)'s definition of "good cause" as "commercial reasonableness in lawful or privileged competition and business
219 practices as defined at common law." 815 ILCS 710/2(v) (West 2004). It claims that *219 the Board analyzed each of the 11 factors in section 12(c) untethered from section 2(v), even though section 12(c) directs that the 11 factors be considered in accordance with section 2(v). See 815 ILCS 710/12(c) (West 2004). GMC further urges that the terms "good cause" and "commercial reasonableness" should be equated with "good faith." According to GMC, if the evidence shows it acted without any bad faith or malice in its decision to add the new franchises, then its decision should not be second-guessed. GMC contends that "good cause" should be interpreted as a minimal standard and not some "super standard of perfection."

GMC's argument presents a question of statutory interpretation. When presented with an issue of statutory construction, our role is to ascertain and give effect to the intent of the legislature. *People v. Whitney,* 188 **Ill.2d** 91, 97, 241 Ill.Dec. 770, 720 N.E.2d 225 (1999). Legislative intent is best determined from the language of the statute itself, which if unambiguous, should be enforced as written. *Taddeo v. Board of Trustees of the Illinois Municipal Retirement Fund,* 216 **Ill.2d** 590, 595, 297 Ill.Dec. 425, 837 N.E.2d 876 (2005); *Comprehensive Community Solutions, Inc. v. Rockford School District No. 205,* 216 **Ill.2d** 455, 473, 297 Ill.Dec. 221, 837 N.E.2d **1** (2005). In giving effect to the statutory intent, the court should consider, in addition to the statutory language, the reason for the law, the problems to be remedied, and the objects and purposes sought. *People v. Donoho,* 204 **Ill.2d** 159, 171-72, 273 Ill.Dec. 116, 788 N.E.2d 707 (2003). A statute is ambiguous if it is subject to two or more reasonable interpretations. *Donoho,* 204 **Ill.2d** at 172, 273 Ill.Dec. 116, 788 N.E.2d 707. The construction of a statute by an agency charged with its administration will be given deference where there is a reasonable debate about the meaning of the statute, but that interpretation is not ultimately binding on this court. *Elementary School District 159 v. Schiller,* 221 **Ill.2d** 130, 142-43, 302 Ill.Dec. 557, 849 N.E.2d 349 (2006); *Taddeo,* 216 **Ill.2d** 590, 297 Ill.Dec. 425, 837 N.E.2d 876.

Beginning with the language of the Act, we note that it plainly requires that the Board "shall" consider each of the 11 factors listed in section 12(c), along with any other relevant circumstances, when determining whether "good cause" has been established. This is precisely what the Board did. In reaching its decision to grant the protest of the existing dealerships, the Board set forth the definition of "good cause" in section 2(v), analyzed each of the applicable factors as directed by section 12(c) of the Act, and balanced the various interests at stake. It concluded that each of the factors in section 12(c) favored the protesting dealers, except the circumstance listed in section 12(c)(11), which it found inapplicable to both franchises.

We believe that in enacting the statutory scheme, the legislature clearly intended that the Board's assessment of the 11 factors be equated with "good cause." It is also apparent that the legislature intended that the Board balance the dealer's interest in maintaining viable businesses, the manufacturer's interest in promoting sales, and the public's interest in adequate competition and convenient service. See *Fields Jeep-Eagle, Inc. v. Chrysler Corp.,* 163 **Ill.2d** 462, 477-78, 206 Ill.Dec. 694, 645 N.E.2d 946 (1994). This is consistent with the Act's declaration of purpose, which provides as follows:

> "The legislature finds and declares that the distribution and sale of vehicles within this State vitally affects
> 220 the general economy of the State and the public interest and welfare, and that in order *220 to promote the public interest and welfare, and in the exercise of its police power, it is necessary to regulate motor vehicle manufacturers, distributors, wholesalers and factory or distributor branches or representatives, and to regulate dealers of motor vehicles doing business in this State in order to prevent frauds, impositions and

other abuses upon its citizens, to protect and preserve the investments and properties of the citizens of this State, and to provide adequate and sufficient service to consumers generally." 815 ILCS 710/1.1 (West 2004).

GMC's interpretation would create an absurd result and would render the Act's purpose and the Board's consideration of the 11 statutory factors essentially meaningless. If all that was required was subjective good faith on the part of GMC in making its business decision, it would negate any objective "good cause" analysis. We do not believe that this is what the legislature had in mind when it placed the burden of proving "good cause" on the manufacturer and *required* the assessment of the 11 statutory criteria.

Additionally, if GMC's interpretation were adopted, it would cause the Illinois Motor Vehicle Franchise Act to differ markedly from other state's automobile franchise acts, which simply require an objective assessment of the statutory factors to determine "good cause." See, *e.g.*, Ark.Code Ann. § 23-112-311 (West 2004); Cal. Vehicle Code § 3062 (Deering Supp. 2006); Conn. Gen.Stat. Ann. § 42-133dd (West Supp.2006); Mass. Gen. Laws Ann. 93B § 6 (West 2005).

GMC emphasizes the "lawful or privileged competition" language of the good-cause standard. 815 ILCS 710/2(v) (West 2004). The terms "lawful competition," "privileged competition," "privilege of competition" and "competitor's privilege" appear in the case law and all refer to the same privilege, which is an affirmative defense to the tort of intentional interference with prospective business advantage. See *Cromeens, Holloman, Sibert, Inc. v. AB Volvo*, 349 F.3d 376, 398-99 (7th Cir.2003); *International Marketing, Ltd. v. Archer-Daniels-Midland Co.*, 192 F.3d 724, 731 (7th Cir.1999); *G.M. Brod & Co. v. U.S. Home Corp.*, 759 F.2d 1526, 1534 (11th Cir.1985). It "allows one to divert business from one's competitors generally as well as from one's particular competitors provided one's intent is, at least in part, to further one's business and is not solely motivated by spite or ill will." See *Soderlund Brothers, Inc. v. Carrier Corp.*, 278 Ill.App.3d 606, 615, 215 Ill.Dec. 251, 663 N.E.2d 1 (1995).

It is not readily apparent, however, what, if anything, this affirmative defense has to do with a protest under the Franchise Act. GMC claims that by referring to "privileged competition," the legislature must have been creating a standard that defers to the manufacturer's business decision absent any evidence of bad faith in reaching that decision. We read the Illinois statutory scheme differently. As the appellate court correctly observed, the standard is not simply "lawful or privileged competition." Instead, the standard is "*commercial reasonableness* in lawful or privileged competition" and requires that the Board "shall" consider the applicable statutory factors listed. (Emphasis added.) 815 ILCS 710/2(v), 12(c) (West 2004).

"Commercial reasonableness" is not specifically defined by the statute; thus, we will look to its commonly understood meaning. Black's Law Dictionary defines "commercially reasonable" as follows: "(Of a property sale) conducted in good
221 faith *and* in accordance with commonly accepted commercial practice." (Emphasis added.) Black's Law Dictionary *221 286 (8th ed.2004). Thus, commercial reasonableness includes something more than simply exercising good faith in a business decision. Good faith and commercial reasonableness are not interchangeable terms. See *Original Great American Chocolate Chip Cookie Co. v. River Valley Cookies, Ltd.*, 970 F.2d 273, 280 (7th Cir. 1992).

One of the clearest explanations we have found for commercial reasonableness was provided by the California appellate court when it attempted to determine whether notice was properly given under a statute that required a "good faith and commercially reasonable effort" in complying with statutory notice requirements. See *Gifford v. J. & A. Holdings*, 54 Cal.App.4th 996, 63 Cal.Rptr.2d 253 (1997). There, the court stated that "[c]ommercial reasonableness is not expressly defined in the statute, but has been defined elsewhere to include commonly accepted commercial practices of responsible businesses which afford all parties fair treatment." *Gifford*, 54 Cal.App.4th at 1005-06, 63 Cal.Rptr.2d at 259. The court continued by stating that "[g]ood faith and commercial reasonableness primarily involve questions of fact, based on all the circumstances; the trial court's findings must be upheld if supported by substantial evidence." *Gifford*, 54 Cal.App.4th at 1006, 63 Cal. Rptr.2d at 259.

Similarly, good faith and commercial reasonableness in the present case were questions of fact for the Board to resolve by assessing and balancing the factors in section 12(c) with an eye toward fair treatment of the interests involved—the existing dealers, the manufacturer and the consumer public. The legislature specifically placed the burden of proof on the manufacturer to show "good cause" (815 ILCS 710/4(e)(8) (West 2004)), and further provided that "*good cause shall not be shown solely by a desire for further market penetration.*" (Emphasis added.) 815 ILCS 710/12(c)(7) (West 2004). GMC essentially asks this court to read this term out of the statute. We decline to do so. Instead, we find that the Board carefully considered the applicable factors and the relevant evidence presented by the parties and concluded that GMC, as the manufacturer, had not met its burden. Accordingly, GMC's argument that the Board applied an erroneous standard must be rejected.

II. Whether the Board's Decision Was Clearly Erroneous

GMC next argues that the Board's decision was either clearly erroneous or against the manifest weight of the evidence.

