

and that each appellant had been convicted in the Superior Court, County of Santa Cruz, State of California, on pleas of guilty of the criminal offense of Conspiracy to Obtain Money and Property by False Pretenses, Section 182.4 of the California Penal Code, a crime involving moral turpitude. It was further found that appellants had operated a Chrysler-Plymouth agency in Santa Cruz County since 1957 and employed 16 persons.

The Director of Motor Vehicles revoked the license, certificate and special plates of the dealership.

An appeal was timely filed with this board pursuant to Article 2, Chapter 6, Division 2, Vehicle Code.

Appellants' arguments follow three avenues. One, the Board should receive evidence that was available at the time of the administrative hearing but was not presented because appellants were not represented by counsel; two, the Board should receive evidence of facts occurring after the administrative hearing; and, three, the penalty imposed by the Director of Motor Vehicles is excessive.

Turning to the question of receiving evidence not introduced at the hearing, we are mindful that our powers in this regard are limited to receiving relevant evidence, which, in the exercise of reasonable diligence, could not have been produced at the administrative hearing or which was improperly excluded at such hearing (Section 3054(e) Vehicle Code). However, appellants contended that they were not represented by counsel at the

administrative hearing because appellants were dissuaded by an employee of respondent's, a Mr. Brown, from being so represented and, because of this lack of representation, relevant evidence was not produced. We believed it incumbent upon this board to receive evidence on that issue and make a finding thereon. Accordingly, appellants were permitted to present evidence on the issue.

Both appellants testified concerning a conversation they had with Mr. Brown which, according to them, formed the basis for deciding to represent themselves at the administrative hearing.

Appellant Fisher testified that "...Mr. Brown assured me this way that in a hundred per cent of the cases, they generally don't take your license away from you. And I asked if I should take a lawyer with me, and he said he didn't feel it would be necessary, that there would be a hearing in San Jose. And Mr. Brown, and I, and Mr. Brajen." (App. Hr. Tr., P.13, lines 19-24.)

Appellant Zar testified that he "...talked to Mr. Brown at the used car lot," but did not ask, "...what he should do about the hearing." "...Don called Mr. Fisher (sic), and he says: 'We don't need an attorney down there.' I didn't, myself. That's what Mr. Fisher told me, my partner. He says: 'I called Mr. Brown, and we don't need no attorney.'" (App. Hr. Tr. P.19, lines 4-10.)

Respondent produced in rebuttal Mr. Henry Hoover who testified that he was the supervisor of Mr. Brown's supervisor and also worked closely with Mr. Brown; that about a week to 10 days before the

administrative hearing, Mr. Hoover met with appellants at their request. This witness then testified:

"Q And what was the nature of this conversation?

"A Well, originally I talked to them on the phone. They desired to make an appointment and come to my office in Campbell and discuss with me the administrative hearing that was coming up. And we made the appointment for the next day, or possibly two days thereafter, and Mr. Fisher and Mr. Zar came over to my office, and we discussed the hearing that was pending against their license.

"Q Was there any discussion about the seriousness or the consequences of the hearing?

"A During the course of the conversation, I did indicate to them that the matter against them was of serious nature.

"Q And what was their response?

"A Well, their response in discussions -- actually, it began a little bit before that, they had indicated that, wanted to know what the hearing was about, and how it operated, and I explained this to them. And one or the other, either Mr. Zar or Mr. Fisher, and I do not recall which, indicated that they had talked to Mr. Brown, and that Mr. Brown had told them that an attorney was not required at the hearing. And we discussed this, and I informed them that it was true, that an attorney was not legally required, but that they were entitled to an attorney and that I personally would recommend to them that they consider hiring counsel to represent them at the hearing. Mr. Fisher or Mr. Zar, one or the other, indicated they were not going to hire an attorney to appear at the hearing because it was too expensive, and it was just pouring good money after bad.

"Q Was there ever any statement made regarding probability that their license would not be suspended?

"A I do not recall any such conversation in my office with them regarding that matter.

