



thing of value to the depositor when a conditional sales contract was not executed; (3) caused advertisements to be published that were misleading and inaccurate in material particulars; (4) represented to a prospective purchaser that a vehicle was new when, in fact, it was a used vehicle; (5) included as an added cost to the selling price of vehicles amounts for licensing and transferring title of the vehicles, which amounts were not due to the State and when the amounts were not in fact paid by the dealer prior to such sale; (6) employed as a vehicle salesman one not licensed as a vehicle salesman; (7) wrongfully and unlawfully advertised that no down payment was required in connection with the sale of a vehicle, when, in fact, a down payment was required and the buyer was advised or induced to finance such down payment by a loan in addition to any other loan financing the remainder of the purchase price of the vehicle; (8) operated on the highways certain vehicles without properly displaying dealer's special plates; (9) knowingly filed with the department false certificates of non-delivery of vehicles; (10) wrongfully and unlawfully used dealer's reports of sale by failing to timely forward documents and fees to the department; (11) failed to affix the operating copy of the report of sale and the paper license plate to a certain vehicle at the time of delivery to a purchaser; (12) failed to give the department timely notice after transferring title to certain vehicles; (13) gave to the department dates of sale of certain vehicles other than

the true dates of sale; (14) filed with the department false certificates of non-operation of certain vehicles; and (15) reported to the department false first dates of operation for certain vehicles.

The penalty imposed by the department revoked the dealer's license, certificate and special plates; stayed the execution of the order of revocation; and placed the appellant on probation for a period of three years under the conditions that: (1) its license, certificate and special plates be suspended for a period of fifteen days from the date of the decision; (2) it employ and retain competent personnel and diligently and properly prepare and complete all of the necessary records required in the operation of its business and submit complete and accurate records and reports when and as required by the Department of Motor Vehicles; and (3) abide by all applicable laws and regulations. It was further ordered that the Director of the Department of Motor Vehicles may, in his discretion and without a hearing, vacate the stay order and impose said order of revocation should he determine upon evidence satisfactory to him that cause for disciplinary action has occurred during the probationary period.

The licensee appealed to the New Car Dealers Policy and Appeals Board pursuant to Chapter 5, Division 2, Vehicle Code. For reasons hereafter stated, we affirm the decision of the department in part and reverse in part.

The first question to be resolved is the proper scope of our review when we sit in our appellate capacity. We are persuaded that Section 3054 Vehicle Code compels the application of the independent judgment rule rather than the substantial evidence rule. We must, therefore, resolve conflicts in the evidence in our own minds and we may make our own determinations regarding the credibility of the witnesses whose testimony appears in the transcript of the administrative hearing. (Cf. C.E.B. Cal. Administrative Mandamus 5.73, 5.74.)

A major portion of the department's case against the appellant calls into question the proper interpretation of Section 2982(a) Civil Code. The department found, and the appellant does not dispute, that the conditional sales contracts entered into between appellant and purchasers of automobiles did not reflect the fact of a secondary loan in the single document; i. e., the fact that the purchasers independently contracted with loan companies for loans to provide funds sufficient to meet the dealer's requirements for a down payment was not shown in the conditional sales contract entered into by the dealer and the buyer. Appellant admitted and the evidence established that it assisted buyers in obtaining the secondary financing, but the evidence also established that appellant was not a party to the loan agreement reached by the buyer and the loan company.

The department interprets Section 2982(a) Civil Code as requiring the inclusion in the conditional sales contract of the fact that secondary financing was resorted to when the buyer was assisted or induced by the seller in obtaining such financing. The appellant argues that this section is ambiguous as it pertains to the setting forth of secondary financing; that the long-standing practices of the industry have been directly opposite to the interpretation now placed by the department; and that the department's failure to issue clarifying regulations precludes the department from pursuing this action.

We do not concern ourselves with the conduct of the industry in this respect nor the absence of clarifying regulations. Section 2982(a) of the Civil Code is not ambiguous as it pertains to the single document provision. Nowhere in this section is there any language which raises an inference of legislative intent to require that a loan made with or without the assistance or inducement of the seller be identified in the conditional sales contract as a loan from a third party to the buyer and there is no indication it was intended that the terms or conditions of that loan be so reflected in the conditional sales contract.

The secondary financing does not constitute an agreement "... with respect to the total cost..." of the vehicle. It has no bearing on the "...terms of payment for the motor vehicle". It is an independently contracted loan of the buyer

from a third party which enables the buyer to pay the seller the down payment required by the seller. The amount of the down payment is set forth in the single document, i.e., the conditional sales contract. Indeed, several of the buyers with whom appellant dealt arranged with the loan companies to obtain money used for purposes wholly unrelated to the transaction with appellant, e.g., consolidation of outstanding debts owed to various creditors of the buyer.