The findings and conclusions of an administrative agency on a question of fact shall be held to be *prima facie* true and correct. 735 ILCS 5/3-110 (West 2004). A reviewing court does not reweigh the evidence that was before the agency. *Comprehensive Community Solutions, Inc. v. Rockford School District No. 205,* 216 **Ill.2d** 455, 471-72, 297 Ill.Dec. 221, 837 N.E.2d 1 (2005). An agency's conclusion on a question of mixed law and fact—that is one that asks the legal effect of a given set of facts—is reviewed for clear error. *Elementary School District 159 v. Schiller,* 221 **Ill.2d** 130, 143, 302 Ill.Dec. 557, 849 N.E.2d 349 (2006). Such review is significantly deferential to an agency's experience in construing and applying the statute that it administers. *Schiller,* 221 **Ill.2d** at 143, 302 Ill.Dec. 557, 849 N.E.2d 349. Thus, an agency's decision will only be found to be clearly erroneous where a reviewing court is left, on the entire record, with a definite and firm conviction that a mistake has been committed. *Schiller,* 221 **Ill.2d** at 143, 302 Ill.Dec. 557, 849 N.E.2d 349.

222 *222 The Board made findings of fact on each of the statutory factors for assessing "good cause" noted above, and did so with respect to each of the two dealerships at issue. The Board's findings of fact were essentially the same for each of the two dealerships. With respect to section 12(c)(**1**), the Board found that a new dealership was not warranted by economic and marketing conditions, including anticipated future changes. See 815 ILCS 710/12(c)(**1**) (West 2004). It noted that there were already three GMC dealers within a radius of less than 10 miles of both Jacobs and Loren, and that there were seven dealers within 11 miles of Jacobs. Thus, the areas were already substantially represented by GMC. Moreover, the Board found that there was little, if any, projected growth around the dealerships, that there was insufficient evidence that the dealers surrounding Jacobs and Loren were underperforming, and that there was no evidence that the answer to any perceived "underperformance" was to add another dealer. It also found that there was competent evidence that the dealers surrounding Jacobs and Loren suffered from a lack of product allocation and that adding a dealer would only exacerbate the problem.

Regarding section 12(c)(2), the Board found that the retail sales and service business transacted by the protesting dealers and other GMC dealers in the relevant market areas, as compared to the business available to them, was reasonable and therefore favored the protesting dealers. See 815 ILCS 710/12(c)(2) (West 2004). The Board found that GMC's experts used a measure of performance that was unrealistic in the metropolitan, multiple-dealer network at issue. Furthermore, GMC presented insufficient evidence to support the argument that the local dealers around Jacobs and Loren were failing to adequately perform.

With respect to sections 12(c)(3) and (c)(4), the Board found that the protesting dealers and other GMC dealers in the relevant market area had made substantial and permanent investments. See 815 ILCS 710/12(c)(3), (c)(4) (West 2004). It noted that the protesting dealers had invested millions of dollars in their facilities, particularly Grossinger, who had a $19 million state-of-the-art Autoplex. Additionally, Castle recently spent $5 million to create an exclusive GMC/Buick/Pontiac dealership and was not permitted to add any nonGMC franchises for the next 25 years. Moreover, each of the protesting dealers had shown a commitment to a long-standing and respectable presence in the community.

Regarding sections 12(c)(5) and (c)(8), the Board found that the addition of a new dealer could be injurious to the public welfare and that there appeared to be little or no public benefit that would accrue. See 815 ILCS 710/12(c)(5), (c)(8) (West 2004). It noted that the public would not be served by a dealer network where the individual dealers are small and lack adequate product to sell. It would be inconvenient for consumers to have to travel to a number of GMC outlets just to be able to see the particular vehicle they are considering. The benefit of being a mile or two closer to the nearest GMC dealer would be incremental at best. Given that already scarce inventory levels would be stretched further by adding another dealer, the public would not be served by the expansion of the dealer network into areas where there were already so many dealers.

223 With regard to section 12(c)(6), the Board found that the local dealers in the relevant market areas of the proposed *223 Jacob and Loren dealerships were providing adequate competition and convenient care to their customers. See 815 ILCS 710/12(c)(6) (West 2004). According to the Board, Castle, Grossinger, Mitchell and Muller all provided excellent customer service and made every effort to record as many sales as possible. There was insufficient evidence to show that these dealers were failing to perform adequately, but there was competent evidence to show that their performance had been hampered by a lack of adequate product supply.

With respect to section 12(c)(7), the Board found that the protesting dealers in the relevant market areas of both proposed add points had adequate sales and service facilities, equipment, vehicle parts and qualified personnel to reasonably provide for the needs of the customers in the relevant market areas. See 815 ILCS 710/12(c)(7) (West 2004). There was no evidence presented by GMC that any of the protesting dealers, or any other GMC dealers in the relevant market areas, had inadequate sales and service facilities, equipment, vehicle parts or qualified personnel to reasonably serve customers. To the contrary, the sales and service facilities ranged from adequate to state-of-the-art.

The Board next found that there was no evidence of a material breach of any franchise agreement by any protesting dealer in the relevant market areas. See 815 ILCS 710/12(c)(9) (West 2004).

Regarding section 12(c)(10), the Board found that there was competent evidence that the addition of Jacobs as a GMC dealer would hurt the existing dealers in the relevant market area. See 815 ILCS 710/12(c)(10) (West 2004). Similarly, the Board found that the addition of Loren would hurt the existing dealers in the relevant market area. There was insufficient evidence presented to show that there was enough additional opportunity to support another dealer in either relevant market area. But there was competent evidence to show that existing dealers suffer from inventory shortages caused by GMC's allocation system, and there was no reason to believe that the existing dealers could respond positively to the addition of a new add point without sufficient product supply.

Finally, the Board found section 12(c)(11) to be inapplicable to the case. See 815 ILCS 710/12(c)(11) (West 2004).

After reviewing the evidence presented, we conclude that the Board's decision to grant the existing dealers' protests was not clearly erroneous. The evidence supporting the Board's conclusions on several factors was undisputed. There was unrebutted testimony establishing that the protesting dealers had made substantial investments in their dealerships that were intended to be permanent. See 815 ILCS 710/12(c)(3), (c)(4) (West 2004). Additionally, the evidence was undisputed that the protesting dealers had adequate sales and service facilities. See 815 ILCS 710/12(c)(7) (West 2004). Finally, there was no evidence that any of the protesting dealers had materially breached their franchise agreements. See 815 ILCS 710/12(c)(9) (West 2004). The parties presented conflicting evidence about the factors that focus on public interest and welfare, the economic impact of adding dealerships, and the amount of business available to existing dealers in the relevant market area. See 815 ILCS 710/12(c)(1), (c)(2), (c)(5), (c)(8), (c)(10) (West 2004).

The two experts who testified, James Anderson (GMC's expert) and Dr. John Matthews (the protesting dealers' expert),
224 had significantly different opinions due to their difference in approaches. Anderson's method compared local GMC sales performance with adjusted national and statewide standards. Matthews compared GMC sales performance in the Jacobs relevant market area with all parts of the Chicago metropolitan area outside the Jacobs relevant market area, and he used the same method for Loren.

GMC criticizes Matthews' approach as "circular" because he relied solely on data from the Chicago area. But Matthews' approach offered the advantage of comparing the two relevant market areas to areas that were similar in most respects, including the fact that they were urban, that dealers sold heavily into one another's territories, and that the climate was generally the same. By contrast, Anderson's adjusted national and state standards took into account data from rural areas, where there was often far less competition and where customer tastes differed from those of customers in major cities like Chicago.

In light of Dr. Matthews' testimony and the other evidence, it was reasonable for the Board to conclude that Anderson's approach was not as valid a method as Dr. Matthew's for measuring dealership performance in a multidealer area in a large metropolitan region. After examining the evidence, the Board was simply not persuaded by GMC's attempt to show that GMC dealers in the two relevant market areas were performing poorly. Instead, the Board found that Dr. Matthews' approach was generally superior, and gave more weight to the testimony he presented on the economic impact of adding the dealerships and the harm this would cause to marginally profitable dealerships like Castle and Muller.

GMC argues that the Board's decision relied in large part upon performance averages for GMC dealers, and assumed a static market. But, as the appellate court majority pointed out, it was GMC who introduced evidence that established average sales as the appropriate measure of performance. 361 Ill.App.3d at 279, 297 Ill.Dec. 172, 836 N.E.2d 903. GMC cannot complain of the Board's reliance upon data concerning average sales when GMC itself relied on such data in its effort to meet its burden of establishing good cause to add the dealerships. Moreover, there is nothing in the record indicating that the Board would not have been receptive to evidence indicating likely future improvement in GMC sales at the time of the administrative hearing, which took place in 2002. But the evidence presented to the Board indicated that GMC sales for dealers in the Jacobs and Loren relevant market areas were generally declining at that time. Moreover, this decline occurred even though the protesting dealerships devoted significant resources to advertising and promoting GMC sales.

Evidence that GMC dealers in the two relevant market areas had considerable difficulty getting an adequate supply of product from GMC supported the Board's conclusion that adding the dealerships would not serve the public interest. Many area GMC dealers testified that they had trouble getting an adequate supply from GMC of sport utility vehicles, the vehicles that sell best in the Chicago area. Grossinger general manager Charles Settles stated that GMC makes discretionary allocations of additional vehicles to dealers, but these allocations are made in an arbitrary fashion. GMC's vehicle allocation system also had an additional problem in that there was a lapse of 90 to 120 days between the time a vehicle is ordered and its arrival.

