

NEW CAR DEALERS POLICY AND APPEALS BOARD

STATE OF CALIFORNIA

RICH MOTOR COMPANY,)
a California Corporation,)
)
Appellant,)
)
v.)
)
DEPARTMENT OF MOTOR VEHICLES,)
)
Respondent.)
_____)

Case No. A-16-71

Filed: May 2, 1972

Time and Place of Hearing:

April 12, 1972, 11:15 a.m.
Director's Conference Room
Department of Motor Vehicles
2415 First Avenue
Sacramento, California

For Appellant:

Edward McCutchen Mannon
Attorney at Law
155 Montgomery Street
San Francisco, CA 94104

For Respondent:

Honorable Evelle J. Younger
Attorney General
By: Victor D. Sonenberg
Deputy Attorney General

FINAL ORDER

On July 12, 1971, the Department of Motor Vehicles, hereinafter referred to as "respondent", filed an accusation pursuant to Chapter 5, Part 1, Division 3, Title 2, of the Government Code, against Rich Motor Company, hereinafter referred to as "appellant", charging that appellant:

1. Issued seven checks to respondent for obligations or fees due the State which checks were dishonored by the bank upon which drawn, and
2. Disconnected, turned back or reset odometers on three automobiles.

The checks were issued from November 6, 1969, to March 8, 1971, inclusive, and ranged in amounts of \$297.00 to \$17.00, for a total of \$1,079.00.

The mileage on the odometers was reduced approximately 30,000 miles on one vehicle, 26,000 miles on a second and 30,500 miles on a third.

The matter was heard by an officer of the Office of Administrative Hearings on September 27, 1971, and a proposed decision issued on September 28, 1971. The hearing officer found the charges as set forth in the accusation to be true and, pursuant to such findings, proposed that appellant's license, certificate and special plates be suspended for a period of sixty days with forty-five days thereof stayed for a one year probationary period. During the first fifteen days of probation, appellant is required to refrain from conducting any business as an automobile dealer and, for the remainder thereof, is to comply fully with all laws, rules and regulations pertaining to licensed automobile dealers.

The hearing officer further found that appellant had paid the full amount of the dishonored checks within a short time

after said checks were dishonored; that Henry R. Weyeneth, president and owner of appellant corporation, had no knowledge of the odometer tampering and took no part therein; that Mr. Weyeneth made reasonable offers to replace one of the vehicles or to pay the purchaser the "Blue Book" difference in price based on the true and false odometer readings but that such offers were declined by the purchaser; that during the past two years Mr. Weyeneth has not been able to draw a salary from the corporation because of its operating at a loss; that Mr. Weyeneth has five minor children and a wife all supported entirely from the dealership; that Mr. Weyeneth has had to refinance his home, refinance his business property and borrow money in order to operate the business and to provide for his family; that while the business is improving, a suspension would have serious effects on it; that Mr. Weyeneth has been operating an automobile dealership for 20 years; that this is the first disciplinary action brought against him and that he has a good reputation as a dealer in the locality in which the business is maintained.

On October 7, 1971, the Director of Motor Vehicles adopted the Proposed Decision of the Hearing Officer. An appeal was timely filed with this board pursuant to Article 3, Chapter 6, Division 2, of the Vehicle Code. Appellant did not attack any of the director's findings nor did it raise any questions of law. Appellant merely contended that the penalty imposed by the director was not commensurate with the findings.

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

On three previous occasions we have had before us on appeal cases wherein odometer tampering was an issue (Denis Dodge v. Department of Motor Vehicles, A-9-70; Zar Motors v. Department of Motor Vehicles, A-17-71; and Chase-Nesse Auto, Inc. v. Department of Motor Vehicles, A-19-71). In each case the penalty imposed by the Director of Motor Vehicles revoked the license, certificate and special plates of the appellant and this board affirmed.

In Zar Motors v. Department of Motor Vehicles, we said:

"This board regards the manipulation of an odometer for the purpose of reducing the mileage indicated thereon as one of the most serious wrongs that a licensee or non-licensee can commit in the sale of an automobile. It is common knowledge that buyers of used vehicles rely on the odometer readings when deciding whether to buy a certain vehicle and at what price. Reducing the number of miles on the odometer is a fraudulent means of deceiving the buyer with respect to a material fact which he relies upon in making his decision.

"The practice of odometer tampering on the part of licensees is fraught with evils other than defrauding innocent purchasers. It severely tarnishes the image of all motor vehicle dealers, including those who do not resort to such fraudulent conduct and gives the dishonest dealer an unfair business advantage over the ethical dealer in a business that is highly competitive. If such conduct were allowed to go unchecked by the licensing authority, it would have a highly corruptive effect upon the retail automobile industry."

We are, of course, cognizant of the factors in mitigation found by the Director of Motor Vehicles and urged upon us by appellant via its brief and oral arguments. However, no facts

have been presented that would warrant a reduction of the penalty. Viewing the matter most favorable to appellant, gross apathy towards business conduct and applicable laws is demonstrated by the issuance of checks subsequently dishonored and managing affairs in a manner permitting customers to be deceived.