"Q And did you, yourself, make any statement along those lines about the probability of their license --

"A I do not recall. It may or may not have been discussed. I really don't remember. The only thing, my memory is that I talked to them about the seriousness of the situation, but whether I specifically told them that their license could be placed on probation, or suspended, or revoked, I can't say. This would be a normal thing that I would say, but I would not desire to testify that I said this, because I have no specific recollection to that effect.

"Q But you do recall that you said that the matter was serious?

"A That's correct." (App.Hr.Tr., P.25, line 4 to P.26, line 22.)

We have carefully weighed the testimony given on this issue and we find that the information Mr. Hoover conveyed to appellants was sufficient to correct any erroneous information that they may have received from Mr. Brown. Mr. Hoover's unrebutted testimony clearly discloses that he did all that could be reasonably expected to place the matter of the accusation filed against appellants in its proper perspective. Appellants had adequate time to weigh the information given by Mr. Hoover and seek the services of a lawyer, but they failed to do so and elected to represent themselves.

Before leaving this issue, we take note of a document in the administrative record which tends to refute the testimony of appellants that they were not aware that the administrative proceedings facing them could result in the penalty imposed by the Director of Motor Vehicles. The record shows that appellants acknowledged on June 28, 1971, receiving a copy of the Accusation filed in this case by the Department of Motor Vehicles on

June 24, 1971. The accusation prays that the department take "...such action to revoke or suspend the license, certificate and special plates of respondent herein as it may deem proper under the circumstances." In view of the quoted language, it is our opinion that appellants were, or should have been, aware of the possible consequences flowing from the administrative proceedings.

In *Borrer vs. Department of Investments, Division of Real Estate*, 15 Cal.App.3d 531, the court said:

"As to the penalties involved, it is inconceivable that a licensee is not aware by virtue of the licensing procedures of the sanctions which may be imposed for violation of his duties and obligations as such licensee. A real estate licensee is required to be aware of the provisions of the Real Estate Law. (See Bus. & Prof. Code, Section 10153, Subd.(c), 10177 and 10185). Moreover in the present case, the licensee was aware that revocation of her license was sought by the proceedings since such penalty was specifically requested in the prayer of the Accusation." (Emphasis added.)

Notice of Time and Place of Hearing, dated July 30, 1971, is also a part of the administrative record and was duly served upon appellants. It recites, among other things, "You may be present at the hearing; may be represented by counsel, but need not be represented by counsel if you so desire; may present any relevant evidence..."

Appellants offered to prove that Chrysler-Plymouth Corporation, while being entitled to do so, had not terminated appellants' franchise but, on the contrary, "...fully supports and endorses appellant's continued franchised relationship." Also, although being aware of appellants' convictions and the revocation pro-

ceedings, the franchisor is considering granting a franchise to appellants for the operation of a Dodge dealership in Watsonville, California. We rejected the offer of proof as we do not consider relevant the acts or intentions of the franchisor with reference to the continuation of the existing franchise or the granting of a new one. The factors influencing the franchisor to make whatever decision it has made concerning enfranchisement may be, and probably are, far different from those that we must consider.

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

Appellants argue on appeal that the penalty should be lessened because their license has been ordered revoked for participating in a practice which only became illegal in 1967; a practice which had been widely practiced in the industry; a practice which does not directly relate to appellants' principal activities of new car sales and service; and that three years is a scant time for an obscure section of the Vehicle Code to become widely known. Appellants further argue that a combination of the fine and probationary sentence imposed by the criminal court and the revocation of the license by the Department of Motor Vehicles constitutes a "grossly excessive" penalty.

The California Legislature concluded many years ago that it was in the public interest to protect automobile purchasers in their dealings with persons engaging in the business of selling automobiles at retail by licensing persons engaging in such

business. Accordingly, a statutory scheme was enacted which, in addition to vesting in the Department of Motor Vehicles the authority to issue licenses to vehicle dealers, set forth standards of conduct for such licensees; e. g., Sections 11705 and 11713 Vehicle Code. Deviations from these standards may result in revocation of a license, or the imposition of a lesser sanction, by the Director of Motor Vehicles.