According to Dr. Matthews, adding the two dealerships would only exacerbate the existing product supply problems and
225 cause greater inconvenience to GMC customers in the area. Dr. Matthews stated that it was not in the public interest to *225 have small dealers with small inventories, thereby requiring buyers to visit several GMC dealers to see all the vehicles they wanted to view. Furthermore, Dr. Matthews believed that the cross-selling data showed there was adequate competition among GMC dealers in the relevant areas, and he felt that GMC should have fewer and larger dealers in the Chicago area. The evidence also showed that growth was unlikely except for a new housing development called the Glen in the Loren relevant market area. Matthews estimated that this new development would only result in an annual sales increase of five GMC vehicles at most.

Under these circumstances, we find that there was sufficient evidence to support the Board's conclusion that adding the dealerships would not serve the public interest and was not warranted by existing economic conditions when balancing the interests involved. Accordingly, we conclude that the Board's findings should not be disturbed because they were not against the manifest weight of the evidence, and its ultimate conclusion to grant the protests was not clearly erroneous.

III. Vagueness

GMC next argues that the Act is unconstitutionally vague because a manufacturer cannot determine in advance when a dealership can be added to the market. In support of its argument, GMC relies upon *Fields Jeep-Eagle, Inc. v. Chrysler Corp.*, 163 **Ill.2d** 462, 206 Ill.Dec. 694, 645 N.E.2d 946 (1994), where this court held a previous version of the Act unconstitutional on separation of powers grounds.

In determining whether a statute has been shown to be unconstitutional, we begin with the presumption that all statutes are constitutional. *People v. Waid,* 221 **Ill.2d** 464, 480, 303 Ill.Dec. 785, 851 N.E.2d 1210 (2006). The burden of rebutting that presumption is on the party challenging the validity of the statute to demonstrate clearly a constitutional violation. *People v. Greco,* 204 **Ill.2d** 400, 406, 274 Ill.Dec. 73, 790 N.E.2d 846 (2003). If reasonably possible, a statute must be construed so as to affirm its constitutionality and validity. Greco, 204 **Ill.2d** at 406, 274 Ill.Dec. 73, 790 N.E.2d 846.

A statute is not unconstitutionally vague if it is explicit enough to serve as a guide to those who must comply with it. *Ardt v. Illinois Department of Professional Regulation,* 154 **Ill.2d** 138, 157, 180 Ill.Dec. 713, 607 N.E.2d 1226 (1992). Moreover, a statute is considered unconstitutionally vague only if its terms are so ill-defined that the ultimate decision as to its meaning rests on the opinions and whims of the trier of fact rather than any objective criteria or facts. *People ex rel. Sherman v. Cryns,* 203 **Ill.2d** 264, 291, 271 Ill.Dec. 881, 786 N.E.2d 139 (2003); *People v. Burpo,* 164 **Ill.2d** 261, 266, 207 Ill.Dec. 503, 647 N.E.2d 996 (1995).

As noted above, section 2(v) of the Act defines "good cause" and section 12(c) sets forth 11 circumstances the court must consider in determining "good cause." 815 ILCS 710/2(v), 12(c) (West 2004). Administrative agencies must often resolve similar "cause" questions against vagueness challenges because courts understand that it is difficult for an administrative agency to anticipate every type of conduct that might constitute "good cause." See *Ford Motor Co. v. Motor Vehicle Review Board,* 338 Ill.App.3d 880, 889, 272 Ill.Dec. 883, 788 N.E.2d 187 (2003). But the Franchise Act is even more detailed than some statutes that have been upheld because it contains 11 factors for the Board to assess to guide its determination.

226 In *Piano v. State of California ex rel. New Motor Vehicle Board,* 103 Cal.App.3d 412, 163 Cal.Rptr. 41 (1980), a California *226 court upheld the constitutionality of an automobile franchise statute that is analogous to the Illinois Act, having a "good cause" standard with just five statutory circumstances to consider to aid the determination. The court held that the standards set forth in the statute were adequate to guide those persons to be governed by the act, as well as the hearing officer, the agency and the courts charged with deciding cases under it. *Piano,* 103 Cal.App.3d at 418, 163 Cal.Rptr. at 44. In so holding, the court noted that fixing any more rigid a standard would subvert the very purpose behind the delegation of authority to the agency—which is to leave the decision to the body with the expertise of handling complicated decisions that depend on "'the individual and varying local conditions.'" *Piano,* 103 Cal.App.3d at 418, 163 Cal.Rptr. at 44, quoting *Jenner v. City Council of the City of Covina,* 164 Cal.App.2d 490, 499, 331 P.2d 176, 182 (1958).

GMC's reliance on *Fields Jeep-Eagle, Inc. v. Chrysler Corp.,* 163 **Ill.2d** 462, 206 Ill.Dec. 694, 645 N.E.2d 946 (1994), is misplaced. There, this court held an earlier version of the Franchise Act (see Ill.Rev. Stat.1989, ch. 121½, pars. 754(e)(8), 762(c); see also 815 ILCS 710/4(e)(8), 12(c) (West 1992)) unconstitutional based on separation of powers grounds, finding that courts are not adequately equipped to make the difficult decision of "independently and originally appraising and determining the appropriate location for a business." *Fields,* 163 **Ill.2d** at 472, 206 Ill.Dec. 694, 645 N.E.2d 946. In so doing, this court commented that several of the statutory circumstances that the court is to inquire into are "subjective and/or speculative in nature and involve competing public and private interests." *Fields,* 163 **Ill.2d** at 476, 206 Ill.Dec. 694, 645 N.E.2d 946. GMC seizes upon this language to argue that the statutory scheme is unconstitutionally vague. GMC takes this language from *Fields* out of context, however, because the court was merely making its observation in the context of noting that courts are not equipped to make the statutory determination because it involves a legislative inquiry into the public interest, which could not be delegated to the judiciary. *Fields,* 163 **Ill.2d** at 478-79, 206 Ill.Dec. 694, 645 N.E.2d 946. *Fields* observed that the majority of state statutes provide for a single administrative agency or board to hear and to decide the merits of protests against the establishment of an additional dealership in a particular area. *Fields,* 163 **Ill.2d** at 477, 206 Ill.Dec. 694, 645 N.E.2d 946. The reason that it is best to have a board decide these kinds of issues in the first instance is that "[t]he independent determination of what facts are pertinent and the assessment of those facts as they bear upon whether a business should be allowed to operate at a given location are not functions which courts are generally equipped to perform or with which they should be burdened." *Fields,* 163 **Ill.2d** at 477, 206 Ill.Dec. 694, 645 N.E.2d 946.

In response to the *Fields* decision, the legislature amended the Act to create a Motor Vehicle Review Board to hear dealer protests under the Act. 815 ILCS 710/1 *et seq.* (West 1996) (amended by Pub. Act 89-145, eff. July 14, 1995). Nothing in *Fields* indicates that the language of the Act would be unconstitutionally vague if a board were created to hear disputes under the Act. Indeed the opposite conclusion can be drawn from the concluding paragraph of *Fields,* where this court recognized the interest of the State in regulating the dealings of motor vehicle manufacturers and dealers so as to redress the disparity in economic and bargaining power between manufacturers and their franchises. *Fields,* 163 **Ill.2d** at 479-80,
227 206 Ill.Dec. 694, 645 N.E.2d 946. The court in *227 *Fields* concluded that it was aware that numerous states have enacted regulatory legislation requiring a determination of whether to allow the establishment of a dealership based on the same or

similar factors as those set out in section 12(c) of the Act. *Fields*, 163 Ill.2d at 480, 206 Ill.Dec. 694, 645 N.E.2d 946.

GMC does not cite any case holding a "good cause" standard unconstitutionally vague where an agency's decision was guided by a list of statutory factors to aid its determination. Nor does GMC offer any persuasive argument to support its position. Accordingly, we find that the Act's standard for making a "good cause" determination is not unconstitutionally vague.

IV. Commerce Clause

GMC next argues that the Franchise Act violates the commerce clause of the United States Constitution (U.S. Const., art. I, § 8, cl.3). According to GMC, the statute improperly favors purely local interests over interstate commerce because it contains a provision that states that "good cause shall not be shown solely by a desire for further market penetration." See 815 ILCS 710/12(c)(7) (West 2004).

A state statute is valid under the commerce clause if it evenhandedly effectuates a legitimate local public interest, the effect on interstate commerce is only incidental, and the burden on commerce is not clearly excessive to the local benefits. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 847, 25 L.Ed.2d 174, 178 (1970). If a legitimate local purpose is found, then the question becomes one of degree: the extent of the burden that will be tolerated will depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities. *Pike*, 397 U.S. at 142, 90 S.Ct. at 847, 25 L.Ed.2d at 178.

The United States Supreme Court has upheld the constitutionality of a California automobile franchise statute that is similar to Illinois' statute, finding a disparity of bargaining power between automobile manufacturers and their franchisees, and holding that such laws promote fair dealing and protect small businesses. *New Motor Vehicle Board v. Orrin W. Fox Co.*, 439 U.S. 96, 100-02, 99 S.Ct. 403, 407-08, 58 L.Ed.2d 361, 370-71 (1978). Additionally, the Fourth Circuit Court of Appeals relied upon *Orrin Fox* and upheld a franchise statute against a commerce clause challenge where the statute prohibited establishment of an automobile franchise if the State Commissioner of Motor Vehicles determined the market could not support all of the dealerships. *American Motors Sales Corp. v. Division of Motor Vehicles of Commonwealth of Virginia*, 592 F.2d 219 (4th Cir.1979).