Furthermore, Section 2982(a) Civil Code designates very specifically what the conditional sales contract shall contain and nowhere in these designations is there any language which could be construed as relating to the secondary financing or terms thereof. In fact, the designations exclude the possibility of requiring the secondary financing and terms thereof to be shown in the conditional sales contract. Item 6 requires that there be included in the conditional sales contract "The amount of finance charge". By using the singular "charge", the Legislature's intent would appear to clearly limit the data required to be included in the document to the finance charge for the deferred balance under that contract, contrary to the department's contention. Moreover, the department's interpretation is ruled out by reference to Item 7, which specifically limits the finance charge referred to in Item 6, as the charge provided for in the contract between the buyer and the seller.

We cannot find any language in Section 2982(a) Civil Code reasonably susceptible to the interpretation given it by the

department. On the contrary, the language which the department reads into the section is in conflict with the language which was adopted by the Legislature. This is not a situation requiring extrinsic aids in the construction of a statute. We find that the department has proceeded in a manner contrary to the law with reference to paragraph III of its decision and, therefore, we reverse the department on this issue.

Appellant initially contended that the department erroneously found appellant had violated Section 2981(f) Civil Code because that provision neither prohibited a specific action nor imposed a mandate of any kind or nature. Appellant argued that the provision was merely a definition, and, therefore, could not be violated. However, in oral argument before this board, appellant stated he had believed that the effective date of the 1968 amendment affecting Section 2981(f) Civil Code, preceded the occurrence of the transaction which gave rise to the department's charge. In 1968, the Legislature deleted from the pertinent provision of the section the language upon which the department relied in making its charge; namely, "which cash, property or thing of value shall be refundable to the buyer in the event a conditional sale contract is not executed, or if the property or thing of value traded cannot be returned, the cash value thereof". At the hearing before this board, appellant did not contend that the department's interpretation of the section was improper. Instead, in its reply brief and in oral

argument, appellant has taken the position that it had not violated the section because the contract in question had in fact been executed.

Appellant's most recent argument regarding execution of the contract is found to be without merit and, therefore, we affirm the findings in paragraph IV of the decision.

Appellant attacks paragraph V of the decision by taking the position that Section 11712(a) Vehicle Code, as it pertains to advertising, is unconstitutional in that it is vague, indefinite and uncertain, and, as a result thereof, it could not reasonably be determined in advance whether or not certain advertising would constitute a violation of that section. Appellant further argues that the finding in paragraph V is defective in that it fails to identify what actions of appellant are found to constitute a violation of Section 11713(a) Vehicle Code.

We reject the argument that Section 11713(a) Vehicle Code is unconstitutionally vague. The meaning of the terms "...misleading or inaccurate..." is not vague or ambiguous. (Cf. *People ex Rel. Mosk v. National Research Company of California*, 201 Cal. App. 2d 765). A statute designed to protect the public good must be upheld unless its nullity clearly, positively and unmistakably appears. (*Lawton v. Board of Medical Examiners*, 143 Cal App. 2d 256). What is misleading and inaccurate under any given set of circumstances is a question of fact and the essential test is whether the

public is likely to be deceived. It does not impose an undue burden upon the appellant to determine whether or not the members of the public observing its advertisements are likely to be deceived therefrom. It is charged with the responsibility of making such a determination prior to publishing the advertisement. The evidence established that the advertisements referred to in paragraph V were misleading, and the the director's findings in paragraph V are sustained.

Appellant's contention that paragraph V of the decision is not supported by specific findings and hence not valid is without merit. In *Savelli v. Board of Medical Examiners*, 229 Cal. App. 2d 124, the court said:

"...Although administrative findings must conform to the statutes governing the particular board or agency, such findings are liberally construed and need not be stated with the formality required in judicial proceedings. (*Swars v. Council of City of Vallejo*, 33 Cal. 2d 867, 872, 206 P.2d 355; *Taylor v. Bureau of Private Investigators*, 128 Cal.App.2d 219, 229, 275 P.2d 579; *Steele v. L. A. County Civil Service Comm.*, 166 Cal.App.2d 129, 136, 333 P.2d 171.) Under Government Code section 11518,<sup>12</sup> providing for the form and content of the decision of the administrative agency, the findings must be sufficient to enable the reviewing court to determine that the agency actually found necessary facts to support its determination of the issues. (*Jones v. Maloney*, 106 Cal.App.2d 80, 90-91, 234 P.2d 666.) Administrative findings may be general as long as they satisfy the dual requirements of making intelligent review possible and apprising the parties of the basis of the decision of the administrative agency. (*Swars v. Council of City of Vallejo*, supra. 33 Cal. 2d p. 873, 206 P.2d 355.) Accordingly, where such findings point out the specific ground upon which the agency has based its decision such a finding will suffice even though the reviewing court might prefer a more detailed statement of the grounds for the decision. (*Webster v. Board of Dental Examiners*, etc., 17 Cal.2d 534, 543-544, 110 P.2d 992.)

