

STATE OF CALIFORNIA

NEW CAR DEALERS POLICY & APPEALS BOARD

M. R. DIENER, and)
H. B. DUNNING, dba)
DIENER MOTORS, a)
partnership,)
)
Appellant,)
)
vs.)
)
DEPARTMENT OF MOTOR VEHICLES,)
)
Respondent.)
_____)

Case No. A-15-71

Filed:

December 7, 1971

Time and Place of Hearing:

November 10, 1971, 1:00 p.m.
Room 6520
2415 First Avenue
Sacramento, CA 95818

For Appellant:

W. Jackson Willoughby
Bowers, Sinclair, Schiess,
Mitchell & Willoughby
219 Estates Drive
P. O. Box 968
Roseville, CA 95678

For Respondent:

Honorable Evelle J. Younger
Attorney General
By: Dan Weston
Deputy Attorney General

FINAL ORDER

A review of appellant's business records covering the period August 1969 through August 1970 was conducted by respondent on September 15 and 16, 1970. Appellant had sold 1,050 automobiles during that period. 170 of those transactions were selected at

random for review by respondent's investigators. The investigators found that in 16 of these 170 transactions, appellant had overcharged automobile purchasers for vehicle license fees in amounts ranging from \$1.00 to \$21.00. Fourteen of the 16 overcharges occurred during June, July and August 1970; one occurred during January 1970 and the other in February 1970.

The Accusation filed by respondent was heard on June 29, 1971, pursuant to Section 11500 et seq. Government Code. The hearing officer found that appellant had violated Section 11713(g) Vehicle Code in these 16 instances. Section 11713(g) provides in relevant part: "It shall be unlawful and a violation of this code for the holder of any license issued under this article: (g) To include as an added cost to the selling price of a vehicle, an amount for licensing or transfer of title of the vehicle which amount is not due the state...". Section 11705 Vehicle Code provides that violation of Section 11713(g) is a ground of license suspension or revocation.

The hearing officer further found that during the consecutive three-month period when 14 of the overcharges occurred, appellant's bookkeeper was intermittently on vacation and engaged in training three inexperienced persons in processing appellant's paperwork involving vehicle license fees. When the overcharges were called to the attention of Mr. M. R. Diener on November 5, 1970, by respondent's investigators, he ordered immediate reimbursement of the overcharges to the customers. The hearing officer also

found that appellant adopted a new procedure, after November 5, 1970, of comparing the amount of vehicle license fees due, as computed by the Department of Motor Vehicles, with the amount appellant had charged its customers and submitted to the department and, in any instance of an overcharge being detected, making appropriate reimbursement.

The penalty proposed by the hearing officer was as follows:

"1. The dealer's license, certificate and special plates (D-8663) issued to the respondent partnership, are suspended for ten days. The suspension shall be stayed, however, for one year from the effective date of this decision during which time the respondent shall be on probation to the Director of the Department of Motor Vehicles upon the following terms and conditions:

"(a) Respondent shall obey all laws of the State of California and all rules and regulations of the Department of Motor Vehicles governing the exercise of his privileges as a licensee. The respondent shall not be convicted of any crime, including upon a plea of guilty or nolo contendere.

"2. If and in the event the Director of Motor Vehicles shall determine, after giving the respondent notice and opportunity to be heard, that a violation of probation

has occurred, the Director may terminate the stay and impose the suspension or otherwise modify the order. If the respondent shall comply with the terms of probation for the period of a year, the stay shall become permanent and the respondent shall be fully restored to all license privileges."

On July 13, 1971, the Director of Motor Vehicles adopted the Proposed Decision of the hearing officer to become effective August 12, 1971. Appellant timely appealed to this board on the following grounds:

- "1. The decision is not supported by the findings;
- "2. The findings are not supported by the weight of the evidence in light of the whole record reviewed in its entirety;
- "3. The determination, as provided in the decision of the department, is not commensurate with the findings."