We find that our Franchise Act serves the same legitimate public interests noted in *Orrin Fox* and *American Motors Sales*. See also *Fireside Nissan*, 30 F.3d at 218 ("Certainly the state's desire to protect local dealers and consumers from harmful franchising practices is a lawful legislative goal"). Thus, we find that the Franchise Act effectuates a legitimate local interest under the *Pike* test.

The cases relied upon by GMC to support its commerce clause argument are either distinguishable or unpersuasive. See *General GMC Trucks, Inc. v. General Motors Corp.*, 239 Ga. 373, 377, 237 S.E.2d 194, 197 (1977); *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 530-31, 69 S.Ct. 657, 661, 93 L.Ed. 865, 870 (1949); *Buck v. Kuykendall*, 267 U.S. 307, 313, 45 S.Ct. 324, 325, 69 L.Ed. 623, 625 (1925). In *General GMC Trucks*, the Georgia Supreme Court found its state's
228 automobile franchise statute unconstitutional because *228 it did not effectuate a public interest. *General GMC Trucks, Inc.*, 239 Ga. at 377, 237 S.E.2d at 197. The case was decided, however, before the United States Supreme Court rendered its decision in *Orrin Fox*, which expressly found the protection of existing new-car dealers to be a legitimate purpose. Thus, the Georgia Supreme Court's decision is of limited value.

Buck is distinguishable because the Franchise Act does not distinguish between out-of-state and in-state manufacturers and therefore it regulates evenhandedly. In contrast, the statute in *Buck* applied to common carriers engaged exclusively in interstate commerce. *Buck*, 267 U.S. at 313, 45 S.Ct. at 325, 69 L.Ed. at 625.

H.P. Hood is also distinguishable. There, the avowed purpose of a law regulating the milk industry was economic isolation and the curtailment of the volume of interstate commerce. *H.P. Hood & Sons, Inc.*, 336 U.S. at 530-31, 69 S.Ct. at 661, 93 L.Ed. at 870. In the present case, the Franchise Act has the legitimate purpose of redressing the disparity in bargaining power between manufacturers and their franchisees, and there has been no showing of any decrease in interstate commerce.

Finally, we conclude that the Franchise Act passes constitutional muster under the *Pike* test because any burden that the Act places on interstate commerce is not clearly excessive in relation to the local benefits. As the appellate court noted,

> "In finding that the Virginia statute did not impose such a burden, the Fourth Circuit noted that even with the statute, the manufacturer and its competitors can still supply the market area with all the vehicles it can absorb, and the public can still buy the manufacturer's brand from the existing dealership or choose to buy a competitive brand. *American Motors,* 592 F.2d at 223. It also noted that in addressing the antitrust issue in *New Motors,* the Supreme Court recognized the California Act did have an anticompetitive effect but noted that '"if an adverse effect on competition were, in and of itself, enough to render a state statute invalid, the States' power to engage in economic regulation would be effectively destroyed."' *American Motors,* 592 F.2d at **224**, quoting *New Motor,* 439 U.S. at 111, 99 S.Ct. at 412, 58 L.Ed.2d at 376-77, quoting *Exxon Corp. v. Governor of Maryland,* 437 U.S. 117, 133, 98 S.Ct. 2207, 2218, 57 L.Ed.2d 91, 105 (1978). Thus, the Fourth Circuit noted something in addition to such a restraint on competition must be shown to establish an unconstitutional burden on interstate commerce, and there, no other effect than a restriction of intrabrand competition was demonstrated." 361 Ill.App.3d at 286-87, 297 Ill.Dec. 172, 836 N.E.2d 903, quoting *American Motors,* 592 F.2d at **224**.

We agree with the analysis of our appellate court and the Fourth Circuit in *American Motors.* GMC has not demonstrated any other effect beyond a restriction on intrabrand competition. Therefore, the Act does not place an excessive burden on interstate commerce, and we conclude that it does not violate the commerce clause.

V. Equal Protection and Special Legislation

GMC's final argument is that the Act violates the equal protection clause of both the Illinois Constitution of 1970 (Ill. Const. 1970, art. I, § 2), and the United States Constitution (U.S. Const., amend.XIV), as well as the special legislation clause of the Illinois Constitution (Ill. Const.1970, art. IV, § 13). GMC contends that there is no principled basis for giving protection to
229 car *229 dealership franchises but denying the same kind of protection to other types of franchises.

The special legislation clause prohibits the General Assembly from conferring a special benefit or privilege upon one person or group and excluding others that are similarly situated. *Schiller,* 221 **Ill.2d** at 149, 302 Ill.Dec. 557, 849 N.E.2d 349. A special legislation challenge is generally judged by the same standards as an equal protection claim. *Crusius v. Illinois Gaming Board,* 216 **Ill.2d** 315, 325, 297 Ill.Dec. 308, 837 N.E.2d 88 (2005). Moreover, in applying an equal protection analysis, we apply the same standard under both the United States Constitution and the Illinois Constitution. *Wauconda Fire Protection District v. Stonewall Orchards, LLP,* 214 **Ill.2d** 417, 434, 293 Ill.Dec. 246, 828 N.E.2d 216 (2005).

A special legislation inquiry first involves the determination of whether the statute discriminates in favor of a select group. *Allen v. Woodfield Chevrolet, Inc.,* 208 **Ill.2d** 12, 22, 280 Ill.Dec. 501, 802 N.E.2d 752 (2003). If it does, this court must then determine whether the classification created by the statute is arbitrary. *Allen,* 208 **Ill.2d** at 22, 280 Ill.Dec. 501, 802 N.E.2d 752. Where the statute does not affect a fundamental right or involve a suspect classification, it will be judged under the deferential rational basis test, and the statute will be upheld if the legislative classification is rationally related to a legitimate state interest. *Crusius,* 216 **Ill.2d** at 325, 297 Ill.Dec. 308, 837 N.E.2d 88. Thus, if this court can reasonably conceive of any set of facts that justify a distinction between the class the statute benefits and the class outside its scope, we will uphold the statute. *Crusius,* 216 **Ill.2d** at 325, 297 Ill.Dec. 308, 837 N.E.2d 88. Again, we note that a statute carries a presumption of constitutionality and the party attacking it bears the burden of establishing its infirmity. *Schiller,* 221 **Ill.2d** at 148, 302 Ill. Dec. 557, 849 N.E.2d 349.

Here, we find that the Franchise Act creates a legislative classification by treating existing automobile dealers differently than other kinds of franchise owners. However, the classification is related to the legitimate government purposes of redressing the disparity in bargaining power between automobile manufacturers and their existing dealers and of protecting the public from the negative impact of harmful franchise practices by automobile manufacturers. Additionally, the means employed by the statute—requiring a determination by a neutral body that establishing a new dealership satisfies the "good cause" standard by taking into account considerations that are directly related to the purposes served by the statute—is rationally related to the legitimate purposes of the statute. Accordingly, we find that GMC has not met its burden of establishing that the statute is unconstitutionally infirm.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the appellate court.

Affirmed.

Justices FREEMAN, FITZGERALD, KILBRIDE, GARMAN, and BURKE concurred in the judgment and opinion.

Justice KARMEIER dissented, with opinion.

Justice KARMEIER, dissenting:

230 The majority opinion implicitly recognizes that the Act itself fails to provide a serviceable definition of "good cause" and "commercial reasonableness," and it casts about in search of one (see **224 Ill.2d** at 15-16, 308 Ill.Dec. at 622-623, 862 N.E.2d at 220-221), but a coherent and workable *230 definition is never found or applied. The court touts a definition of "commercial reasonableness" it derives, not from a franchising context, but from a California case dealing with bulk sales and California's Uniform Commercial Code (**224 Ill.2d** at 16, 308 Ill.Dec. at 623, 862 N.E.2d at 221, citing *Gifford v. J. & A. Holdings,* 54 Cal.App.4th 996, 63 Cal.Rptr.2d 253 (1997)), defining "commercial reasonableness" as "commonly accepted commercial practices of responsible businesses which afford all parties fair treatment" (see **224 Ill.2d** at 16, 308 Ill.Dec. at 623, 862 N.E.2d at 221, quoting *Gifford,* 54 Cal.App.4th at 1005-06, 63 Cal.Rptr.2d at 259); however, I see no evidence that the court has utilized even that standard in its review of this matter.

Perhaps that is because the standard is so vague that it provides no meaningful guidance to either the parties whom it affects, the administrative body charged with implementing it, or courts which must review the administrative action. Perhaps it is because the definition has no real utility in the context of an Act whose sole purpose is to protect only *one* group: motor vehicle franchisees.