"\*12 - 11518. The decision shall be in writing and shall contain findings of fact, a determination of the issues presented and the penalty, if any. The findings may be stated in the language of the pleadings or by reference thereto. Copies of the decision shall be delivered to the parties personally or sent to them by registered mail."

With reference to paragraph VI of the decision, we reverse because the finding that the appellant wrongfully and unlawfully represented to the buyer of the motor vehicle in question that it was a new vehicle is not supported by the weight of the evidence. All documents filed with the department by the appellant properly identified the vehicle as a used car at the time of the sale of the vehicle. The buyer testified that the mileage on the car at time of purchase was between 3000 and 3100 miles. The conditional sales contract noted certain body damage and a loose window. While the purchaser testified that he believed he was buying a new car rather than a used one, the other evidence outweighs this testimony. The department has not proven that there was a wrongful and unlawful representation to the buyer that the vehicle was new, and the department's finding in paragraph VI of the decision is reversed.

The department found in paragraph VIII of the decision that the appellant employed or delegated the duties of a vehicle salesman to one not licensed as such. It was further found that a salesman employed by the appellant advised Carol Snyder that he would share a portion of his commission with her if she referred customers to him. The salesman provided Carol Snyder with business cards. Carol Snyder sent a customer to

the salesman who purchased a car through him. Carol Snyder subsequently received \$15 from the salesman. It was not established that the fee was paid by any check issued by the appellant, and there was no other evidence of employment by appellant.

The evidence falls far short of establishing that the appellant played any part in the agreement between the salesman and Carol Snyder. In fact, the evidence preponderates heavily in favor of the proposition the appellant did not pay Carol Snyder for referring a customer to appellant and that appellant played no role in the payment of or agreement to pay any fee to her. Furthermore, the evidence indicates that appellant had no knowledge of the "referral fee" arrangements of the salesman and, in fact, had a policy of not permitting such conduct.

Val Strough Chevrolet vs. Bright (269 A.C.A. 965) held that a discount house was not a salesman when it referred a potential car purchaser to a licensed car salesman and received from such licensed salesman a referral fee. The court said that usual attributes of an employer-employee relationship did not exist because there was no agreement or understanding between the dealer and the discount house as to any service to be rendered or compensation to be paid and that there was no evidence that the dealer exercised any control or had the right to control the conduct or activities of the discount house.

The Val Strough case applies here. Snyder referred a potential customer to a car salesman and received a fee from the salesman. There is no evidence that the appellant was involved in whatever agreement there was between Snyder and the salesman and there is no evidence that the appellant exercised any control or had the right to control Snyder.

On the basis of the evidence and the Val Strough case, we hold that the findings in paragraph VIII of the decision are not supported by the weight of the evidence in light of the whole record reviewed in its entirety and that the department has proceeded in a manner contrary to the law. We reverse the findings set forth in paragraph VIII of the decision.

We must also reverse the department on the findings in paragraph IX of the decision wherein it is found that appellant wrongfully and unlawfully advertised no down payment was necessary in the sale of a vehicle, when in fact a down payment was required, and buyers of certain described vehicles were advised or induced to obtain secondary financing in order to make the down payment. The evidence adduced by the department fails to establish that appellant advertised that "no down payment" was required. The advertisements placed into evidence by the department contained no such language. The department has confused "no down payment" with "no money down". These phrases obviously need not have the same meaning. Furthermore, the evidence discloses that, in

the two transactions used by the department as a basis for its findings, the purchasers did not meet the "no money down" offer because they either did not have adequate credit or the value of their trade-in was insufficient. Indeed, the "no money down" advertisements made reference to the necessity of an adequate trade-in or credit.

In paragraph IV, page 2, of the Amendment to Appeal, appellant advances the proposition that the decision of the department is improper and invalid in that affidavits submitted into evidence at the administrative hearing contained irrelevant material and the hearing officer proceeded in a manner contrary to law by failing to exclude the irrelevant material. The department offered, and the hearing officer accepted, into evidence, a group of affidavits wherein the appellant made no request for cross-examination. The appellant objected to the introduction of the affidavits on the basis they contained a substantial amount of information that was not relevant. The hearing officer overruled the objection subject to further objection which could be raised in the course of the proceedings. Further on in the proceedings, the following dialogue took place between the hearing officer and the appellant:

"MR. PRITCHARD: May I again reflect my understanding that those portions of the affidavits had been submitted that are not material to the issues in the case will not be considered in any determination?"