The finding that appellant's president was unaware that the odometer tampering was occurring provides no basis for penalty reduction. Mr. Weyeneth's lack of such knowledge in no way decreases the harm to the public and the ethical dealer; it is elementary and unchallenged by appellant that appellant is responsible for all acts of its employees performed in the conduct of the licensed business.

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

This Final Order shall become effective May 26, 1972 .

AUDREY B. JONES

PASCAL B. DILDAY

MELECIO H. JACABAN

ROBERT B. NESEN

WINFIELD J. TUTTLE

ROBERT A. SMITH

DISSENT

I dissent:

The 15-day license suspension and one-year probation ordered

by the department are inadequate in this case. Moreover, the penalty is entirely inconsistent with the penalty which the department has imposed, and which this board has upheld, in three recent decisions involving odometer rollbacks. In all of the other three cases the department ordered revocation and we affirmed.

This was an appropriate case for us to either (1) exercise our power under Vehicle Code Sections 3054(f) and 3056 to reverse the decision of the department, on the ground that the penalty is not commensurate with the findings, and to direct the department to reconsider the matter of penalty in the light of the seriousness of the appellant's misconduct and of the public interest, or (2) exercise our power under Vehicle Code Section 3055 to modify the penalty by imposing a penalty of revocation.

This conclusion seems inescapable in view of the language which the majority has quoted from our final order in the Zar Motors appeal.

The first odometer case of the three referred to was Denis Dodge, which we decided on January 4, 1971. That case involved 40 violations involving careless business practices, namely, late notices of sale and late reports of sale and false certificates of nonoperation. In addition, it involved four odometer rollbacks. The second case, Zar Motors, which we decided on February 10, 1972, involved nine odometer rollbacks and criminal

convictions arising therefrom. Chase-Nesse Auto, Inc., which we decided on February 29, 1972, involved one failure to give timely notice of transfer, one filing of false date of first operation, one overcharge of registration fees (\$2.00), one misuse of dealer's plates, and four odometer rollbacks.

Here, we were presented a record of admitted odometer rollbacks of approximately 30,000 miles in each of three instances, and, in addition, the issuance by appellant of seven checks to the department for fees which had been collected by the appellant from its customers for payment to the state, all of which were dishonored by appellant's bank when presented for payment. This is conduct closely akin to misappropriation of trust funds and embezzlement, as counsel for the department suggested at the administrative hearing (R.T. 48:3-14).

The dishonored checks were not issued because of any error in appellant's record keeping. They were issued at different times during a period of over sixteen months. The dishonored checks totaled \$1,079.00.

By way of "mitigation" of the check violations, appellant's president testified that, when he issued the checks, he did not determine whether or not there were funds sufficient to cover the checks (R.T. 31:2-3). Other evidence proved that he had no need to make this determination; it was his standard business practice to write checks against the account without sufficient funds (Appellant's Exhibit D). He offered no excuse or explanation

of how or why the funds entrusted to it by appellant's customers for payment to the state had been expended by appellant for other purposes. Appellant did, however, offer in evidence in "mitigation" Appellant's Exhibit D, a series of ledger sheets of appellant's commercial account, covering a period of several months, which certainly substantiated appellant's president's testimony that appellant on many, many occasions overdrew its account. The overdrafts amounted to thousands of dollars.

The director adopted a finding of the hearing officer that the dishonored checks were paid by appellant within a "short" time after they were dishonored. This "finding" was apparently based upon the unsupported assertion of appellant's counsel at the administrative hearing. This contention was, somewhat surprisingly, acquiesced in by the department's counsel and accepted as true by the hearing officer (see the colloquy, R.T. 28:22 to R.T. 29:6). However, the record contains no evidence whatsoever to support that finding. The evidence does establish the length of time that expired between appellant's issuance of three of the dishonored checks and the dates on which they were ultimately paid. Check No. 3462 for \$241.00 was issued September 9, 1970; it was not paid until October 19, 1970, forty days later. Check No. 3550 for \$282.00 was issued October 2, 1970, but collection was not effected until November 6, 1970, thirty-five days later (Department's Exhibit 3, page 2, of declaration of Albert P. Harrington). Check No. 4570 for \$297.00 was issued March 18, 1971,

but collection was not effected until April 22, 1971, thirty-five days later (Appellant's Exhibit C, R.T. 29:8-28). There was no evidence that any of the dishonored checks were made good in a shorter period.

Appellant offered no evidence whatsoever of mitigating circumstances attending the admitted, fraudulent odometer rollbacks. Instead, while admitting to the rollbacks, appellant's president evaded questions by the hearing officer when he sought to determine how and why the rollbacks occurred, and who caused them to occur. Appellant's president inconsistently contended that (1) he had no knowledge of the matter, and (2) he didn't care to divulge the knowledge that he had of the matter (R.T. 43:14 to R.T. 44:9; R.T. 44:26 to R.T. 46:12).