With respect to the first possibility, I would acknowledge that the legislature may delegate authority to an administrative body to perform certain functions; however, in order to *properly* delegate such authority, the legislature must provide sufficient standards to guide the administrative body in the exercise of its functions. See *East St. Louis Federation of Teachers, Local 1220 v. East St. Louis School District No. 189 Financial Oversight Panel,* 178 **Ill.2d** 399, 423, 227 Ill. Dec. 568, 687 N.E.2d 1050 (1997). A law vesting discretionary power in an administrative body or officer must properly define the terms under which the discretion is to be exercised (*In re Application for Judgment & Sale of Delinquent Properties for the Tax Year 1989,* 167 **Ill.2d** 161, 176, 212 Ill.Dec. 215, 656 N.E.2d 1049 (1995)) and provide intelligible standards (*Hoogasian v. Regional Transportation Authority,* 58 **Ill.2d** 117, 130, 317 N.E.2d 534 (1974)). Similarly, in order to provide adequate notice to those whom it affects, the statute must be explicit enough to serve as a guide to those who must comply with it. *Ardt v. Illinois Department of Professional Regulation,* 154 **Ill.2d** 138, 157, 180 Ill. Dec. 713, 607 N.E.2d 1226 (1992). A statute is considered unconstitutionally vague if its terms are so ill-defined that the ultimate decision as to its meaning rests on the opinions and whims of the trier of fact rather than any objective criteria or facts. *People ex rel. Sherman v. Cryns,* 203 **Ill.2d** 264, 291, 271 Ill.Dec. 881, 786 N.E.2d 139 (2003). In my opinion, the Act does not satisfy the applicable criteria. Thus, I believe that the Act is an improper delegation of the legislature's authority *and* unconstitutionally vague. The majority's reliance upon the term "good cause" and the "11 circumstances" set forth in section 12(c) of the Act (815 ILCS 710/12(c) (West 2004)) does not persuade me otherwise. With the exception of subsections (5) and (8), those factors address only the interests of the protesting dealers, only one of the groups whose interests are at stake. As for subsections (5) and (8), they speak only of "the public welfare" and the "public interest," without providing any substantive guidance as to what those vague concepts mean, or even who is subsumed in "the public." This court has previously observed that "the Act does not state or identify what the overall or ultimate public interest is." *Fields Jeep-Eagle, Inc. v. Chrysler Corp.,* 163 **Ill.2d** 462, 478, 206 Ill.Dec. 694, 645 N.E.2d 946 (1994). As far as I am aware, no legislative action has been taken since *Fields* to remedy that deficiency.

231 *231 It is that deficiency which brings the discussion to the second possibility I previously mentioned. I believe the majority never again discusses its imported definition of "commercial reasonableness" because the majority at some level recognizes that the Act, and its "11 circumstances," display very little in the way of genuine concern for the interests of the manufacturer, its citizen-shareholders, or consumers generally, and it essentially provides no guidance as to how their interests might be identified and weighed.

The disingenuously benevolent language of the Act's "Declaration of purpose" (815 ILCS 710/1.1 (West 2004) (purporting to promote, *inter alia,* "the public interest and welfare" and that of "consumers generally")) rings hollow when the substantive provisions of the Act are applied. In practice, the Act benefits neither manufacturers—and the many citizens who have invested in them—nor consumers. This court has acknowledged as much:

> "The several statutory purposes and goals stated in this section are consistent with neither each other nor with various of the competing interests expressed in section 12(c). Protecting the private economic interests of dealers in their dealership investments and properties may, for example, militate against the allowance of an additional dealership and thereby frustrate the goal of protecting consumer interests by ensuring competition and convenience for consumers. Conversely, the allowance of an additional dealership which has the capability of offering lower prices and better service than an existing dealership may benefit consumers but result in a loss of business or even the entire investment of the existing dealer.
>
> * * * [T]he Act does not state or identify what the overall or ultimate public interest is." Fields Jeep-Eagle, 163 Ill.2d at 478, 206 Ill.Dec. 694, 645 N.E.2d 946.

The "standards" of the Act are inadequate to provide the guidance necessary to achieve the purported goals of section 1.1. Thus, the "assessment" of the administrative body becomes the "standard" itself. See **224 Ill.2d** at 14, 308 Ill.Dec. at 621-622, 862 N.E.2d at 219-220.

Beyond that deficiency, and notwithstanding its seemingly lofty purpose of protecting "the public interest and welfare" and "consumers generally," this Act is clearly nothing more than a protectionist measure favoring existing motor vehicle dealerships, and it should be acknowledged as such. In my opinion, there is no rational basis to justify a distinction between the class the statute benefits and the class outside its scope. In short, it is special legislation. As Justice Cook noted in his insightful appellate court dissent: "Motor Vehicle Franchise Acts * * * were justified on the basis of a `disparity in bargaining power between automobile manufacturers and their dealers.' [New Motor Vehicle Board v. Orrin W. Fox Co., 439 U.S. 96, 100, 99 S.Ct. 403, 407, 58 L.Ed.2d 361, 370 (1978).]" 361 Ill.App.3d at 293, 297 Ill.Dec. 172, 836 N.E.2d 903 (Cook, P.J., dissenting). As the Supreme Court noted in *New Motor,* at the time of that decision, "'there exist[ed] only 5 passenger-car manufacturers, 3 of which produce[d] in excess of 95 percent of all passenger cars sold in the United States.'" New Motor, 439 U.S. at 100 n. 4, 99 S.Ct. at 407 n. 4, 58 L.Ed.2d at 370 n. 4, quoting S.Rep. No. 2073, 84th Cong., 2d Sess., 2 (1956). That is no longer the case. As Justice Cook observes:

> "We now live in a world of franchises. Motor vehicle dealers are given special treatment not enjoyed by
> 232 other franchisees, who must protect themselves by the contracts they sign. Motor vehicle *232 manufacturers from around the world now compete in the United States. New manufacturers can put dealers wherever they want them. Established manufacturers, such as General Motors, cannot." 361 Ill.App.3d at 293, 297 Ill.Dec. 172, 836 N.E.2d 903 (Cook, P.J., dissenting).

Indeed, the contract is a well-known and time-honored device particularly suited to establishing the legal rights of parties *before* they enter into agreements and governing the nature and conditions of their relationship thereafter. If dealerships wish to limit the geographical proximity of other franchises, that would be a matter for negotiation *before* an agreement is concluded, when the parties' expectations are on the table. I fail to see how motor vehicle franchises differ in any significant respect from franchises for food service, home improvement or gas stations, just to name a few. All may have citizen investors who believe they stand to lose business and money when other franchises are granted in their area. Perhaps I am unaware of franchise laws protecting them; my belief is that they protect themselves through the contracts they sign.

As for any claimed disparity in bargaining power between automobile manufacturers and their dealers, I agree with Justice

Cook's observation that the world has indeed changed since the Supreme Court's 1978 decision in *New Motor*, a development of which GMC is no doubt well aware. Three manufacturers no longer dominate the American market, as automobile manufacturers struggle for market share, profitability, and in some instances survival. In such a business climate it seems implausible that a manufacturer would want to add dealerships that are not viable or purposefully risk disruption in the chain of distribution by undermining its existing dealerships. I simply fail to see how motor vehicle franchisees are in a less favorable position, *vis-á-vis* their franchisers, than other franchisees are with respect to theirs. The majority's one-paragraph rejection of GMC's special legislation argument offers no explanation.

Because I believe the majority opinion offers no meaningful standard of review, and because I believe the Motor Vehicle Franchise Act is unconstitutional, I respectfully dissent.

[1] Thirty-two states currently have motor vehicle franchise statutes that allow existing dealerships of the same line make within a specified distance of a proposed new dealership to file a protest to resolve whether a new dealer may be added, and thirty of those states have a "good cause" standard.

[2] Grossinger was located in the relevant market area of both proposed add points and protested both of them.

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CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Tenth District, Franklin County.

HALLEEN CHEVROLET, INC. et al., Appellants-Appellants,
v.
GENERAL MOTORS CORPORATION et al., Appellees-Appellees.

No. 00AP-1454. | June 28, 2001.

Appeal from the Franklin County Court of Common Pleas.

Attorneys and Law Firms

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Opinion

OPINION

BROWN.

*1 Appellants, Halleen Chevrolet, Inc., and Charles Halleen (collectively referred to as "Halleen"), appeal the judgment of the Franklin County Court of Common Pleas affirming the order of the Motor Vehicle Dealers Board of Ohio ("MVDB" or "the board") to permit appellees, General Motors Corporation ("GM"), to relocate Fairchild Chevrolet ("Fairchild").

Before a franchisor such as GM may relocate an existing new automobile dealer, it first must give written notice of such intent to each franchisee of the same line-make of vehicle in the relevant market area ("RMA"), an area within a ten-mile radius from the site of the proposed relocated existing dealer. On January 23, 1997, GM gave Halleen and other RMA dealers Notice of Intent to Relocate Fairchild from Detroit Road in Lakewood, Ohio, to the intersection of Detroit and Columbia Roads in Westlake, Ohio. Halleen filed a protest, pursuant to R.C. 4517.50(A).

On July 6, 1998, a hearing commenced before a hearing examiner for the MVDB. Voluminous evidence was presented over the course of the ten-day trial. James A. Anderson testified as an expert witness on behalf of GM. Halleen presented the testimony of expert witnesses Professors John Matthews and Norman Krumholz. Several other lay witnesses testified. After eight months, the original hearing examiner failed to issue a recommendation and the MVDB reassigned the case to another hearing examiner over the objection of Halleen.