At the administrative hearing, counsel for appellant stipulated that the facts alleged in the Accusation and relating to the 16 overcharges of vehicle license fees were true. He did not stipulate that such facts constitute a violation of Section 11713(g) Vehicle Code. The Reporter's Transcript, at page 4, lines 16-22, recites the following acceptance of the stipulation by the hearing officer: "All right, then it is stipulated between counsel that

the factual matters alleged in Paragraph III, and relating to 16 overcharges of fees -- the stipulation is that such facts are true. It is not stipulated, however, that the facts contained in Paragraph III constitute a violation of Section 11713(g); the stipulation does not cover that point."

The administrative record reveals that in its Petition for Reconsideration, appellant "...admitted that it did, by mistake, overcharge the 16 items alleged, but denies that it is thereby guilty of violation of Section 11713(g), justifying disciplinary action under Section 11705 of the Vehicle Code."

In oral argument before this board, appellant conceded that the overcharges for vehicle license fees as alleged by the department did occur but contended that such acts did not justify disciplinary action or, if the Board did not agree with this contention, the penalty imposed by the Department of Motor Vehicles was excessive in view of all of the circumstances.

The findings are supported by the weight of the evidence.

Appellant directs our attention to Merrill v. Department of Motor Vehicles, 71 Cal.2d 907, and argues that the case compels a holding that an automobile dealer may not be disciplined for overcharging a customer for vehicle license fees in the absence of a showing that the dealer was either "unscrupulous or irresponsible". Appellant maintains that the record controverts any contention that appellant was either unscrupulous or irresponsible. The language of the Merrill case that appellant focuses upon is as follows:

". . . we consider that the dominant concern of the statutory scheme is that of protecting the purchaser from the various harms which can be visited upon him by an irresponsible or unscrupulous dealer. It is within this context that we now address ourselves to the specific phrase whose interpretation is here in question."

Appellant's first and third grounds of appeal stand or fall upon the applicability of the Merrill case urged by appellant.

We reject appellant's argument as we do not believe the Merrill case either requires or authorizes us to consider the dealer's character, reputation or state of mind when deciding whether there was or was not a violation of Section 11713(g) Vehicle Code.

In the Merrill case, the Supreme Court of California was faced with determining the proper meaning of the word "bona fide" as it is used in Section 11701 Vehicle Code.^{1/} The Department of Motor Vehicles had refused to issue a dealer's license to Merrill (dba The Merchandiser) on the basis, among others, that the applicant was not a "bona fide" dealer, as that term is used in Section 11701 Vehicle Code, because the applicant did not have and did not intend to have an inventory of new automobiles for sale to the public. In upholding Merrill, the court concluded that, "Viewing the term 'bona fide' within the entire statutory

^{1/} "Sec. 11701. Every manufacturer of, transporter of, or dealer in vehicles of a type subject to registration or of snowmobiles shall make application to the department for a license and certificate containing a general distinguishing number. The applicant shall submit proof of his status as a bona fide manufacturer, transporter, or dealer as may reasonably be required by the department."

scheme in which it appears, we conclude that it is there used in the first lexical sense adverted to above -- to wit, that of honesty, fair dealing and freedom from deceit." The court rejected the department's contention that it could find a dealer-applicant was not "bona fide" on the basis that the dealer-applicant had no automobile inventory and did not anticipate obtaining such inventory.

In our view, the Merrill case merely precludes the department from imposing upon an applicant for a dealer's license, under the requirement that the applicant be a "bona fide" dealer, standards of conduct or other requirements not related to the applicant's honesty, fair dealing and freedom from deceit. There was no issue in Merrill that Merchandiser fell within the definition of "dealer".

The holding in the Merrill case has no bearing whatever on the proper interpretation of Section 11713(g) Vehicle Code.