"THE HEARING OFFICER: Correct."

The case of Tarpey v. Veith, (22 Cal. App. 289), involved a similar issue. There the defendant objected to the introduction of some evidence but it was allowed in, subject to a motion to strike. On appeal, the court, in sustaining the ruling of the trial judge, said:

"...It is very evident that the trial court, in admitting the evidence complained of, contemplated that the plaintiff would obviate the defendant's objection by making proof of the fact that plaintiff's permission to use the strip of land in controversy had been communicated to the defendant, and that if the plaintiff failed to make such proof the evidence complained of would be stricken out on motion. No such motion was made. Presumably, if the defendant did not desire the evidence in question to stand, he would have moved to strike it out. We have no doubt that if such a motion had been made it would have been granted. The evidence having been admitted subject to a motion to strike out, and the defendant having failed to make such a motion, he may not now be heard to say that the ruling was erroneous."

Appellant failed to pursue the matter, elected not to make appropriate objections or motions to strike and waived any objection.

Tarpey v. Veith controls the relevancy issue raised by the appellant in this case and, therefore, we dismiss the contention of the appellant that irrelevant material was improperly received during the administrative hearing.

Appellant presents us with the proposition that the decision of the department was improper and invalid in that it was based on information obtained by the department through conduct of the department infringing on appellant's

constitutional rights; i.e., the information was the product of an unreasonable search or seizure.

Appellant's theory is that the department engaged in an unreasonable search and seizure when its agent extracted from the business records of the appellant names and addresses of persons to whom appellant had sold vehicles. Appellant contends that the examination of its records by the agents of the department went beyond those records that the appellant is required by law to keep.

Appellant's argument overlooks Section 320 Vehicle Code which provides in part: "The place of business shall be open to inspection of the premises, pertinent records and vehicles by any peace officer during business hours." We are not presented by appellant with any arguments that the inspection of the department went beyond the premises, pertinent records, or vehicles nor are we presented by any proposition from appellant that the quoted language from Section 320 Vehicle Code is unconstitutional. We find that the department's actions in obtaining the information, which was subsequently introduced into evidence at the administrative hearing, was obtained properly and with no taint of unreasonableness and, therefore, we dismiss the appellant's arguments to the contrary as being without merit.

For the first time, during oral argument before this board, appellant raised the question as to whether or not the

Director of the Department of Motor Vehicles has the authority to vacate his stay order and impose an order of revocation in his discretion and without a hearing in the event evidence satisfactory to him is presented that cause for disciplinary action has occurred during the probationary period. This issue was not raised in appellant's appeal or in its amendment thereto. Accordingly, we do not pass upon this question and refrain from doing so until it is properly raised and presented. Moreover, should the director subsequently act in an abuse of his discretion, we are satisfied that appellant will have an adequate remedy available to it.

Appellant accepts for appeal purposes, the findings of the department contained in paragraphs VII, X, XI, XII, XIII, XIV, XV, XVI, XVII and XVIII of the decision. Therefore, the matters contained therein are not before this Board on appeal except for penalty determination.

Turning to the issue of penalty, we are cognizant of the general rule that a reviewing court will not disturb the penalty imposed by the administrative agency unless there is a clear abuse of discretion. However, the Legislature has given this board the power to deviate from the general rule. Section 3055 Vehicle Code provides as follows:

"The Board shall also have the power to amend, modify, or reverse the penalty imposed by the department."

Pursuant to this grant of authority, the New Car Dealers Policy and Appeals Board modifies the order of the Director of

the Department of Motor Vehicles, as follows:

1. Dealer's license, certificate and special plates (D-2031) heretofore issued to Holiday Ford, a corporation, are hereby revoked; provided, however, that execution of said order of revocation is hereby stayed and appellant is placed on probation for a period of three (3) years upon the following terms and conditions:

- (a) That appellant shall employ and retain competent personnel for the purpose of, and diligently and promptly prepare and keep all of the necessary books and records required in the operation of its business and submit complete and accurate records and reports when and as required by the Department of Motor Vehicles.
- (b) That appellant obey all laws of the United States, the State of California and its political sub-divisions and all of the rules and regulations of the Department of Motor Vehicles.

2. That should the Director of the Department of Motor Vehicles determine upon evidence satisfactory to him that cause for disciplinary action has occurred during the period of probation imposed herein, he may, in his discretion and without a hearing, immediately vacate the stay order and impose said order of revocation; otherwise, the stay shall become permanent.

*Robert B. Clark*

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