A one-day hearing was held before the second hearing examiner, at which counsel for the respective parties presented arguments and the examiner inspected the dealership sites. On October 20, 1999, the hearing examiner issued a recommendation, including findings of fact and conclusions of law, in which he determined that good cause existed to permit Fairchild to relocate. Halleen filed objections to the hearing examiner's decision, but the MVDB declined to further consider the matter and adopted and approved the hearing examiner's decision.

On December 8, 1999, Halleen appealed to the Franklin County Court of Common Pleas asserting five assignments of error. On December 5, 2000, the common pleas court found that there was reliable, probative, and substantial evidence to support the decision of the MVDB and affirmed the MVDB's decision. Halleen appeals this judgment, asserting the following six assignments of error:

> Assignment of Error No. I: The Board's *sua sponte* reassignment of Hearing Examiners Without any Explanation and Over Halleens' Objections Violates Appellants' Due Process Rights.

> Assignment of Error No. II: Halleen was Denied its Constitutionally Protected Right of Due Process when the Hearing Examiner Proceeded to Make a Recommendation *Without* a Hearing or Review of the Conflicting Oral Expert Evidence.

> Assignment of Error No. III: Halleen was Denied its Constitutionally Protected Rights of Due Process when the

Ohio Motor Vehicle Dealers Board Failed to Deliberate or Review the Hearing Examiner's Proposed Findings.

*2 Assignment of Error No. IV: The Hearing Examiner's Recommendation is Contrary to the Ohio Motor Vehicle Dealer Board and Other States' Public Policy.

Assignment of Error No. V: The Hearing Examiner's Recommendations Failed to Apply the Relevant Market Area Analysis as Required by R.C. §§ 4517.51 and 4517.01(DD).

Assignment of Error No. VI: The Hearing Examiner's Adoption *in toto* of GM's Proposed Findings of Fact and Conclusions of Law was not Supported by Reliable, Probative and Substantial Evidence and in Accordance with Law.

The standard of review for the court of common pleas in administrative matters is given in R.C. 119.12, which states in part:

> The court may affirm the order of the agency complained of in the appeal if it finds, upon consideration of the entire record and such additional evidence as the court has admitted, that the order is supported by reliable, probative, and substantial evidence and is in accordance with law. In the absence of such a finding, it may reverse, vacate, or modify the order or make such other ruling as is supported by reliable, probative, and substantial evidence and is in accordance with law.

The standard of review for appellate courts is whether the common pleas court abused its discretion in finding that the administrative order was or was not supported by reliable, probative, and substantial evidence. *Crowe v. State Bd. of Edn.* (Oct. 26, 1999), Franklin App. No. 99AP-78, unreported, quoting *Samson v. State Bd. of Edn.* (Aug. 13, 1998), Franklin App. No. 97APE12-1702, unreported. Further:

> In reviewing an order of an administrative agency, an appellate court's role is more limited than that of a trial court reviewing the same order. It is incumbent on the trial court to examine the evidence. Such is not the charge of the appellate court. The appellate court is to determine only if the trial court has abused its discretion. An abuse of discretion * * * implies not merely error of judgment, but perversity of will, passion, prejudice, partiality, or moral delinquency. * * * Absent an abuse of discretion on the part of the trial court, a court of appeals must affirm the trial court's judgment. * * *
>
> The fact that the court of appeals * * * might have arrived at a different conclusion than did the administrative agency is immaterial. Appellate courts must not substitute their judgment for those of an administrative agency or a trial court absent the approved criteria for doing so. *Rossford Exempted Village School Dist. Bd. of Edn. v. State Bd. of Edn.* (1992), 63 Ohio St.3d 705, 707, quoting *Lorain City Bd. of Edn. v. State Emp. Relations Bd.* (1988), 40 Ohio St.3d 257, 260-261. (Citations omitted.)

Having set forth the appropriate standard of review, we now address Halleen's assignments of error. Halleen asserts in its first assignment of error that the MVDB's *sua sponte* reassignment of a new hearing examiner, after the hearing and without any explanation, violated Halleen's due process rights. However, this argument regarding the method of transfer was raised neither in the objections to the MVDB nor the appeal to the common pleas court, and the trial court did not address it. Halleen's failure to raise such argument before the common pleas court and administrative agency constitutes a waiver of his right to assert it for the first time on appeal to this court. See *State ex rel. Zollner v. Indus. Comm.* (1993), 66 Ohio St.3d. 276, 278; *Morgan v. Girard City School Dist. Bd. of Edn.* (1993), 90 Ohio App.3d 627, 631; *D & D Investment v. Franklin Cty. Bd. of Zoning Appeals* (Dec. 29, 1998), Franklin App. No. 97APD11-1479, unreported. Accordingly, Halleen's first assignment of error is overruled.

*3 Halleen argues in its second assignment of error that the MVDB denied it due process when the second hearing examiner proceeded to make a recommendation without a hearing or a review of the conflicting oral expert evidence. The trial court found the substitution of hearing examiners did not violate any due process or equal protection rights, citing several cases, including *Laughlin v. Pub. Util. Comm.* (1996), 6 Ohio St.2d 110, and *Ritchie Photographic v. Limbach* (1994), 71 Ohio St.3d 440. In *Laughlin,* the Ohio Supreme Court found it was not essential that a person who hears the evidence in an administrative proceeding also prepares the findings and recommendations if that same person reviews and examines the record of the proceeding. In *Ritchie,* citing *Laughlin,* the Ohio Supreme Court also found the administrative board did not deny the parties due process by replacing the attorney-examiner who had conducted the evidentiary hearing with another attorney-examiner who made a determination based upon a "cold record."

Halleen contends that *Laughlin* and *Ritchie* are distinguishable from the present case because neither involved disputes as to the credibility of witnesses and both were based entirely upon a question of law. However, neither *Laughlin* nor *Ritchie* specifically limited their respective holdings to situations where only legal questions are involved, or where credibility is not at issue.

Even if Halleen's view of the underlying circumstances in *Laughlin* and *Ritchie* were true, we do not find the present case distinguishable from those cases. In support of its contention that the expert witnesses' credibility was at issue in the present case, Halleen cites the common pleas court's statement that the hearing examiner "weighed the voluminous evidence" and "had to weigh a substantial amount of conflicting evidence presented primarily through the parties' expert witnesses." Halleen also cites the common pleas court's statement that the parties' experts disagreed on almost every one of the non-exclusive statutory factors. These three citations to the trial court's decision are the only argument put forth by Halleen to demonstrate that credibility was at issue.

However, the statements by the common pleas court regarding the "weighing" of evidence only points out the existence of conflicting evidence and does not comment on or acknowledge any credibility issues. That the experts disagreed on nearly all of the statutory factors also does not point to any issues of credibility. To the contrary, the hearing before the hearing examiner consisted largely of undisputed data and statistics and each expert's analysis and interpretation of such data. We agree with GM's view that this is not a case where one witness was "lying" and one was being "truthful," which would require the weighing of witness demeanor and veracity. Apart from the citations to the common pleas court's decision, Halleen fails to point to any specific instances in the record where witness credibility was at issue. The second hearing examiner agreed that he would hear any additional evidence to resolve questions of demeanor or honesty, but after reviewing the evidentiary record, he found that such was not necessary.

***4** This court addressed the same issue raised in this assignment of error in *In re Christian Care Home of Cincinnati, Inc.* (1991), 74 Ohio App.3d 453 and *Kremer v. State Med. Bd.* (1996), Franklin App. No. 95APE09-1247, unreported. The common pleas court in the present case cited both favorably and analyzed our holding in both cases. Although Halleen failed to address these two cases in its merit brief, it did mention them in its reply brief, but only to state that these cases were distinguishable because they also did not involve determinations of demeanor and credibility. However, as with *Laughlin* and *Ritchie,* neither *Kremer* nor *Christian Care* limited their holdings to cases involving only questions of law. Indeed, in *Christian Care,* Christian Care specifically argued that upon remand, the original hearing examiner should have been appointed to consider additional testimony and a modified certificate of need application because only the initial examiner had the opportunity to observe the demeanor of the witnesses. However, we found in *Christian Care* that the appointment of a new hearing examiner met due process requirements even though the new hearing examiner did not observe the witnesses and issued recommendations based only on a review and analysis of the record. We find both *Kremer* and *Christian Care* persuasive.

Halleen points to cases from myriad other jurisdictions outside of Ohio for several related propositions, but it fails to cite any Ohio law to support these same propositions. Given our analysis above, the cases on point from the Ohio Supreme Court and this court, and Halleen's failure to point to any persuasive Ohio law to the contrary, we find these determinations by other jurisdictions to be unpersuasive.

Halleen also points to R.C. 4517.57(A) and 119.09 to support its argument that the same hearing examiner who conducts the hearing must also issue the findings and recommendations to the board. We disagree. R.C. 4517.57(A) requires that the board appoint a hearing officer to hear and consider the oral and documented evidence and issue findings and recommendations to the board. As the trial court similarly noted, we read the term "hearing officer" as used in this provision, to refer to the generic legal capacity or title of the position, rather than as a requirement that the hearing officer be one person or a specific individual. If the legislature had intended this provision to require the specific limitation propounded by Halleen, it could have simply stated so. Likewise, R.C. 119.09 similarly states that the administrative agency may appoint an examiner to conduct a hearing, and the examiner shall submit findings of fact, conclusions of law, and make recommendations to the agency. Again, this provision refers to the generic legal capacity of an "examiner." See *Christian Care, supra,* at 461 ("We may not interpret R.C. 119.09 in such a manner as to expand the intent

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expressed therein by the General Assembly"). Therefore, we find these statutes do not stand for the proposition urged by Halleen. Accordingly, Halleen's second assignment of error is overruled.