In view of the nature of the charges here, and particularly in view of the fact that they were admitted by appellant, I find the appearance and testimony of appellant's witness, Abbey, most remarkable. Abbey's sole contribution as a "Special Investigator with the Department of Motor Vehicles," from the office which had jurisdiction over appellant, was to attest to appellant's "good reputation" as an automobile dealer. Counsel for the department declined to cross-examine Abbey. (R.T. 40:15 to R.T. 41:16.) One can only conclude that members of the community holding this opinion were not informed of appellant's business practices as disclosed by the record.

Oddly, counsel for the department declined to cross-examine appellant's president at the administrative hearing, and left this task to the hearing officer (R.T. 34:18; 40:7-9; 47:3). The hearing officer, as an impartial arbiter, was at somewhat of a disadvantage in pursuing the role of an adversary to appellant. Indeed, the hearing officer complained of this while he was examining Mr. Weyeneth: "Well, going back into the evidence again -- I really have to do this, and I don't like to -- " (R.T. 45:11-12).

Even more surprisingly, counsel for the department made no specific recommendation to the hearing officer on the only issue before him, namely, the penalty, even though the hearing officer requested a recommendation: "Well, I think you ought to make a recommendation." Department's counsel also waived opening argument! (R.T. 41:25 to R.T. 42:6; R.T. 47:11 to R.T. 48:20.) There may be some valid reason for the forbearance of the department's counsel, but it is not apparent from the record. The department and the public do not appear to have been adequately represented, and the hearing officer was put in an adversary role as a result. Perhaps the leniency of his recommended penalty was the result of this circumstance.

On the same day that we heard the instant appeal, we heard an appeal from a decision of the director imposing a total of thirty-five days suspension, based upon a record which the department

conceded did not involve fraud or corrupt business practices, and in which it was admitted that no accusation would have been filed had there not been a charge involving an honest difference of opinion as to the legal construction of language in a statute governing a technicality in the manner of handling registration and license fees. The suspensions in that case were ordered to run concurrently for fifteen days, a penalty closely akin to the penalty which is imposed in the instant case. It is this board's duty, among other things, to require that discipline imposed by the department upon licensees be reasonably just and equal. A comparison of the records and of the penalties with which we were concerned in these two cases, heard the same day, demonstrates that the department is not imposing discipline consistently with justice and equality. The majority's opinion itself reveals that the department has been unfair and inconsistent in the matter of discipline. The results in the four odometer cases which we have heard cannot be reconciled. There was strong reason for sympathy in the other cases, just as there was in the instant case, for the family of appellant's president. However, sympathy has no place in deliberations concerned with protection of the public. It is our duty to correct this inconsistency.

The injustice which the majority upholds here is to the innocent future customers who rely upon the department, and upon us, to assure that new car dealer licensees are ethical and

financially and morally responsible. The majority has chosen to overlook or ignore our responsibility.

The penalty imposed by the director does not adequately protect the public interest. In Zar, this board stated in its final order, affirming revocation: "The record before us abundantly establishes that the methods employed by appellants in the conduct of their business were severely lacking the qualities demanded by the law" and the "...only way of making certain that appellants will not perpetuate further frauds upon purchasers of automobiles is to remove them from the business." These observations apply with equal force to the record in the instant case.

Appellant's license as a new car dealer should have been revoked.

ROBERT B. KUTZ

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The finding that appellant's president was unaware that the odometer tampering was occurring provides no basis for penalty reduction. Mr. Weyeneth's lack of such knowledge in no way decreases the harm to the public and the ethical dealer; it is elementary and unchallenged by appellant that appellant is responsible for all acts of its employees performed in the conduct of the licensed business.

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

This Final Order shall become effective _____.

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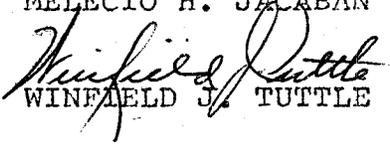
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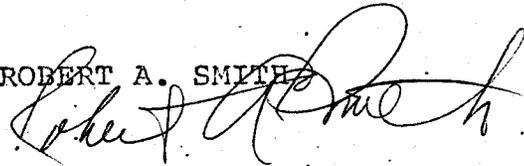
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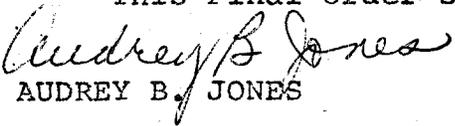
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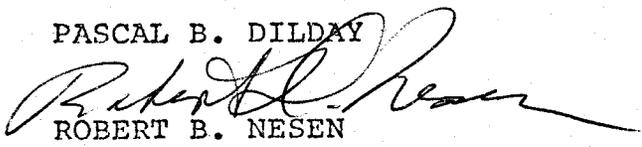
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