While a dealer-licensee could have been prosecuted in a judicial proceeding under other laws prior to 1967 for defrauding customers through the disconnecting or resetting odometers, it was not until 1967 that legislation on the specific subject was enacted. Among other statutes dealing with odometers, Section 28051 was added to the Vehicle Code in 1967 as follows:

"It is unlawful for any person to disconnect, turn back or reset the odometer of any motor vehicle with the intent to reduce the number of miles indicated on the odometer gauge." (Amendments to this section during 1968 and 1969 are not relevant to this case.)

During 1967, subsection (n) was added to Section 11713 Vehicle Code making a violation of Sections 28050 or 28051 a basis for disciplinary action against a dealer. In enacting subsection (n), the Legislature gave the Department of Motor Vehicles a specific statutory tool designed to prevent an evil which was being perpetrated upon buyers of motor vehicles by some licensed dealers. That tool was not provided for the purpose of punishing dealers but was provided for the purpose of removing, either temporarily or permanently, the erring dealer from the business of selling

automobiles.

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 decisions.

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. The extent to which odometer tampering may have been engaged in by members of the automobile retail industry certainly cannot be urged in mitigation of appellants' conduct. Appellants cannot be heard to say that their wrongful conduct was less wrongful merely because others in a similar position had been or are engaging in the same practice. Standards for a licensee's conduct are established by law, not by the practice of others in the business

or profession. (See *Stevenson vs. Board of Medical Examiners*, 10 Cal.App.3d 433.)

We dispose of the assertion that odometer tampering on the part of appellants was a practice not directly related to their principle activities of new car sales and services by pointing out the obvious fact that the wrongful conduct was directly related to appellants' licensed business; i.e., the sale of vehicles at retail.

We reject in its entirety the contention that "...three years is scant time for an obscure section of the Vehicle Code to become widely known." A licensee is required to be aware of the provisions of the laws governing conduct of licensees. (*Borrer vs. Department of Investments*, 15 Cal.App.3d 531.) We are persuaded that an accurate recital of appellants' attitude towards the laws governing odometer tampering is contained in Mr. Zar's testimony that "...we didn't pay any attention to the law." (RT 7, lines 12-13.) Moreover, odometer tampering was obviously immoral and criminal conduct prior to the enactment of Section 28051 Vehicle Code.

In determining the appropriate administrative sanction in the case before us, we are not unmindful of the substantial fine imposed upon both Mr. Zar and Mr. Fisher in the criminal proceeding and the length of the probationary period imposed therein. The judicially imposed penalty has the effect of punishing the wrongdoers for unlawful conduct and tends to discourage them from again engaging in fraudulent conduct. However, the only way of making

certain that appellants will not perpetrate further frauds upon purchasers of automobiles is to remove them from the business.

"It is well settled that the revocation or suspension of a license is not penal in nature but is a mechanism by which licensees who have demonstrated their ignorance, incompetency or lack of honesty and integrity may be removed from the licensed business. The legislation was not intended to provide for punishment but to afford protection of the public. *Furnish v. Board of Medical Examiners*, 149 Cal.App.2d 326, 308 P.2d 924; *Bold v. Board of Medical Examiners*, 135 Cal.App. 29, 26 P.2d 707; *Traxler v. Board of Medical Examiners*, 135 Cal.App.37, 26 P.2d 710. Or, as stated in another way, the purpose of the proceeding is to determine the fitness of the licensee to continue in that capacity and thus to protect society by removing, either temporarily or permanently, from the licensed business or profession, a licensee whose methods of conducting his business indicate a lack of those qualities which the law demands. *West Coast Home Improvement Co., Inc. v. Contractor's State License Board*, 72 Cal.App.2d 287, 301, 164 P.2d 811; *in re Winne*, 208 Cal. 35, 41, 280 P. 113." (*Meade v. State Collection Agency Board*, 181 Cal.App.2d 774.)

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. The director's decision to permanently remove appellants from the business of selling motor vehicles is entirely commensurate with the facts of the case.

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

The Final Order shall become effective February 28, 1972.

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