***5** Halleen argues in its third assignment of error that it was denied due process when the board refused to deliberate or review the hearing examiner's proposed findings after Halleen filed objections to the hearing examiner's decision. After the MVDB failed to act within thirty days of the filing of the hearing examiner's recommendations and declined "to further deliberate on this matter," the recommendations and decision of the examiner were automatically approved. R.C. 4517.58 specifically permits automatic approval "[i]f the board fails to act within thirty days after the board receives a proposed decision from the hearing officer or within any longer period mutually agreed upon by the parties, the proposed decision shall be considered approved." Moreover, Halleen fails to address the trial court's reliance upon *Bob Daniels Buick Co. v. Gen. Motors Corp.* (Oct. 13, 1998), Franklin App. No. 97APE12-1701, unreported. In *Bob Daniels,* we found that the MVDB acted in accord with R.C. 4517.57(D) and 4517.58, by allowing the hearing officer's recommendation to be automatically approved by operation of law when the board's inability to attain a majority vote precluded them from acting on the recommendation. We further stated that "[a]utomatic adoption provisions satisfy due process requirements if the party with the claim of entitlement had the opportunity for a meaningful hearing and consideration of its claim, and the decision adopted by operation of law is consistent with the factual determinations made during the administrative proceeding." *Id.* In the present case, Halleen had a meaningful hearing and consideration of its claim. The examiner made factual considerations based upon evidence and testimony presented at the administrative proceeding.

Further, although Halleen cites *In re Cleveland Clinic Found.* (1994), 94 Ohio App.3d 348, to support its argument that the board's failure to grant a hearing on its objections denied it due process, we already declined to follow that case in *Bob Daniels,* which had similar underlying circumstances as the present case. Further, the statute in *Cleveland Clinic* required "deliberation" of the hearing examiner's decision by the Certificate of Need Review Board. In the present case, R.C. 4517.58 has no such requirement and provides for automatic adoption if no action is taken by the board. Thus, because R.C. 4517.58 allows automatic adoption of a hearing examiner's recommendations, the MVDB did not violate Halleen's due process rights by automatically approving the recommendations without further "deliberation." Therefore, Halleen's third assignment of error is overruled.

In its fifth assignment of error, Halleen argues the hearing examiner's recommendation failed to analyze the entire RMA as required by R.C. 4517.51 and 4517.01(DD), because it only took into consideration individual Area of Geographic Sales and Service Advantage ("AGSSA"). Chevrolet assigns each Chevrolet dealer in a Multiple Dealer Area ("MDA"), such as Cleveland, an AGSSA. Each AGSSA consists of census tracts closest to the dealer's location in terms of geographic distance. The AGSSA to be assigned to the proposed Fairchild dealership is AGSSA 3.

***6** Halleen cites to *Douglas Bigelow Chevrolet, Inc. v. Gen. Motors Corp.* (2000), 138 Ohio App.3d 841, for the proposition that the hearing examiner is required to analyze the entire RMA and not just the AGSSA. In *Bigelow,* we found that R.C. 4517.51 "clearly requires a consideration of the dealers in the RMA and it cannot be read to permit an analysis of only a small portion of the RMA." *Id.* at 846. Thus, we found that GM's expert could not rely only upon the individual AGSSA. Consequently, we reversed the common pleas court's finding that the hearing officer's conclusions were supported by substantive, reliable, and probative evidence, and remanded the matter to consider the entire RMA.

In the present case, Halleen fails to address the common pleas court's finding on this issue or give any explanation as to how the common pleas court abused its discretion in finding *Bigelow* inapposite. See *Crowe, supra.* We agree with the common pleas court's analysis and do not find it abused its discretion. Before the MVDB, GM's expert presented data as to Chevrolet's penetration performance in the entire RMA over a period of several years; population and household counts and retail growth in the RMA; census tracts in the RMA; new vehicle registration patters in the RMA; opportunity per dealer in the RMA; the location of Chevrolet dealers in the RMA; competition within the RMA; customer convenience levels in the RMA; and lost sales opportunities within the RMA. As the common pleas court found, the hearing examiner's decision indicates that he focused his analysis on the proper geographic area, the RMA. The examiner's decision reflected this data, and the examiner specifically analyzed the entire RMA throughout his decision, including findings 6, 13, 16, 38, 39, 56, 58, 62, 65, 66, 69, 70, 71, 72, 73, 80, 81, 82, and conclusions B, D, and E.

Thus, we find *Bigelow* and the present case distinguishable. Unlike *Bigelow,* in the present case, the hearing examiner's conclusions were not expressly limited to a "significant portion" of the RMA; neither GM's expert nor the hearing officer only "tangentially" addressed the entire RMA; GM's expert did not testify that he had numbers to analyze the entire RMA but "chose not to do so"; and GM's expert and the hearing examiner cited penetration and competition statistics for the whole RMA, not just the AGSSA. Further, that the hearing examiner discussed AGSSA 3 in his findings, in addition to the RMA, is not fatal to his analysis and ultimate determination. As we pointed out in *Bigelow,* "the RMA may be broken down into smaller areas for analytical purposes * * *." *Id.* For the foregoing reasons, we find Halleen's argument not well-taken, and overrule its fifth assignment of error.

In its sixth assignment of error, Halleen asserts the hearing examiner's adoption of GM's proposed findings of fact and conclusions of law were not supported by reliable, probative, and substantial evidence. R.C. 4517.50(B) provides that the franchisor may not relocate a dealer if the MVDB determines that good cause exists for not permitting the dealer to relocate. The franchisor has the burden to establish that good cause exists to relocate a dealer. R.C. 4517.57(C). In determining whether good cause exists, R.C. 4517.51 requires the MVDB to consider the existing circumstances, which include, but are not limited to, the following:

> *7 (A) The effect of an additional or relocated dealer upon the existing new motor vehicle dealer of the same line-make in the relevant market area to be served by the additional franchisee or relocated dealer;
>
> (B) Whether it is injurious or beneficial to the public interest for the dealer to be established or relocated;
>
> (C) Whether the franchisees of the same line-make in the relevant market area are:
>
> (1) Providing adequate competition and convenient consumer care for the motor vehicles of the same line-make in the relevant market area, which shall include the adequacy of motor vehicle sales and service facilities, equipment, supply of vehicle parts, and qualified sales and service personnel;
>
> (2) Providing adequate market penetration and representation.
>
> (D) Whether the franchisor has complied with the requirements of this chapter.

At the outset, we note that Halleen's objections to the hearing examiner's recommendations filed with the board related almost exclusively to the procedural issues regarding the appointment of a second hearing examiner. The only mention of the merits in the objections as it relates to the evidence was one sentence in the conclusion, tersely contending that "the Hearing Examiner's Recommendation and findings are contradicted by, inconsistent with and unsupported by competent credible evidence." As stated previously, generally, the failure to raise an argument before the administrative agency constitutes a waiver of the right to assert such argument. See *Morgan, supra.* Notwithstanding, we will address Halleen's arguments.

As noted above, our standard of review is limited to whether the common pleas court abused its discretion in finding that the administrative order was or was not supported by reliable, probative, and substantial evidence. *Crowe, supra.* However, Halleen has attempted to reargue its case in its entirety to this court. Noticeably absent from its argument before this court is the contradictory evidence cited by the hearing examiner and the common pleas court. There will nary be a case in this area of law that does not contain contradictory evidence and testimony presented by each side on nearly every factor. Indeed, for the arguments Halleen again asserts before us, there was conflicting testimony, interpretations, analysis, and evidence presented by GM and its expert.

As to the factors set forth in R.C. 4517.51(A), (B), (C), and (D), the hearing officer had to weigh this substantial amount of conflicting evidence presented by the parties' expert witnesses. A common pleas court must defer to an administrative agency's resolution of conflicting evidence if the evidence relied upon by the agency is reliable, probative, and substantial. *Bob Daniels Buick, supra,* citing *Ohio Historical Soc. v. State Emp. Relations Bd.* (1993), 66 Ohio St.3d 466, 470-471. In the present case, we find that the common pleas court did not abuse its discretion in deferring to the hearing officer's findings on the directly conflicting testimony, and the record contains reliable, probative, and substantial evidence regarding each of the factors in R.C. 4517.51.

*8 With regard to R.C. 4517.51(A), the common pleas court found there was reliable, probative, and substantial evidence that if Fairchild relocated, there would not be an "oversaturation" or "rampant competition" in the RMA. Granville Cole, the Cleveland zone manager for Chevrolet Motor Division, testified that two dealerships in the RMA were relocating outside the RMA. Anderson, GM's expert witness, testified that the proper number of Chevrolet dealers are located in the RMA but they are not properly located within the RMA because five of the seven dealers are located in the eastern half where there is declining population and opportunity. In the western half, where the proposed Fairchild dealership would be located, there is increasing population, registrations, and households. Krumholz, Halleen's expert, agreed there has been a shift in population, investments, employment, and higher-income individuals away from Lakewood and toward Westlake.