We should note, in passing, that the Supreme Court in Merrill, expressly recognized legislative goals in the statutory scheme governing the licensing of automobile dealers other than honesty and integrity, and that among the grounds for license discipline are violations dealing with the registration of motor vehicles, including "addition of unauthorized costs to the selling price", citing subdivision (g) of Section 11713 (see page 919 of the opinion). The court concludes, at page 920, "...that the dominant concern of this statutory scheme is that of protecting the purchaser from the various harms which can be visited upon him by an irresponsible or unscrupulous dealer." As discussed below, we feel that a dealer

who overcharges his customers when he collects license fees is neither "scrupulous" nor "responsible", and certainly he cannot be said to be reliable, another attribute required of California dealers by the Legislature, according to the Merrill decision.

IS THE PENALTY IMPOSED BY THE DIRECTOR OF MOTOR VEHICLES COMMENSURATE WITH THE FINDINGS?

We take note that appellant has been in business since 1954, and that it has been free from any difficulties with the Department of Motor Vehicles heretofore. We also note that the overcharges were immediately refunded to the appropriate parties when brought to the personal attention of M. R. Diener by the investigators, and that the dealership thereupon adopted new procedures to assure immediate refunding when an overcharge of vehicle license fee is detected.

We do not, however, consider as a mitigating circumstance the fact that most of the wrongful acts occurred when appellant's bookkeeper was either on vacation or engaged in training new personnel in work involving the processing of vehicle license fees. In our view, a careful and prudent dealer would have arranged for an adequate degree of supervision over the inexperienced personnel to assure that the customers were charged the correct amounts as required by the law, or in the event of inadvertent overcharge, which reasonable care could not prevent, that funds belonging to purchasers would be promptly refunded. This was not done and, further, the evidence preponderates to the view that the dealership did not take the precaution

of having the work of the inexperienced personnel reviewed by the bookkeeper when she returned to work after her vacation absences.

An automobile dealer has a duty to determine at the time a vehicle is sold at retail the correct license fee. The Department of Motor Vehicles and the board recognize that honest errors in computation can occasionally occur. If an error is made, however, and an overcharge results, the dealer is clearly under a duty to reimburse the buyer any excess amount charged for such fees whether the error is found when the bundle sheet is being prepared by the dealership or after the bundle sheet is returned to the dealership by the Department of Motor Vehicles. These obligations do not place an unreasonable burden upon a dealer.

In this case, the evidence showed that in the random sample of 170 transactions, the appellant overcharged the customer on 16 occasions, nearly one time out of 10. Appellant's method of operation did not result in prompt refunding of the overcharges. "Scrupulous" is defined in Webster's Seventh New Collegiate Dictionary as, "Full of or having scruples; inclined to scruple; careful; exact; punctilious," and "scruple", as, "...2: to be reluctant on grounds of conscience; hesitate." The license fees are subject to exact determination from information provided by the Department of Motor Vehicles if prudent business methods are

employed. The appellant's admitted course of dealings with customers with regard to collection of license fees was "unscrupulous" and "irresponsible" in the instances admitted to by stipulation.

The penalty permits the appellant to continue its business of selling motor vehicles. The conditions of probation merely require that appellant do that which all vehicle dealers are obligated to do; i. e., obey all laws of the State of California and the regulations of the Department of Motor Vehicles governing the exercise of the privileges as a licensee. Should appellant do so, the ten-day stayed suspension is of no consequence. Should it not do so, the Director of Motor Vehicles may remove the stay or a portion thereof after giving appellant notice and opportunity to be heard.

We find the penalty imposed by the Director of Motor Vehicles to be both appropriate and equitable under the circumstances of the case as reflected by the administrative record.

The Decision of the Director of Motor Vehicles is affirmed in its entirety.

This Final Order shall become effective December 22, 1971.

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GILBERT D. ASHCOM, President

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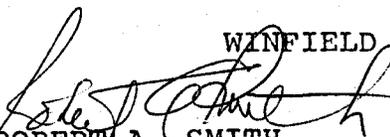
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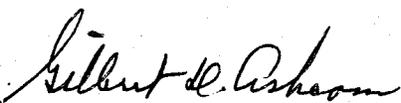
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