The common pleas court also cited Anderson's testimony that the RMA is certainly capable of supporting the Fairchild dealership based upon market opportunity because the RMA is one of the largest markets in the state in terms of opportunity but one of the worst in terms of performance for Chevrolet. Anderson also testified that the proposed Fairchild dealership would be located about four and one-half miles from the Halleen dealership, which is typical of the distance the other Chevrolet dealers currently are to the nearest competition in this marketplace. Mark Halleen, the general manager of Halleen Chevrolet, testified that if Fairchild relocates, Halleen will continue to compete and sell cars. The testimony of Victor Nelawake, a CPA, indicated that Halleen is not suffering from rampant competition or oversaturation, finding that Halleen's balance sheet demonstrates it is profitable, very financially viable, well-capitalized, has sufficient cash to maintain its operations, and maintains adequate amounts of inventory.

Halleen cites Dr. Matthews', Mark Halleen's, and Carl Halleen's (Charles Halleen's nephew, Mark Halleen's father, and fifty-percent owner of Halleen Chevrolet) testimony that Halleen will lose sales and profits if Fairchild relocates. However, the common pleas court relied upon Anderson's contrary opinion that one competitor can stimulate competition among all same line-make competitors and that there is a "tremendous" opportunity for Halleen to benefit from a new dealership nearby. Anderson supported his opinion with empirical studies from four different United States cities demonstrating that after a dealer relocated, the surrounding Chevrolet dealers' sales increased. Further, as the hearing examiner pointed out, Matthews' projections are based upon an unrealistic "static" market, wherein he assumes that if a new dealer relocates, the Chevrolet dealers in the RMA will each lose a portion of their sales every year because aggregate sales numbers will remain unchanged. As the hearing examiner pointed out, Matthews' analysis does not take into account the growth of the market or increased competitive efforts among dealers.

*9 With regard to R.C. 4517.51(B), the common pleas court found there was reliable, probative, and substantial evidence that if Fairchild relocated, it would be beneficial to the public interest. Although Krumholz opined that the proposed relocation would not increase public benefit, there was substantial testimony from Anderson and Robert Fairchild that there has been tremendous retail, population, manufacturing, and lodging growth in the area of the proposed dealership in Westlake and a decline in such areas in Lakewood, and that relocation would benefit the growing population in that area. Fairchild also testified that relocating would increase customer satisfaction and convenience due to ample customer parking, openness, and a state-of-the-art facility. Fairchild further stated that the land on the proposed site is now largely vacant, and the new construction would increase employment and economic activity. The common pleas court also cited the testimony of Carl Halleen that increased employment, tax revenue, economic activity, and increased competition all benefit the public interest.

With regard to R.C. 4517.51(C)(1), the common pleas court found that there was reliable, probative, and substantial evidence cited by the hearing examiner that the proposed Fairchild dealership would increase competition and customer convenience. The common pleas court cited Fairchild's testimony that the proposed location would be a tremendous convenience for customers because of the easy access off the highway and its location near other retail outlets and shopping centers. Cole also testified that the Fairchild dealership would improve customer convenience, access in the market, and competition. Fairchild further stated that the traffic count for the new location would be ten times greater than the old location. Anderson agreed with this testimony, citing to a study showing that the proposed site is the single best site for maximizing customer convenience for the entire RMA and for minimizing the average distance to a Chevrolet dealership for everyone who lives in the RMA.

With regard to R.C. 4517.51(C)(2), the common pleas court found there was reliable, probative, and substantial evidence cited by the hearing examiner that the existing franchisees are not providing adequate market penetration and representation. The hearing examiner relied upon Anderson's testimony that Chevrolet's market share perfomance and market penetration in the entire RMA was less than the expected penetration standard adjusted by product segments.

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He also stated that Chevrolet's penetration performance in the RMA was "very poor" as compared with Chevrolet's performance throughout the state (1994-78.6% of state average; 1995-77.8% of state average; 1996-72.7% of state average; first nine months of 1997-74 .8% of state average). Anderson further testified that representation in the RMA as a whole is inadequate, has been over an extended period, and is trending downward. There was also a downward trend in market share performance for the RMA verses the national standard adjusted for local preferences. Anderson further concluded that there was inadequate competition among the Chevrolet dealers in the RMA based upon lost opportunities. Dr. Matthews also testified that the actual Chevrolet registrations for the RMA fell below expected penetration levels although he cautioned he could not state such with statistical certainty.

***10** With regard to R.C. 4517.51(D), Halleen argues that GM has not complied with the provisions of R.C. Chapter 4517 because its proposed financial assistance and special allocation plans relating to Fairchild's new dealership violate R.C. 4517.59(M), which prohibits any predatory practice or discrimination against any new motor vehicle dealer. GM has agreed to provide Fairchild with $350,000 and to consider a special allocation of vehicles if Fairchild relocates. Halleen argues that these arrangements are unfair because it will not receive money from GM and already experiences product shortages. However, the hearing examiner cited testimony demonstrating that these arrangements were not predatory or discriminatory. David Fowler, an area manager for GM's dealer network development, testified that the $350,000 was for "site control," which assures GM that a piece of real estate is used exclusively for GM operations. He specifically stated that the $350,000 payment made to Fairchild is comparable to the amount of consideration that would be given to other GM dealers in these types of situations where GM is obtaining control of the real estate for twenty-five years. Fairchild was not required to accept the payment for site control, and other dealers have previously refused to relinquish site control to GM and thus, received no payment. As to the special allocation of vehicles, the hearing examiner cited Cole's testimony that when any dealer builds a new facility, GM always considers a request for allocation of vehicles, although it may not allocate any. He stated that the policy was expressed to dealers in 1995, and allows a special allocation request to any dealer that builds a new facility, relocates, renovates, or experiences a loss of inventory due to natural catastrophes. Cole further testified that the policy is used for grand openings at new locations. Therefore, there was reliable, probative, and substantial evidence that these policies are uniform and standard for GM based upon legitimate business purposes.

As the common pleas court noted, the hearing examiner also cited evidence supporting several non-statutory, business-related factors in favor of relocation. Fairchild's net profit deteriorated in recent years, and GM's Project 2000 study found that Fairchild's long-term viability was in jeopardy at its current location. Although Halleen suggests Fairchild's profitability problems are tied to its used car operations, Nelawake testified that the gross profits for both used and new units had been declining in recent years. Halleen also argues that Fairchild's working capital demonstrates it is in no financial distress. However, as Nelawake explained, because Fairchild's working capital is above standard, its poor performance can be ascribed to the location of the dealership in a deteriorating market. As previously noted, there was also substantial testimony regarding the population and retail shift away from Lakewood and toward the proposed new location.

***11** Further, Fairchild testified that his current location in Lakewood has poor access and half the acreage of the Westlake site. The Lakewood site also lacks convenient parking and an adequate customer waiting area. Halleen counters that Fairchild's problems may be attributed to its lack of investment in its facilities. Halleen argues that its fixed assets at cost between 1993 and 1997, increased by approximately $390,000, while Fairchild's total investment at cost in fixed assets for the same period was only $22,000. However, Fairchild testified that he bought and razed a nearby building to construct a new display area, purchased a double residence and razed it to allow access to another street and more display space, built a seven thousand square-foot service facility on their back lot, and bought a closed gas station to make a truck facility; but the Lakewood facility is now "landlocked" and cannot be expanded. He testified the three acres in Lakewood are convoluted and split-up. Also, he testified that he considered tearing down the Lakewood facilities and rebuilding, but he does not see that as a good investment given the declining market.

Given the proceeding evidence, the record demonstrates that the common pleas court properly exercised its discretion and deferred to the hearing examiner's resolution of the evidentiary conflicts. The Ohio Supreme Court stated:

> [A]n agency's findings of fact are presumed to be correct and must be deferred to by a reviewing court

> unless that court determines that the agency's findings are internally inconsistent, impeached by evidence of a prior inconsistent statement, rest upon improper inferences, or are otherwise unsupportable. *Ohio Historical Soc. v. State Emp. Relations Bd.* (1993), 66 Ohio St.3d 466, 471.

In the present case, the hearing examiner's findings were not internally inconsistent, did not rest upon improper inferences, and were not otherwise unsupportable. Because the common pleas court properly exercised its discretion in determining that the decision of the MVDB was supported by reliable, probative, and substantial evidence, Halleen's sixth assignment of error is overruled.

Halleen argues in its fourth assignment of error that the MVDB's decision is contrary to public policy. Halleen's argument is, generally, that one of the specific purposes of R.C. 4517.51 is to prevent the oversaturation of a franchisee's market area. Because we have found the trial court did not abuse its discretion in finding there was reliable, probative, and substantial evidence demonstrating good cause for the relocation of the Fairchild dealership, we find Halleen's argument that the relocation is against public policy to be unfounded. We already found under our discussion of R.C. 4517.51 that the proposed relocation would be beneficial to the public interest and that inadequate competition existed in the RMA. Therefore, Halleen's fourth assignment of error is overruled.

Accordingly, Halleen's six assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

***12** *Judgment affirmed.*

LAZARUS and TYACK, JJ., concur.

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